*****NOT FOR PUBLICATION*****

NO. 24695

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

CHRIS GRINDLING, Petitioner-Appellant

vs.

STATE OF HAWAI‘I, Respondent-Appellee

APPEAL FROM THE SECOND CIRCUIT COURT
(S.P.P. NOS. 00-1-0013 & 01-1-0003)

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

On March 18, 1999, in Cr. No. 98-0325, Petitioner-Appellant Chris Grindling was found guilty by a jury of disorderly conduct, Hawai‘i Revised Statutes (HRS) § 711-1101 (1993) (Count I of the indictment), terroristic threatening in the first degree, HRS § 707-716 (1993) (Count III), resisting arrest, HRS § 710-1026 (1993) (Count IV), and terroristic threatening in the second degree, HRS § 707-17 (1993) (Count V). Grindling was acquitted of another count of terroristic threatening in the second degree (Count II).

The judgment of conviction and sentence was filed on March 21, 1999, and the judgment of acquittal was filed on March 22, 1999. Grindling appealed on May 26, 1999, and in

Supreme Court number (S.Ct. No.) 22573, this court affirmed the judgment by Summary Disposition Order filed on August 10, 2000.

On September 7, 2000, the second circuit court (the court)[1] determined that Grindling had violated the terms of his probation and resentenced him to an indeterminate five-year term of imprisonment. An order of resentencing and revocation of probation was filed on September 19, 2000. Grindling subsequently appealed said order on October 9, 2000 in S.Ct. No. 23810. In S.Ct. No. 23810, this court dismissed Grindling's appeal of the September 19, 2000 order of resentencing and revocation of probation by Summary Disposition Order on September 24, 2001.

On October 12, 2000, pursuant to Hawai‘i Rules of Penal Procedure (HRPP) Rule 40, Grindling filed three similar, but not identical, petitions to vacate, set aside or correct judgment or to release Grindling from custody in S.P.P. No. 00-1-0013(3) (SPP 13).[2] On February 6, 2001, Grindling filed a motion to

[1] The Honorable Joseph E. Cardoza presided.

[2] These three petitions were treated as a single conforming petition under HRPP Rule 40(c)(2) in an Order in Response to Petitions for Post-Conviction Relief filed October 20, 2000.

On November 20, 2000, Grindling filed an application for Writ of Habeas Corpus in which he raised additional Eighth and Fourteenth Amendment violation claims. On November 27, 2000, the court ordered that Grindling's habeas application "shall be accepted as an amendment and supplement to [Grindling's] Petition to Vacate, Set Aside, or Correct Judgment or Release Prisoner from Custody filed in [SPP 13,]" because under HRPP Rule 40(e), an amendment to a petition shall be "freely allowed in order to achieve substantial justice." On January 19, 2001, Grindling filed a supplement to his Rule 40 petition, and again raised the issue of ineffective assistance of counsel and stated that the verdict regarding resisting arrest was contrary to the evidence.

The three petitions of SPP 13 repeat essentially the same claims although the petitions are not identical. In one, Grindling claims 1) double

(continued...)

voluntarily withdraw the Rule 40 petition in SPP 13.[3]

Grindling filed three additional Rule 40 petitions to vacate, set aside, or correct judgment or to release Grindling from custody under SPP No. 01-1-0003(3) (SPP 3) on February 6, 2001, February 15, 2001, and February 21, 2001. On February 28, 2001, Grindling filed an ex parte motion to declare Judge Joseph Cardoza biased and prejudiced.[4]

On October 18, 2001, Judge Cardoza filed a Decision and Order on SPP 13 and SPP 3 granting, in part, and denying, in part, the HRPP Rule 40 petitions without a hearing.[5]

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[2](...continued)
jeopardy, 2) ineffective assistance of counsel, and 3) that "'I'll kick your ass' is not a felony." In the second, he claims 1) double jeopardy, 2) denial of effective counsel, 3) "conspiracy" and 4) no probation violation. In the third, he claims 1) double jeopardy, 2) denial of effective counsel, 3) "conspiracy," and 4) no probation violation. In the present appeal, Grindling did not raise the issues regarding double jeopardy, or whether he violated probation.

[3] Grindling explained that he filed the motion to voluntarily withdraw the Rule 40 petitions in SPP 13, "till such time I can get consule [sic] or build a strong enough case to overturn the felony conviction."

[4] Grindling alleged, inter alia, that previously, as head prosecutor, Judge Cardoza "was responible for nearly 25 indictments and charges against me that I proved were false[,] every last one of them."

[5] In the October 18, 2001 Decision and Order, the court noted that

> [i]n [SPP 13] Petitioner has raised [9] separate issues[.]
> In [SPP 3] Petitioner raises [47] issues. With the exception of the new argument[s] with respect to 1) recusal of this Court, 2) denial of the right to appeal from the order to show cause determination, 3) the lack of a probable cause determination at the order to show cause hearing, and 4) denial of right to counsel at the order to show cause hearing, all are included in the [9] issues that were raised in [SPP 13]. In addition, with the exception of the argument relating to an alleged conspiracy . . . , all issues raised in [SPP 13] have also been raised in [SPP 3]. Therefore the issues raised in these two SPP numbers will be discussed interchangeably, except where specifically noted. . . .

On November 13, 2001, Grindling filed a Notice of Appeal in S.Ct. No. 24694 (SPP 13) and in S.Ct. No. 24695 (SPP 3). The appeals were consolidated by this court. On appeal, Grindling contends that: (1) Judge Cardoza should have recused himself because, while a prosecutor, he prosecuted Grindling, (2) the court should have allowed Grindling to amend his Rule 40 petition to include specific allegations of his counsel's lack of diligence, (3) the court should state why, with respect to Grindling's conspiracy allegation, a HRPP Rule 40 petition is frivolous rather than stating that the claim is without merit, (4) there was a failure to allege all of the elements of the charge of disorderly conduct, (5) the words "I'll get that guy who put me in jail" do not constitute a "true threat," (6) the discrepancies in the testimony of the witnesses at trial made it impossible for their statements to be true, and (7) all of the elements of resisting arrest were not alleged.

Respondent-Appellee State of Hawai‘i (the prosecution) primarily asserts that (1) Grindling's opening brief is not in compliance with Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b) and therefore the appeal should be dismissed, (2) Grindling's appeal on the issues of SPP 13 should be dismissed because he voluntarily withdrew the petition, and (3) the court made proper findings on all of the claims asserted by Grindling.

As to the prosecution's HRAP 28(b) objection, such noncompliance offers sufficient grounds for the dismissal of the

appeal. Housing & Fin. Dev. Corp. v. Ferguson, 91 Hawai‘i 81, 85, 979 P.2d 1107, 1111 (1999) (citing Bettencourt v. Bettencourt, 80 Hawai‘i 225, 228, 909 P.2d 553, 556 (1995)). However, "this court has consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible." Bettencourt, 80 Hawai‘i at 230, 909 P.2d at 558. Therefore, the issues raised by Grindling are addressed on the merits.

As to Grindling's first contention, it cannot be concluded that Judge Cardoza abused his discretion in determining that no basis for disqualification existed on the issues he decided, despite his previous position as a prosecutor against Grindling.[6] See State v. Ross, 89 Hawai‘i 371, 974 P.2d 11 (1998) (holding that a judge's denial of a motion for recusal or disqualification is reviewed for abuse of discretion). "An abuse of discretion occurs when the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai‘i 465, 484, 78 P.3d 1, 20 (2003). Other than pointing to Judge Cardoza's rulings that were not in his favor,[7] Grindling does not

[6] It appears from the record that Grindling's February 28, 2001 ex parte motion to declare Judge Cardoza biased and prejudiced was not ruled on prior to the October 18, 2001 Decision and Order on Grindling's Rule 40 petitions.

[7] Specifically, Grindling states that Judge Cardoza "denied basic things like credit for time served, a presentence report, all three rule 40 motions to reconsider, and . . . denied [Grindling] counsel in the [hearing on (continued...)

cite any specific facts or claims indicating how his rights were violated. This court has "long recognized, however, that petitioners may not predicate their claims of disqualifying bias on adverse rulings." Id. at 378, 974 P.2d at 18. The assertions made by Grindling primarily involve "matters affecting [Judge Cardoza's] exercise of judicial discretion" and thus do not justify disqualification. Id.

As to Grindling's second contention, the court did not err in denying him an additional opportunity to amend his Rule 40 petition to include specific allegations of his counsel's failure to "raise proper issues at trial and on appeal."[8] Grindling did specify with particularity his trial counsel's decision not to cross examine Officer Benito. Inasmuch as this decision was a strategic one, the court did not err in finding that the failure to cross examine did not constitute ineffective assistance of counsel. See State v. Silva, 75 Haw. 419, 441, 864 P.2d 583, 593 (1993) (explaining that "defense counsel's tactical decisions at trial generally will not be questioned by a reviewing court"). Aside from this issue, Grindling does not proffer any other grounds regarding ineffective assistance. In this light, his general reference to his counsel's failure to raise "proper issues at trial or on appeal" appears to be a failure to meet his

[7](...continued)
the probation revocation and resentencing]."

[8] With respect to amendment of the petition, HRPP Rule 40(e) states that "no petition shall be dismissed for want of particularity unless the petitioner is first given an opportunity to clarify the petition."

burden of proof on ineffective assistance of counsel rather than a denial of the opportunity to clarify his petition.

As to Grindling's third contention made in conjunction with his claim that a conspiracy existed among the police, prosecution, trial judge, probation officers and the court sitting at the order to show cause hearing, (a) the court correctly ruled that the issue of a conspiracy was raised in SPP 13, but because SPP 13 was voluntarily withdrawn by Grindling on February 6, 2001 and not raised again in SPP 3, it was "waived" under Rule 40(a)(3)[9] and (b) the court did comply with Cacatian v. State, 70 Haw. 402, 403, 772 P.2d 691, 692 (1989), which required that in denying a Rule 40 claim, a court state that the claim was "patently frivolous and without a trace of support" in the record. As to Grindling's fourth contention, all of the elements of the charge of disorderly conduct were properly alleged inasmuch as "where the statute sets forth with reasonable clarity all essential elements of the crime intended to be punished, and fully defines the offense in unmistakable terms

[9] Rule 40(a)(3) entitled "Inapplicability[,]" states that:

> 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. Except for a claim of illegal sentence, 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.

readily comprehensible to [a] person of common understanding, a charge drawn in the language of the statute is sufficient." State v. Cummings, 101 Hawai'i 139, 144, 63 P.3d 1109, 1113 (2003) (citations, internal quotation marks, and brackets omitted). As to Grindling's fifth contention of whether the statement "I'll get that guy who put me in jail" is a true threat, the court noted that "the issue of whether the statement was a 'true threat' was raised on the direct appeal taken from the conviction, which was affirmed by Summary Disposition Order filed August [1]0, 2000[]" in S.Ct. No. 22573. As the issue of "true threat" has been raised and ruled upon, the court did not err in denying the petition without a hearing. See HRPP Rule 40(a)(3)[10] ("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 . . . ."). As to Gridling's sixth contention that "discrepancies in the in-court testimony at trial made it impossible for the [police report] statements to be true," the court correctly noted that the resolution of discrepancies in testimonies fall "within the province of the trier of fact, and nothing in the petition establishes that there was not 'substantial evidence to support the conclusion' before the jury." (Quoting State v. Pineda, 70 Haw. 245, 250, 768 P.2d 239, 242 (1989)). As to Grindling's final issue on appeal, (a) the elements of resisting arrest were

[10] See supra note 9.

sufficiently alleged in the indictment, see Cummings, 101 Hawai‘i at 144, 63 P.3d at 1113, and (b) the sufficiency of the evidence to support a conviction of resisting arrest was, according to the court, "previously raised . . . on direct appeal" or in any event, if not raised in the appeal in S.Ct. No. 22573, it may be presumed waived. See HRPP Rule 40(a)(3).

In the October 18, 2000 decision and order, Judge Cardoza concluded that he could not rule on four issues because "a direct appeal was filed in this matter and the appellate process has not yet terminated[.]" As such, the court denied "the petition without a hearing as to these grounds."[11]

While the court posited that the foregoing issues had been raised in S.Ct. No. 23810, it is to be noted that only the fourth issue was raised on appeal in S.Ct. No. 23810, see supra note 11, and the other three issues were not raised. The SDO in S.Ct. No. 23810 did not reach any of the issues but dismissed the case for failure to provide a transcript. The SDO further stated that "because the merits of [Grindling's] claim on appeal are not decided, assertion of his rights under HRPP Rule 40 are not precluded by this decision." It is observed that apparently Judge Cardoza presided over Grindling's hearings for revocation

[11] The four issues are

> 1) whether the Court's findings at the order to show cause hearing [with respect to probation revocation] were clearly erroneous, 2) denial of the right to appeal from the order to show cause determination, 3) the lack of probable cause determination at the order to show cause hearing, and 4) denial of a right to counsel at the order to show cause hearing.

of probation and entered the September 19, 2000 order of resentencing and revocation of probation. As such, resolution of the aforesaid four issues may require his disqualification under HRS § 601-7. Inasmuch as these issues were not decided, they remain to be decided by the second circuit court and the case is remanded for that purpose. Therefore,

In accordance with Hawai‘i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the court's October 18, 2001 Decision and Order, from which the appeal is taken, is affirmed, except that the court's order concerning the four issues not ruled upon is vacated and the case remanded with respect to the said four issues for disposition.

DATED: Honolulu, Hawai‘i, March 5, 2004.

On the briefs:

Chris Grindling, petitioner-appellant, pro se.

Simone C. Polak, Deputy Prosecuting Attorney, County of Maui, for respondent-appellee.