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NO. CAAP-13-0000415

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

JAMES K. LIBERO, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 13-1-0002; CR. NO. 98-0697)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant James K. Libero appeals from the Findings of Fact, Conclusions of Law, and Judgment Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, filed on April 10, 2013 in the Circuit Court of the Second Circuit ("Circuit Court").^{1/}

On October 4, 2000, Libero was convicted of Attempted Murder in the Second Degree, Assault in the First Degree, and Attempted Sexual Assault in the First Degree. On direct appeal, we affirmed Libero's convictions for Attempted Murder in the Second Degree and Assault in the First Degree but reversed his conviction for Attempted Sexual Assault in the First Degree. *State v. Libero*, 103 Hawai'i 490, 83 P.3d 753 (App. 2003), *cert. denied*, 103 Hawai'i 479, 83 P.3d 742 (2004).

Between August 23, 2001, and January 16, 2013, Libero filed seven petitions for relief pursuant to Rule 40 of the Hawaii Rules of Penal Procedure. The first petition was denied because his direct appeal was still pending before the appellate

^{1/} The Honorable Peter T. Cahill presided.

court. The subsequent six petitions were also denied.

On February 20, 2013, Libero filed a Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody ("Eighth Petition"). On April 10, 2013, the Circuit Court issued the Findings of Fact, Conclusions of Law, and Judgment Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody which denied Libero's Eighth Petition.

On appeal, Libero asserts the same claims as he did in his Eighth Petition: (1) the Circuit Court should reverse the First Degree Assault conviction because there was no matching DNA from a blood stain or hair on the kiawe branch; (2) the Circuit Court failed to instruct the jury on the merger of the charges for Attempted Murder in the Second Degree and Assault in the First Degree; (3) there was no probable cause for his arrest and he was not given a *Miranda* warning; and (4) ineffective assistance of counsel, who failed to object to irrelevant and prejudicial trial testimony by a police detective.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments they advance and the issues they raise, we resolve Libero's points of error as follows, and affirm:

(1 & 2) Libero's first and second points of error were previously raised and ruled upon in his sixth petition. Therefore, relief is not available. Haw. R. Pen. P. 40(a)(3) ("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.")

(3) Libero failed to prove the existence of extraordinary circumstances to justify his failure to raise the issue in his direct appeal and seven prior petitions for relief. Therefore, relief is not available. Haw. R. Pen. P. 40(a)(3).

(4) Claims of ineffective assistance of counsel were raised and ruled upon in Libero's second, fourth, fifth, and seventh petitions. Therefore, relief is not available. Haw. R. Pen. P. 40(a)(3).

To the extent that Libero's appeal can be construed to

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assert any other point of error on appeal, Libero failed to prove the existence of extraordinary circumstances to justify his failure to raise the issue in seven prior petitions for relief. Therefore, relief is not available. Haw. R. Pen. P. 40(a)(3).

Therefore,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Judgment Denying Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody, filed on April 10, 2013 in the Circuit Court of the Second Circuit is affirmed.


DATED: Honolulu, Hawai'i, May 22, 2015.

On the briefs:

James K. Libero,
Pro Se Petitioner-Appellant.

Artemio C. Baxa,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.


Chief Judge


Associate Judge


Associate Judge