

*** NOT FOR PUBLICATION in WEST'S HAWAI'I REPORTS and PACIFIC REPORTER ***

NO. 26447

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RICKY D. GARRINGER, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. No. 03-1-0056)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, and Nakayama, JJ.; and Acoba, J.,
concurring separately, with whom Duffy, J., joins)

The petitioner-appellant Ricky D. Garringer appeals from the February 20, 2004 order of the circuit court of the first circuit, the Honorable Marcia J. Waldorf presiding, denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition without a hearing.

On appeal, Garringer contends that the circuit court erred in denying his HRPP Rule 40 petition by implicitly concluding that Apprendi v. New Jersey, 530 U.S. 466 (2000), did not render illegal his extended term of imprisonment imposed pursuant to HRS § 706-662(4) (Supp. 1996).

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 affirm the order of the circuit court.

On March 4, 1991, Garringer was sentenced to life imprisonment with the possibility of parole with a ten-year

minimum sentence. On March 3, 1992 that sentence was affirmed on direct appeal through this court's memorandum opinion (Mem. Op.), No. 15217, 73 Haw. 624, 827 P.2d 1148 (1992). Pursuant to a previous HRPP Rule 40 petition that resulted in this court's published decision in Garringer v. State, 80 Hawai'i 327, 909 P.2d 1142 (1996), Garringer was resentenced on August 12, 1997, to life imprisonment with the possibility of parole with no mandatory minimum sentence. He appealed the new sentence, which was affirmed by this court on December 22, 1998 via summary disposition order (SDO) No. 20955. Apprendi was announced on June 26, 2000. Therefore, Garringer seeks, through his HRPP Rule 40 petition, to apply Apprendi retroactively to collaterally attack his sentence.¹

This court held in State v. Gomes, 107 Hawai'i 308, 314, 113 P.3d 184, 190 (2005), "that Apprendi does not apply retroactively in this jurisdiction to cases on collateral attack." Therefore,

¹ To the extent that Garringer's appeal alleges that the circuit court "erred when it enhanced [his] sentence based on facts other than a prior conviction" and that the prosecution "erred when it did not charge in the indictment and submit to the jury[] the facts used to enhance [Garringer]'s sentence," Garringer argues in substance that Apprendi was violated during the sentencing process. To the extent that Garringer is generally challenging the sentencing court's discretion in imposing the extended sentence of life with the possibility of parole, that issue has been previously ruled upon in Mem. Op. No. 15217 and the sentence reaffirmed in SDO No. 20955. Therefore, pursuant to HRPP Rule 40(a)(3), relief is not available. Finally, to the extent that Garringer argues in his opening brief that he was not given fair notice at trial that an extended sentence was possible, information that he alleges might have changed his trial strategy, aside from failing to explicate this point through any authority aside from a passing reference to the fifth amendment to the United States Constitution, he offers no extenuating circumstances as to why the issue could not have been raised on direct appeal of his sentence in March 1991. Therefore, pursuant to HRPP Rule 40(a)(3), he has waived that issue for purposes of the present petition.

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

DATED: Honolulu, Hawai'i, November 6, 2006.

On the briefs:

Ricky D. Garringer,
petitioner-appellant, pro se

James M. Anderson,
Deputy Prosecuting Attorney
for the respondent-appellee
State of Hawai'i

