

*** NOT FOR PUBLICATION ***

NO. 25105

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ZENO ABELLIRA, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Special Proceedings Prisoner No. 02-1-0019)

SUMMARY DISPOSITION ORDER

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

The petitioner-appellant Zeno Abellira appeals from the order of the circuit court of the first circuit, the Honorable Marie N. Milks presiding, filed on April 30, 2002, summarily denying his petition for post-conviction relief, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40(d) (2002) [hereinafter, "the Rule 40 petition"]. On appeal, Abellira contends that: (1) the circuit court's imposition of an extended term sentence violated the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000); (2) his no-contest pleas were not knowing, intelligent, and voluntary; and (3) he was denied the effective assistance of counsel with respect to the decision to plead no contest to the charged offenses.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we hold that, because (1) the record supports a finding that Abellira, in fact, knowingly, intelligently, and voluntarily

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entered his no-contest pleas in the present matter and, therefore, (2) Abellira failed to establish that the circuit court "clearly exceeded the bounds of reason or . . . disregarded rules or principles of law or practice to [his] substantial detriment," State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998), thereby abusing its discretion in accepting his no-contest pleas, the circuit court did not err in denying Abellira's Rule 40 petition on that basis. Moreover, insofar as Abellira established neither "that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence" nor "that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense," Adams v. State, 103 Hawai'i 214, 220, 81 P.3d 394, 400 (2003), the circuit court did not err in denying Abellira's Rule 40 petition, on the basis that there was no evidence that he received ineffective assistance of counsel at the time of entering his no-contest pleas. Finally, inasmuch as Abellira failed to raise the issue of the constitutionality of HRS § 706-662 in his Rule 40 petition, the issue is not properly before this court on appeal, see Bitney v. Honolulu Police Dept., 96 Hawai'i 243, 251, 30 P.3d 257, 265 (2001) ("[Appellate courts] will not consider an issue not raised below unless justice so requires.") (Brackets in original.); Earl M. Jorgensen Co. v. Mark Const., Inc., 56 Haw. 466, 475, 540 P.2d 978, 985 (1975) ("A[n order] ordinarily will not be reversed upon a legal theory not raised by the appellant in the court below."). Moreover, assuming arguendo that Abellira had properly raised a constitutional challenge to HRS § 706-662 in light of Apprendi on appeal, this court's recent decision in State v. Kaua, 102

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Hawai'i 1, 13, 72 P.3d 473, 485 (2003), upheld the constitutionality of HRS § 706-662 under both the United States and Hawai'i Constitutions. Therefore,

IT IS HEREBY ORDERED that the order from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, March 1, 2004.

On the briefs:

Zeno Abellira, pro se

Mark Yuen, deputy
prosecuting attorney, for
the respondent-appellee
State of Hawai'i