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Intermediate Court of Appeals
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NO. 30585

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

MARSHALL MARTINEZ, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 09-1-0009(1))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Marshall Martinez (Martinez) appeals from the "Findings of Fact, Conclusions of Law, and Decision and Order Dismissing HRPP Rule 40 Petition Filed on May 15, 2009" (5/28/10 FOF/COL/Order), entered on May 28, 2010, in the Circuit Court of the Second Circuit (circuit court).¹ The circuit court dismissed Martinez's Hawai'i Rules of Penal Procedure Rule 40 Petition for Post-Conviction Relief (Rule 40 Petition),² which he filed on May 15, 2009, on the ground that it failed "to present a colorable claim for relief and [wa]s patently frivolous and without merit[.]"

¹ The Honorable Joel E. August issued the 5/28/10 FOF/COL/Order.

² On April 27, 2009, Martinez, pro se, filed a Writ of Habeas Corpus in the circuit court, which the court treated as a Rule 40 Petition in an order entered on May 15, 2009.

On appeal, Martinez argues that the circuit court erred in denying his Rule 40 Petition where (1) he colorably claimed that the statute under which he was sentenced, Hawaii Revised Statutes (HRS) § 706-662 (Supp. 1988), was void *ab initio* pursuant to State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007) (Maugaotega II), and (2) in sentencing him, the circuit court unconstitutionally punished him for unsubstantiated allegations of misconduct.

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 Martinez's points of error as follows:

The circuit court did not err by denying Martinez's Rule 40 Petition.

(1) The circuit court properly concluded that the extended sentencing statute, HRS § 706-662, was not void *ab initio*, based on case law following Maugaotega II. See State v. Jess, 117 Hawai'i 381, 407-15, 184 P.3d 133, 159-67 (2008); State v. Cutsinger, 118 Hawai'i 68, 79-82, 185 P.3d 816, 827-30 (App. 2008), *overruled in part on other grounds by Jess*, 117 Hawai'i at 398 n.17, 184 P.3d at 150 n.17.

(2) By not raising his claim that he was sentenced based on unsubstantiated conduct in a direct appeal from his 1988 sentence or in his ten prior HRPP Rule 40 petitions, Martinez has waived this claim. Moreover, no plain error in denying Martinez's Rule 40 Petition appears where Martinez was convicted of two prior felonies and Martinez does not argue the circumstances of those offenses do not support the sentencing court's determination that an extended term of imprisonment was necessary for the protection of the public under HRS § 706-662.

Therefore,

IT IS HEREBY ORDERED that the "Findings of Fact, Conclusions of Law, and Decision and Order Dismissing HRPP

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

Rule 40 Petition Filed on May 15, 2009," entered on May 28, 2010
in the Circuit Court of the Second Circuit, is affirmed.

DATED: Honolulu, Hawai'i, August 31, 2011.

On the briefs:

James S. Tabe,
Deputy Public Defender,
for Petitioner-Appellant.


Chief Judge

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


Associate Judge


Associate Judge