

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 29614

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DALE MARK FETALVERO, Petitioner-Appellant,
v.
STATE OF HAWAII, Respondent-Appellee

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 08-1-0012(2) (Cr. No. 88-0058(2))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Dale Mark Fetalvero (Fetalvero) appeals from the Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief filed on January 20, 2009 in the Circuit Court of the Second Circuit (circuit court).¹

On July 7, 1989, the circuit court convicted Fetalvero of Kidnapping, in violation of Hawaii Revised Statutes (HRS) § 707-720 (1976); Rape in the First Degree, in violation of HRS § 707-730 (1985) (§ 707-730 was repealed in 1986); and Murder, in violation of HRS § 707-701 (1976).

On July 23, 1990, the Hawaii Supreme Court affirmed Fetalvero's convictions in No. 14013.

On August 17, 1993, Fetalvero filed a Petition for Post-Conviction Relief, pursuant to Rule 40 of the Hawaii Rules of Penal Procedure (HRPP) (First Petition). The circuit court denied the First Petition on November 17, 1993. Fetalvero did not appeal the denial of the First Petition.

¹ The Honorable Shackley F. Raffetto presided.

On July 21, 2008, Fetalvero filed a Petition for Post-Conviction Relief, pursuant to HRPP Rule 40 (Second Petition).

In the Second Petition, Fetalvero asserted that:

- A. Ground one: Petitioner was denied the fundamental right to a jury trial in violation of Art. 1, § 2, 5, 10, 14 of the Haw. Const. And U.S. const. 6 Amend.

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Petitioner did not waive his right to a jury trial and was therefore denied and subsequently usurped his fundamental right to a jury trial

- B. Ground two: The sentence of petitioner is illegal as there were only multiple terms imposed at the same time which by statute HRS § 706-668.5 runs concurrent.

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The sentencing court sentenced the petitioner to 3 consecutive terms of life/w parole and 5 years each mandatory terms of imprisonment. Under current and prior laws consecutive and mandatory sentencing were illegal.

- C. Ground three: Petitioner's extended terms of imprisonment is illegal on its face, as deemed by Hawaii's Supreme Court.

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Unconstitutional challenge to prior sentencing statute is deemed illegal and has no force and effect ab initio and void.

- D. Ground four: The principle charge of the crimes was kidnapping and murder cannot be a secondary or third part of the serious offense.

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The charges are erroneous because the first [sic] charge is kidnapping and not murder there is no degree of murder i.e 1st° 2nd° murder What? its defective and should be thrown out.

On January 20, 2009, the circuit court issued its Findings of Fact, Conclusions of Law, and Judgment Denying Rule 40 Petition for Post-Conviction Relief, denying the Second Petition without a hearing. The circuit court concluded that Ground One had been previously ruled upon; Grounds Two and Four had no colorable basis, were patently frivolous, and were without

a trace of support in the record; and Ground Three had been waived.

On appeal, Fetalvero's only point of error is that his consecutive sentences were illegal pursuant to HRS §§ 706-668.5 (1993) and 706-606 (1993).² Fetalvero vaguely alleges that the indictment should have put him on notice that he could receive consecutive sentences.

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, as well as the relevant statutory and case law, we conclude that Fetalvero's appeal is without merit.

HRPP "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." HRPP Rule 40(a)(3). Furthermore, imposition of consecutive sentences upon Fetalvero did not violate his constitutional rights. State v. Kahapea, 111 Hawai'i 267, 278-80, 141 P.3d 440, 451-53 (2006); Oregon v. Ice, ___ U.S. ___, 129 S. Ct. 711, 716-19 (2009).

Therefore,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law, and Order Denying Petition For Post-

² Although Fetalvero states that the circuit court sentenced him pursuant to HRS § 706-606.5 (Sentencing of Repeat Offenders), the circuit court actually sentenced him pursuant to HRS § 706-606. The circuit court did not sentence Fetalvero as a repeat offender.

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Conviction Relief filed on January 26, 2009 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, March 22, 2010.

On the briefs:

Dale Mark Fetalvero,
Petitioner-Appellant pro se.

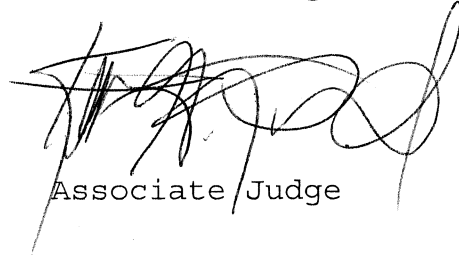
Renee Ishikawa Delizo,
Deputy Prosecuting Attorney,
County of Maui,
for Respondent-Appellee.



Chief Judge



Associate Judge



Associate Judge