

NO. 29869

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAIIREGINA SMITH, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-AppelleeAPPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 09-1-0001; FC-CRIMINAL NO. 93-0001)SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Leonard and Reifurth, JJ.)

Petitioner-Appellant Regina Smith (**Smith**) appeals the Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief, filed on April 29, 2009 (**Order Denying Post-Conviction Relief**) in the Circuit Court of the First Circuit (**Circuit Court**).^{1/}

On September 29, 1993, Smith was found guilty of five counts of Sexual Assault in the First Degree and six counts of Sexual Assault in the Third Degree. Smith was sentenced to an extended term of imprisonment. On January 13, 1997, Smith's convictions were affirmed by the Supreme Court of Hawai'i.

On April 1, 1998, Smith filed a petition for post-conviction relief (**First Petition**) (S.P.P. No. 98-0027) pursuant to Hawai'i Rules of Penal Procedure (**HRPP**) Rule 40. The First Petition was denied.

On July 3, 2002, Smith filed another petition for post-conviction relief (**Second Petition**) (S.P.P. No. 02-1-0051) pursuant to HRPP Rule 40. The Second Petition was also denied. On February 3, 2004, the Supreme Court of Hawai'i affirmed the denial of the Second Petition in Appeal No. 25724.

^{1/} The Honorable Michael D. Wilson presided.

JAN R. KIKUMOTO
CLERK OF APPELLATE COURTS
STATE OF HAWAII

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On November 12, 2008, Smith filed a "memorandum" in support of petition for post-conviction relief, which was designated as a non-conforming petition for post-conviction relief, in S.P.P. 08-1-0047. On January 6, 2009, Smith filed a Petition for Post-Conviction Relief (**Third Petition**), pursuant to HRPP Rule 40 in S.P.P. 09-1-0001. On February 3, 2009, the Circuit Court ordered that all documents in S.P.P. 08-1-0047 be transferred to S.P.P. 09-1-0001 and that S.P.P. 08-1-0047 be dismissed.

In the Third Petition, Smith stated that "petitioner is not attempting to claim that Apprendi v. New Jersey, 530 U.S. 466 (2000), or any of its progeny, should be applied retroactively." Smith claimed that her extended sentence, imposed pursuant to Hawaii Revised Statute § 706-662 was unconstitutional on its face, and therefore, void ab initio. On April 29, 2009, the Circuit Court entered the Order Denying Post-Conviction Relief, which denied Smith's Third Petition.

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 Smith's point of error as follows:

Smith's sentence to an extended term of imprisonment was not void ab initio. See State v. Jess, 117 Hawai'i 381, 184 P.3d 133 (2008); Loher v. State, 118 Hawai'i 522, 193 P.3d 438 (App. 2008); and State v. Cutsinger, 118 Hawai'i 68, 81, 185 P.3d 816, 829 (App. 2008), overruled in part on other grounds by State v. Jess, 117 Hawai'i 381, 184 P.3d 133 (2008).

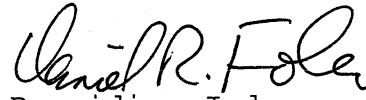
For these reasons, the Circuit Court's April 29, 2009
Order Denying Post-Conviction Relief is affirmed.

DATED: Honolulu, Hawai'i, June 24, 2010.

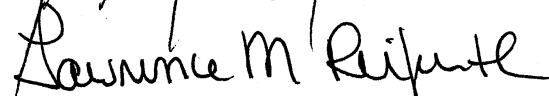
On the briefs:

Regina Smith
Pro Se Petitioner-Appellant

Brian R. Vincent
Deputy Prosecuting Attorney
for Respondent-Appellee


Presiding Judge


Associate Judge


Associate Judge