

NO. 29808

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MELVIN FREITAS, JR., Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 09-1-0010)

SUMMARY DISPOSITION ORDER

(By: Nakamura, Chief Judge, Foley and Leonard, JJ.)

Petitioner-Appellant Melvin Freitas, Jr. (**Freitas**) appeals the Findings of Fact, Conclusions of Law, and Order Denying Petition for Post-Conviction Relief Without a Hearing, filed on April 13, 2009 (**Post-Conviction Order**) in the Circuit Court of the First Circuit (**Circuit Court**).¹

On June 26, 1997, Freitas was found guilty of three counts of Kidnapping, one count of Robbery in the Second Degree, one count of Assault in the Second Degree, one count of Terroristic Threatening in the First Degree, and one count of Assault in the Third Degree. Freitas was sentenced to an extended term of imprisonment. On October 23, 1998, this court found that the charge of Robbery in the Second Degree merged with Assault in the Second Degree and vacated the conviction for Assault in the Second Degree. On June 14, 2000, Freitas was resentenced to the same terms of imprisonment, except for the sentence for Assault in the Second Degree.

On April 11, 2002, Freitas filed a petition for post-conviction relief (**First Petition**) (S.P.P. No. 02-1-0028), pursuant to the Hawaii Rules of Penal Procedure (**HRPP**) Rule 40 which was denied.

¹ The Honorable Richard K. Perkins presided.

On December 1, 2004, Freitas filed another petition for post-conviction relief (**Second Petition**) (S.P.P. No. 04-1-0096), pursuant to HRPP Rule 40. One of the grounds for relief in the Second Petition was that his extended term sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004). On May 13, 2005, the Second Petition was denied by the Circuit Court. On November 28, 2006, this court affirmed the Circuit Court's denial of the Second Petition in No. 27342.

On February 20, 2009, Freitas filed a third petition for post-conviction relief (**Third Petition**), pursuant to HRPP Rule 40. Freitas asserted his extended term of imprisonment was illegal because State v. Mugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007) (**Mugaotega II**), invalidated Hawaii Revised Statutes § 706-662, and that Mugaotega II applies retroactively to his extended term sentencing. On January 27, 2009, the Circuit Court entered the Post-Conviction Order, which denied the Third Petition. On appeal, Freitas asserts the same ground for relief as in the 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 Freitas's points of error as follows:

Mugaotega II does not apply retroactively to Freitas's conviction and sentence, which became final in 2000. See Loher v. State, 118 Hawai'i 522, 537-38, 193 P.3d 438, 453-54 (App. 2008). Freitas'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) and Loher, supra; 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 13, 2009 Post-Conviction Order is affirmed.

DATED: Honolulu, Hawai'i, May 21, 2010.

On the briefs:

Melvin Freitas, Jr.
Petitioner-Appellant

Chief Judge

Stephen K. Tsushima
Deputy Prosecuting Attorney
City and County of Honolulu
for Respondent-Appellee

Associate Judge

Associate Judge