

NO. CAAP-14-0001369

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KIM RAYNARD MASSEY, Petitioner-Appellant,
v.
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPECIAL PROCEEDING PRISONER NO. 12-1-0032)
(CRIMINAL NO. 06-1-2105)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Kim Raynard Massey (**Massey**)
appeals pro se from the denial of his Hawai'i Rules of Penal
Procedure (**HRPP**) Rule 40 Petition,¹ which was ordered in the
"Findings of Fact, Conclusions of Law, and Order Denying Hearing
for Post-Conviction Relief Without a Hearing" entered on November
3, 2014 in the Circuit Court of the First Circuit² (**circuit
court**).

¹ Massey's notice of appeal states that he appeals from the "final Judgment and Decision of the Circuit Court of the First Circuit . . . attached hereto as exhibit 'A,'" but attached to his notice of appeal is the "Order Denying Petitioner's Motion for Appointment of Counsel and Order Denying Motion for Leave to Amend and Clarify Petition." We construe Massey's appeal as being taken from the circuit court's order denying Massey's HRPP Rule 40 Petition. See City & Cty. of Honolulu v. Midkiff, 57 Haw. 273, 275, 554 P.2d 233, 235 (1976) ("[A] mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.") (citation and internal quotation marks omitted).

² The Honorable Steven S. Alm presided.

On appeal, Massey contends that he received (1) ineffective assistance of counsel during the underlying criminal trial and (2) ineffective assistance of appellate counsel in the direct appeal from his conviction.

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 Massey's appeal is without merit.

I. Ineffective Assistance of Counsel at Trial

Massey asserted in his HRPP Rule 40 Petition that he received ineffective assistance of his trial counsel.

The Hawai'i Supreme Court has held, "a claim of ineffective assistance of counsel is not considered 'waived' for the purposes of an HRPP Rule 40 Petition if there was 'no realistic opportunity' for the petitioner to raise the claim in the proceedings specified by the rule." Fagaragan v. State, 132 Hawai'i 224, 235, 320 P.3d 889, 900 (2014).

On November 22, 2006, the circuit court entered an order appointing the Office of the Public Defender as counsel for Massey in Cr. No. 06-1-2105. Deputy Public Defender Debra Loy represented Massey at trial. Attorney Barry L. Sooalo represented Massey on the direct appeal.

On the direct appeal, Massey asserted, among other claims, that his trial counsel provided ineffective assistance. State v. Massey, No. 30331 at *1 (App. June 9, 2011) (SDO). Specifically, Massey pointed to "(a) counsel's failure to present a witness to contest the State's expert fire witness regarding possible causes of the fire, (b) counsel's failure to object to hearsay evidence, and (c) counsel's failure to object to the cumulative nature and relevance of the State's expert fire witness." Id.

Under these circumstances, where Massey already alleged ineffective assistance of his trial counsel on his direct appeal and was represented by an attorney different than the one who represented him at trial, we affirm the circuit court's decision

that the claim for ineffective assistance of trial counsel was waived under HRPP Rule 40(a)(3)³ because Massey had a "realistic opportunity" to raise these arguments in his direct appeal.

II. Ineffective Assistance of Counsel on Direct Appeal

Massey argues in his HRPP Rule 40 Petition and on appeal that the attorney who represented him on his direct appeal was ineffective because the attorney prepared the opening brief in contravention of Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28, failed to file a timely appeal to the Hawai'i Supreme Court, "[f]ail[ed] to prefect [sic] [a] Prosecutorial Misconduct Argument," and "failed to prefect [sic] the Argument that Trial Judge abused his Discretion" in admitting expert testimony.

In order to establish the ineffective assistance of counsel on appeal, a petitioner must show that (1) his appellate counsel omitted an appealable issue, and (2) in light of the entire record, the status of the law, and the space and time limitations inherent in the appellate process, a reasonably competent, informed and diligent criminal attorney would not have omitted that issue.

Domingo v. State, 76 Hawai'i 237, 242, 873 P.2d 775, 780 (1994) (citing Briones v. State, 74 Haw. 442, 466-67, 848 P.2d 966, 977-78 (1993)).

An "appealable issue" is an error or omission by counsel, judge, or jury resulting in the withdrawal or substantial impairment of a potentially meritorious defense. Every appealable issue is not required to be asserted. The page limitation on the appellate briefs and the dictates of

³ HRPP Rule 40(a)(3) provides:

Rule 40. POST-CONVICTION PROCEEDING.

(a) Proceedings and grounds.

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(3) **INAPPLICABILITY.** 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. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

effective appellate advocacy compel appellate counsel to advance a limited number of key issues.

If an appealable issue is omitted, then both the issues actually presented on appeal as well as those omitted are evaluated in light of the entire record, the status of the law and, most importantly, counsel's knowledge of both. Counsel's scope of review and knowledge of the law are assessed, in light of all the circumstances, as that information a reasonably competent, informed and diligent attorney in criminal cases in our community should possess. Counsel's informed decision as to which issues to present on appeal will not ordinarily be second-guessed. Counsel's performance need not be errorless. If, however, an appealable issue is omitted as a result of the performance of counsel whose competence fell below that required of attorneys in criminal cases then appellant's counsel is constitutionally ineffective.

Briones, 74 Haw. at 465-67, 848 P.2d at 977-78 (footnotes omitted).

Massey's first argument is that his appellate counsel was ineffective because he prepared and submitted Massey's opening brief on the direct appeal in contravention of HRAP Rule 28. In Massey's direct appeal, we deemed Massey's argument that his trial counsel was ineffective because she failed to object to the relevance or cumulative nature of the Respondent-Appellee State of Hawai'i's (**State**) expert fire witness testimony waived, because the opening brief "[did] not explain how or where in the record the testimony is cumulative, or how counsel's alleged failure to object to that testimony amounted to the withdrawal or substantial impairment of a potentially meritorious defense." Massey, SDO at *4. We also noted that Massey's argument that his trial counsel did not object to "numerous instances of hearsay evidence" was not supported by legal authorities in contravention of HRAP Rule 28(b)(7). Massey, SDO at *3 n.7. This lack of compliance with HRAP Rule 28, we noted, was "a pervasive problem throughout the opening brief." Id. at *1 n.4.

Massey's HRPP Rule 40 Petition and his opening brief in this appeal do not explain how his appellate counsel's preparation of the opening brief for the direct appeal led to the omission of an "appealable issue." Massey has not shown that the argument regarding Massey's trial counsel's failure to object to the relevance or cumulative nature of the State's fire expert

witness's testimony would have, even if fully briefed, raised a potentially meritorious defense. Additionally, even though Massey's appellate counsel did not support the argument that Massey's trial counsel failed to object to hearsay evidence with legal authorities as required by HRAP Rule 28, this court addressed the merits of the argument and concluded that "counsel's failure to object to the identified hearsay included in [the investigator's] testimony did not amount to ineffective assistance of counsel." Massey, SDO at *4. Massey has failed to demonstrate that his appellate counsel's noncompliance with HRAP Rule 28 resulted in the withdrawal or substantial impairment of a potentially meritorious defense. See Domingo, 76 Hawai'i at 242, 873 P.2d at 780.

Massey's second argument is that his appellate counsel failed to timely appeal to the Hawai'i Supreme Court. The issuance of a writ of certiorari is a matter within the discretion of the supreme court. Where the record does not show the "withdrawal or substantial impairment of a potentially meritorious defense," an HRPP Rule 40 petitioner will not be awarded relief on the grounds that the ineffective assistance of his or her appellate counsel denied the petitioner of discretionary review by the supreme court. See Briones, 74 Haw. at 465-66, 848 P.2d at 977-78. Here, Massey has not demonstrated the withdrawal or substantial impairment of a potentially meritorious defense, and therefore, we cannot grant Massey HRPP Rule 40 relief.

Massey's third argument, that his appellate counsel failed to raise prosecutorial misconduct as an issue on appeal, is based on Massey's contention that the State's expert witness relied on improper methodology regarding fire scene investigation. Massey argues, "It is the duty of the prosecution to refrain from improper methods Calculated to Produce a Wrongful Conviction." Prosecutorial misconduct may be an appealable issue. See State v. Pacheco, 96 Hawai'i 83, 93, 26 P.3d 572, 582 (2001) ("Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard[.]"). On

direct appeal, Massey raised a number of points of error, including,

the [circuit court] erred when it (1) denied [Massey's] motion to dismiss under Rule 48 of [HRPP] without making appropriate findings on the record [sic], (2) failed to apply the proper factor's [sic] in denying the motion to dismiss after a second mistrial was declared, and (3) failed to declare a mistrial after two of the State's witnesses violated the exclusionary rule. In addition, Massey contends that he was (4) denied effective assistance of counsel at trial, as evidenced by (a) counsel's failure to present a witness to contest the State's expert fire witness regarding possible causes of the fire, (b) counsel's failure to object to hearsay evidence, and (c) counsel's failure to object to the cumulative nature and relevance of the State's expert fire witness.

Massey, SDO at *1. Massey has not shown that his appellate counsel's failure to raise the prosecutorial misconduct issue constituted the omission of an appealable issue. In addition, given the number of arguments made on the direct appeal and that the arguments were related to the State's expert witness testimony on the fire scene investigation, Massey has failed to demonstrate that "in light of the entire record, the status of the law, and the space and time limitations inherent in the appellate process, a reasonably competent, informed and diligent criminal attorney would not have omitted that issue." See Domingo, 76 Hawai'i at 242, 873 P.2d at 780; Briones, 74 Haw. at 466, 848 P.2d at 977-78 ("Every appealable issue is not required to be asserted.").

Massey's fourth argument, that his appellate counsel failed to raise the argument that the circuit court abused its discretion by allowing in testimony from the State's expert witness, similarly fails. Again, based on Massey's failure to show that this issue constituted an appealable issue, the number of arguments made on the direct appeal and the similarity of those arguments to Massey's fourth argument, Massey has failed to meet his burden. See Domingo, 76 Hawai'i at 242, 873 P.2d at 780; Briones, 74 Haw. at 466, 848 P.2d at 977-78.

Therefore,

IT IS HEREBY ORDERED that the "Findings of Fact, Conclusions of Law, and Order Denying Hearing for Post-Conviction

Relief Without a Hearing" entered on November 3, 2014 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 12, 2016.

On the briefs:

Kim Raynard Massey
Petitioner-Appellant pro se.

Chief Judge

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

Associate Judge

Associate Judge