

NO. CAAP-11-0000461

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

MICHAEL L. CARTER, Petitioner-Appellant,
v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 09-1-0027 (CR. NO. 04-1-1977))

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., Foley, and Reifurth, JJ.)

Petitioner-Appellant Michael L . Carter (Carter) appeals pro se from the "Order Denying Petitioner Michael L. Carter's Petition for Post-Conviction Relief Without a Hearing" (Order Denying Rule 40 Petition), filed April 14, 2011 in the Circuit Court of the First Circuit¹ (circuit court). The circuit court denied without a hearing, Carter's July 28, 2009 Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody (alternatively, "7/28/09 Rule 40 Petition" and "7/28/09 Petition") and included the claims Carter added in his "Motion to Amend Rule 40 Petition Pursuant to H.R.P.P. 40(e)" (Petition Supplement) filed April 19, 2010.

¹ The Honorable Edward H. Kubo, Jr. presided.

The court concluded, *inter alia*, that Carter could and should have raised his arguments in his first Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, filed September 12, 2008 (9/12/08 Rule 40 Petition) or in his subsequent appeal. Consequently, his claims were waived.

On appeal, Carter argues that the circuit court erred in denying his 7/28/09 Rule 40 Petition and Petition Supplement without a hearing because (1) his sentence was illegal, (2) his Rule 11 plea agreement was violated, (3) the Hawaii Paroling Authority did not correct his sentence, and (4) he moved to amend his 9/12/08 Rule 40 Petition to include these claims, but the court "refused to answer any of [his] motions."

Upon careful review of 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 resolve Carter's points of error as follows:

The circuit court did not err in denying Carter's Rule 40 Petition without a hearing. Carter waived his arguments in his 7/28/09 Rule 40 Petition and Petition Supplement by failing to raise them in his 9/12/08 Rule 40 Petition or subsequent appeal. We note that he also failed to raise his fourth point of error in his 7/28/09 Petition and Petition Supplement. He does not prove the existence of extraordinary circumstances that would justify his failure to do so. Hawai'i Rules of Penal Procedure Rule 40(a)(3); Hawai'i Rules of Appellate Procedure Rule 28(b)(4).

Therefore,

IT IS HEREBY ORDERED that the "Order Denying Petitioner Michael L. Carter's Petition for Post-Conviction Relief Without a Hearing," filed April 14, 2011 in the Circuit Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawai'i, July 18, 2012.

On the briefs:

Michael L. Carter
Petitioner-Appellant pro se.

Chief Judge

Loren Thomas
Deputy Prosecuting Attorney
for Respondent-Appellee.

Lisa Itomura
Deputy Attorney General
for Respondent-Appellee.

Associate Judge

Associate Judge