

***** NOT FOR PUBLICATION *****

NO. 24480

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MARK A. BENSON, Petitioner-Appellant,
vs.

STATE OF HAWAI'I, Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(S.P.P. No. LH01-1)

SUMMARY DISPOSITION ORDER

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

The petitioner-appellant Mark A. Benson appeals from the order of the district court of the second circuit, Lahaina division, the Honorable Dougals H. Ige presiding, granting in part and denying in part his petition for post-conviction relief, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2004) [hereinafter, "the Rule 40 petition"]. On appeal, Benson argues that the district court erred in denying his Rule 40 petition without holding an evidentiary hearing to address all points of relief contained in the Rule 40 petition, inasmuch as it contained a colorable claim that his trial counsel provided ineffective assistance, in violation of his constitutional rights to effective assistance of counsel.

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, we resolve Benson's appeal as follows. On July 20, 2001, the district court entered an order granting in part Benson's Rule 40 petition

on the ground that his previous appellate counsel, Richard E. Icenogle, Jr., Esq., provided ineffective assistance of counsel by failing to file an opening brief[,] which

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resulted in the dismissal of the appeal, thereby depriving [Benson] of his right to appeal, and hence a judgment nunc pro tunc is entered allowing [Benson] his right to an appeal[.]

The district court subsequently determined that, having granted in part Benson's Rule 40 petition, it did not need to rule on the remaining claims as stated in the Rule 40 petition, "as the [district] court determined that these remaining issues are moot because they can be raised on appeal." The district court refused to allow Benson an evidentiary hearing on the remaining issues contained in his Rule 40 petition. Benson appealed both the district court's entry of the nunc pro tunc judgment and the order denying in part his Rule 40 petition.

On February 14, 2002, this court entered an order dismissing Benson's appeal of the nunc pro tunc judgment, filed under supreme court number 24479, for lack of appellate jurisdiction, noting that

[a]lthough Appellant Benson was entitled to seek relief from his conviction through a post-conviction petition pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP), HRPP Rule 40(g) did not authorize the district court . . . to enter an order, that in effect required the supreme court to assume jurisdiction over Appellant Benson's second direct appeal.

HRPP Rule 40(f) provides in relevant part:

If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner.

(Emphases added.)

The prosecution concedes that "reversible error has occurred and agrees that [this] court should vacate the district

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court's [o]rder [g]ranted in [p]art [Benson's] [Rule 40] [p]etition . . . entered on July 20, 2001, and remand this case to the district court for further Rule 40 proceedings."

HRPP Rule 40(g)(1) provides in relevant part that "[i]f the court finds in favor of the petitioner, it shall enter an appropriate order" Alternatively, the court "may dismiss a petition at any time upon finding the petition is patently frivolous, the issues have been previously raised and ruled upon, or the issues were waived" or "may deny a petition upon determining the allegations and arguments have no merit." HRPP Rule 40(g)(2). "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." Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999) (internal citations omitted). Nevertheless, the district court's July 20, 2001 order granting Benson's request for entry of a judgment nunc pro tunc did not address the remaining claims in Benson's Rule 40 petition, thereby failing either to determine whether the Rule 40 petition contained a colorable claim or to dismiss it as patently frivolous.

Therefore, inasmuch as (1) the district court failed to address Benson's claim of ineffective assistance of counsel, (2) the district court did not allow Benson an evidentiary hearing to present the remaining claims contained within his Rule 40 petition, and (3) the prosecution concedes error on the part of the district court, we hold that the district court erred in failing to address the remaining claims in Benson's Rule 40

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petition. Therefore,

IT IS HEREBY ORDERED that the order of the district court is vacated and remanded to the district court with instructions to hold a hearing on Benson's Rule 40 petition in order to address his ineffective assistance of counsel claim.

DATED: Honolulu, Hawai'i, July 23, 2004.

On the briefs:

Jock Yamaguchi, for
the petitioner-appellant
Mark A. Benson

Simone Polak, deputy
prosecuting attorney, for
the respondent-appellee
State of Hawai'i