

NO. CAAP-15-0000136

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

BERNARTITA MOSES, Petitioner-Appellant,
v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 14-1-0030 (CR. NO. 06-1-1855))

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant Bernartita Moses (Moses) filed a "Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" (Petition), pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2006). In her Petition, Moses sought to set aside her conviction for second-degree theft and withdraw her guilty plea on the grounds that her trial counsel provided ineffective assistance and that counsel's ineffective assistance rendered her guilty plea invalid. Moses alleged that she informed her trial counsel that she was not a United States citizen and her main concern was not being deported; that her trial counsel provided ineffective assistance by affirmatively misinforming her that she would not be deported based on her guilty plea; and that contrary to her trial counsel's advice, the offense to which she pleaded guilty subjects her to automatic and certain deportation, which she discovered after pleading guilty.

In support of her Petition, Moses submitted a declaration, under penalty of perjury, in which she asserted, among other things, that her trial counsel advised her that because she had resided in Hawai'i for more than five years, all her family was in the United States, and her offense was not a violent offense, she would not be deported if she was sentenced to probation; that her trial counsel informed her that he had reached a plea agreement that would result in a probationary sentence; that she did not realize that by pleading guilty she would be subject to certain deportation; and that she would not have pleaded guilty if she had been informed that by pleading guilty she was facing certain deportation.

The Circuit Court of the First Circuit (Circuit Court)^{1/} denied the Petition without a hearing and filed its "Findings of Fact, Conclusions of Law, and Order Denying Petition for Post Conviction Relief" (Order Denying Petition) on February 12, 2015.

Moses appeals from the Order Denying Petition. On appeal, Moses argues that the Circuit Court erred in: (1) denying her Petition without a hearing; (2) concluding that she was not deprived of the effective assistance of counsel; and (3) concluding that her guilty plea was valid. As explained below, we conclude that the Circuit Court erred in denying the Petition without a hearing and therefore vacate the Order Denying Petition.

I.

"If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer." HRPP Rule 40(f).

As a general rule, a hearing should be held on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that if taken as

^{1/} The Honorable Colette Y. Garibaldi presided.

true the facts alleged would change the [outcome of the case], however, a petitioner's conclusions need not be regarded as true.

Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). (quoting State v. Allen, 7 Haw. App. 89, 92-93, 744 P.2d 789, 792-93 (1987)).

Moses alleged that her trial counsel provided ineffective assistance by affirmatively misinforming her that she would not be deported if she pleaded guilty; that contrary to trial counsel's advice, her guilty plea subjected her to certain deportation; and that she would not have pleaded guilty if she had known that her guilty plea would subject her to certain deportation. Moses further alleged that her trial counsel's ineffective assistance rendered her guilty plea invalid. We conclude that the allegations of Moses's Petition, if taken as true, stated a colorable claim for relief. See United States v. Kwan, 407 F.3d 1005, 1014-18 (9th Cir. 2005). Accordingly, the Circuit Court erred in denying Moses's Petition without a hearing to determine if the allegations in the Petition were true. See HRPP Rule 40(f); Dan, 76 Hawai'i at 427, 879 P.2d at 532.

In light of our conclusion that the Circuit Court should have held a hearing on Moses's Petition, we do not reach the other issues raised by Moses in her appeal.

II.

We vacate the Order Denying Petition and remand the case for hearing on the Petition.

DATED: Honolulu, Hawai'i, April 26, 2016.

On the briefs:

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Chief Judge

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Associate Judge