

\*\*\*NOT FOR PUBLICATION\*\*\*

NO. 24965

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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EUGENE JAMES HUTCH, Petitioner-Appellant

vs.

STATE OF HAWAI'I, Respondent-Appellee

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APPEAL FROM THE FIRST CIRCUIT COURT  
(S.P.P. NO. 01-1-0029; CR. NO. 60333)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.;  
and Circuit Judge Crandall, Assigned by Reason of Vacancy)

Petitioner-Appellant Eugene J. Hutch (Hutch) was convicted on November 29, 1984 of terroristic threatening<sup>1</sup> in the first degree, Hawai'i Revised Statutes (HRS) § 707-716(1) (d) (1979),<sup>2</sup> and sentenced to five years' imprisonment. This court affirmed the conviction and sentence on April 5, 1988. Hutch filed a Hawai'i Rules of Penal Procedure Rule 40 (2000) (Rule 40)

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<sup>1</sup> The 1979 version of HRS § 707-715, effective at the time of Hutch's violation, defined terroristic threatening as follows:

A person commits the offense of terroristic threatening if he threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or
- (2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation.

<sup>2</sup> The 1979 version of HRS § 707-716(1) read, in pertinent part:

(1) A person commits the offense of terroristic threatening in the first degree if he commits terroristic threatening:

- . . . .
- (d) With the use of a dangerous instrument.

petition on August 6, 2001 to vacate, set aside, or correct his conviction.<sup>3</sup> On February 21, 2002, the circuit court of the first circuit (the court)<sup>4</sup> dismissed the petition without a hearing.

On appeal, Hutch states the following grounds for his petition: (1) Hawai'i Administrative Rules (HAR) § 17-202-1(b)<sup>5</sup> denies him adequate legal assistance; (2) stand-by counsel denied him adequate access to his preliminary hearing transcripts (PHTs) during the pre-trial phase; and (3) prison staff continue to deny him legal and other services needed to challenge his case.

This court has held that "the issue whether the trial court erred in denying a Rule 40 petition without a hearing based on no showing of a colorable claim is reviewed de novo; thus, the right/wrong standard of review is applicable." Dan v. State, 76

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<sup>3</sup> Since Hutch was discharged from custody in this case in 1989, it is assumed that the petition deals strictly with Hutch's conviction. Rule 40(a)(1) states, in relevant part:

(1) [Post-conviction proceedings f]rom judgment [of conviction]. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;

(ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter;

(iii) that the sentence is illegal;

(iv) that there is newly discovered evidence; or

(v) any ground which is a basis for collateral attack on the judgment.

<sup>4</sup> The Honorable Karen S.S. Ahn presided over this matter.

<sup>5</sup> HAR § 17-202-1 was repealed on April 15, 2000, prior to the filing of Hutch's petition. Subsection (b) stated:

(b) Mutual assistance between inmates or wards on legal matters is permitted on a case by case basis at the facility administrator's discretion. There is no absolute right to mutual assistance.

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Hawai'i 423, 427, 879 P.2d 528, 532 (1994). "To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict, however, a petitioner's conclusions need not be regarded as true." Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999) (citation omitted).

Grounds One and Three do not constitute colorable claims. Hutch fails to provide evidence that these allegations, if accepted as true, relate in any way to his conviction for terroristic threatening in the first degree. As for Ground Two, Respondent-Appellee State of Hawai'i (Respondent) correctly notes the relevance of Rule 40(a)(3):

Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

(Emphases added.) As mentioned by Respondent, Hutch did not raise his arguments against stand-by counsel at trial or on direct appeal. In his opening brief, Hutch merely lists his allegations without explaining why he neglected to previously raise them. Even if Hutch's Ground Two claims can be construed as colorable, they are considered waived under Rule 40(a)(3).

The foregoing analysis is raised in Respondent's answering brief. Hutch fails to supply any specific

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counterarguments to these matters in his reply brief.

Accordingly, the court's February 21, 2002 order denying Hutch's Rule 40 petition is affirmed.

DATED: Honolulu, Hawai'i, July 11, 2003.

On the briefs:

Eugene Hutch, petitioner-appellant, pro se.

James M. Anderson, Deputy Prosecuting Attorney, City and County of Honolulu, for respondent-appellee.