
NO. 24405

IN THE SUPREME COURT OF THE STATE OF HAWAII

FRANCIS A. DEFEO, Petitioner-Appellant,

vs.

STATE OF HAWAII, Respondent-Appellee.

APPEAL FROM THE SECOND CIRCUIT COURT
(S.P.P. NO. 00-1-0009(3))

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Petitioner-appellant Francis A. Defeo appeals from the June 21, 2001 order of the Circuit Court of the Second Circuit, the Honorable Joseph E. Cardoza presiding, denying Defeo's Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post conviction relief without a hearing. On appeal, Defeo argues that the circuit court erred in dismissing his HRPP Rule 40 petition because: (1) his trial counsel was ineffective; (2) his appellate counsel was ineffective; and (3) he was denied a hearing on his ethics complaint against his trial counsel.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the issues raised and the arguments presented, we resolve each of Defeo's contentions on appeal as follows:

First, Defeo has failed to establish a colorable claim that his trial counsel was ineffective for advancing a theory of self-defense because: (1) his testimony at trial supported the

defense established by Hawai'i Revised Statutes (HRS) § 703-304 (1993)¹ and (2) the evidence submitted by Defeo, together with the record on appeal, reflects that he was aware of the prosecution's plea offer and the potential consequences of a conviction of murder in the second degree.

Second, given that Defeo has failed to advance a colorable claim of ineffective assistance of trial counsel, his

¹ HRS § 703-304 provides in pertinent part:

(2) The use of deadly force is justifiable under this section if the actor believes that deadly force is necessary to protect himself against death, serious bodily injury, kidnapping, rape, or forcible sodomy.

(3) Except as otherwise provided in subsections (4) and (5) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(5) The use of deadly force is not justifiable under this section if:

- (a) The actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
- (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
 - (i) The actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and
 - (ii) A public officer justified in using force in the performance of his duties, or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape, is not obliged to desist from efforts to perform his duty, effect the arrest, or prevent the escape because of resistance or threatened resistance by or on behalf of the person against whom the action is directed.

claim that his appellate counsel was ineffective for failing to raise trial counsel's representation on direct appeal also fails. See State v. Briones, 74 Haw. 442, 466 n.14, 848 P.2d 966, 978 n.14 (1993) ("If the 'appealable issue' raised is an action or omission of defendant's trial counsel, then that issue's 'appealability' should be determined using the full standard of review for the effectiveness of trial counsel's performance as set forth herein.").

Third, given the nature and scope of a disciplinary proceeding, ODC's alleged failure to conduct an evidentiary hearing on Defeo's ethics complaint could not affect the jury's verdict in this case. See Akinaka v. Disciplinary Bd. of the Hawai'i Supreme Court, 91 Hawai'i 51, 979 P.2d 1077 (1999).

Accordingly,

IT IS HEREBY ORDERED that the June 21, 2001 order of the circuit court denying Defeo's HRPP Rule 40 petition without a hearing is affirmed.

DATED: Honolulu, Hawai'i, February 13, 2004.

On the briefs:

Francis A. Defeo,
petitioner-appellant,
appearing pro se

Benjamin M. Acob, First
Deputy Prosecuting Attorney,
for respondent-appellee