

NO. 25347

IN THE SUPREME COURT OF THE STATE OF HAWAII

LARRY S. DOMINGO, Petitioner-Appellant,

vs.

STATE OF HAWAII, Respondent-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 02-1-0043)

ORDER VACATING THE CIRCUIT COURT'S AUGUST 19, 2002
"FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
DISMISSING PETITION FOR POST-CONVICTION RELIEF" AND
SEPTEMBER 5, 2002 "ORDER DENYING PETITION FOR RECONSIDERATION,"
AND REMANDING THIS CASE TO THE CIRCUIT COURT FOR A HEARING
(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.,
and Intermediate Court of Appeals Chief Judge Burns
in place of Acoba, J., recused)

Upon review of the parties' briefs regarding the circuit court's adjudication of Petitioner-Appellant Larry S. Domingo's (Appellant Domingo) petition for post-conviction relief pursuant to Rule 40 of the Hawaii Rules of Penal Procedure (HRPP), it appears that Respondent-Appellant State of Hawaii's (Respondent State) confession of the circuit court's error in S.P.P. No. 02-1-0043 is supported by the record and well-founded in law. State v. Hoang, 93 Hawaii 333, 336, 3 P.3d 499, 502 (2000). Furthermore, the error is properly preserved and prejudicial. Id.

As a general rule, a hearing should be held on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. 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. Where examination of the record of the

trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing. The question on appeal of a denial of a Rule 40 petition without a hearing is whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994)

(citation and internal quotation marks omitted). Assuming, for this limited purpose, that the allegations in Appellant Domingo's HRPP Rule 40 petition are true, Appellant Domingo made a colorable claim that his conviction in Criminal No. 91-3117 was the result of the ineffective assistance of his trial counsel. Therefore, the circuit court erred when it adjudicated Appellant Domingo's HRPP Rule 40 petition without first holding a hearing. Accordingly,

IT IS HEREBY ORDERED that the circuit court's August 19, 2002 "Findings of Fact, Conclusions of Law, and Order Dismissing Petition for Post-Conviction Relief" and September 5, 2002 "Order Denying Petition for Reconsideration" are vacated. We remand S.P.P. No. 02-1-0043 to the circuit court with instructions to hold a hearing on Appellant Domingo's HRPP Rule 40 petition.

DATED: Honolulu, Hawai'i, December 10, 2003.