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NO. CAAP-15-0000444
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JOHN E. KNIGHT, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE CIRCUIT CIRCUIT
(SPECIAL PROCEEDING PRISONER NO. 14-1-0023 (CR. NO. 91-2108))

MEMORANDUM OPINION

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

Petitioner-Appellant John E. Knight (**Knight**) appeals from the "Order Denying [Knight's] Petition for Post-Conviction Relief Without a Hearing" entered on May 8, 2015 in the Circuit Court of the First Circuit¹ (**circuit court**).

On appeal, Knight contends the circuit court erred in denying his Hawai'i Rules of Penal Procedure (**HRPP**) Rule 40 Petition without a hearing.

I. BACKGROUND

On March 2, 1994, Knight was convicted of murder in the second degree. The Hawaii Paroling Authority (**HPA**) set Knight's minimum term of imprisonment at thirty-five years.

On January 22, 2009, Knight requested, from the HPA, a new minimum-term hearing based on the Hawai'i Supreme Court's decision in Coulter v. State, 116 Hawai'i 181, 172 P.3d 493 (2007).² There is no information in the record pertaining to a

¹ The Honorable Edward H. Kubo, Jr. presided.

² Knight's request is not contained in the record on appeal, but Respondent-Appellee State of Hawai'i does not dispute this fact.

hearing on the new minimum-term hearing or to the information the HPA considered in setting a new minimum-term, and there is no transcript of the hearing in the record. The HPA issued a "Notice of Order of Fixing Minimum Term(s) of Imprisonment" on July 15, 2009, setting Knight's minimum-term at thirty-five years. The HPA determined that Knight's crime warranted "Level III" punishment, and identified the "Nature of the Offense" and "Degree of Loss to Person" as significant factors in determining the punishment level of Knight's crime.

On October 2, 2009, Knight filed a writ of habeas corpus with the circuit court (**Non-Conforming Petition**). The circuit court entered an order designating the motion as a non-conforming petition for post-conviction relief under HRPP Rule 40 and directed Knight to supplement the petition by January 4, 2010. Knight's Non-Conforming Petition was dismissed because Knight failed to comply with the order. Knight v. State, No. CAAP-11-0000472 at *1 (App. Dec. 7, 2012) (SDO)

On September 13, 2010, Knight filed an HRPP Rule 40 petition (**2010 Rule 40 Petition**), which the circuit court denied on May 27, 2011. Id. This court affirmed the circuit court's denial. Id.

On September 23, 2014, Knight filed a "Petition to Vacate, Set Aside, or Correct Illegal Sentence Through a Writ of Habeas Corpus Pursuant to HRPP Rule 40" (**2014 Rule 40 Petition**). In his 2014 Rule 40 Petition, Knight describes the issues warranting relief:

- 1) Whether the HPA, in using the criteria "Nature of Offense" and "Degree of Loss to Person" to justify [Knight's] Level III punishment, violated [Knight's] right to due process under the constitutions of the State of Hawaii and the United States by using what are in fact "elements of the offense" without a unanimous finding by a jury;
- 2) Whether such failure to provide due process is contrary to, or an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court;
- 3) Whether the HPA's habitual, and specific to [Knight], use of inappropriate criteria to justify Level III punishment is unconstitutional;
- 4) Whether the HPA violated [Knight's] due process rights by setting his minimum term far above the normal

range for similarly-situated offenders whose crimes had similar or more heinous circumstances;

5) Whether the HPA violated [Knight's] rights by not disclosing to him all of the adverse material in his HPA file prior to his minimum term hearing;

6) Whether the HPA violated [Knight's] rights by not disclosing to him prior to his hearing what criteria and Level of Punishment would be used to finalize his sentence;

7) Whether individually or cumulatively, the violations of [Knight's] rights were contrary to, or an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court and the Hawaii Supreme Court and deserve habeas relief.

(Format altered.)

On May 8, 2015, the circuit court entered its "Order Denying Petitioner John E. Knight's Petition for Post-Conviction Relief Without a Hearing." Knight filed a notice of appeal from the order on May 28, 2015.

II. STANDARD OF REVIEW

Denial of HRPP Rule 40 Petition

The standard of review in determining whether a court erred in denying a petition for post-conviction relief without a hearing is de novo. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). Under de novo review, "the appellate court steps into the trial court's position, reviews the same trial record, and redecides the issue," determining whether the court's decision was right or wrong. Id. This court has held that de novo review is appropriate because a denial of a petition for post-conviction relief presents a question of law. Id. As this court has said,

as a general rule, a hearing should be held on [an HRPP] 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 true the facts alleged would change the verdict, however, a petitioner's conclusions need not be regarded as true. Where examination of the record of the trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing. The question on appeal of a denial of [an HRPP] Rule 40 petition without a hearing is whether the trial record indicates that a petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.

Id. (quoting State v. Allen, 7 Haw. App. 89, 92-93, 744 P.2d 789, 792-93 (1987))

Hutch v. State, 107 Hawai'i 411, 414, 114 P.3d 917, 920 (2005)
(brackets and emphases omitted).

With respect to HPA decisions establishing a minimum term, this court has stated that "judicial intervention is appropriate where the HPA has failed to exercise any discretion at all, acted arbitrarily and capriciously so as to give rise to a due process violation, or otherwise violated the prisoner's constitutional rights."

Fagaragan v. State, 132 Hawai'i 224, 234, 320 P.3d 889, 899
(2014) (quoting Coulter, 116 Hawai'i at 184, 172 P.3d at 496.

III. DISCUSSION

Relief under HRPP Rule 40 is not available 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.

HRPP Rule 40(a)(3). A court may deny the petitioner a hearing "if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner." HRPP Rule 40(f).

Knight argued in his 2014 Rule 40 Petition that the issues he raised were not waived for failure to raise them in his previous petitions because the issues are based on rules announced in cases decided after his Non-Conforming Petition and 2010 Rule 40 Petition. Knight's 2014 Rule 40 Petition can be summarized as raising three distinct issues. First, Knight contended that "Nature of Offense" and "Degree of Loss to Person" are elements of the underlying claim that are required to be submitted to a jury under the United States Supreme Court's decision in Alleyne v. United States, 133 S.Ct. 2151 (2013). However, Knight does not raise this issue on appeal.

Second, Knight claimed the HPA insufficiently justified a Level III punishment under St. Clair v. State, No. CAAP-11-0000359 at *5 (App. Dec. 20, 2013) (mem.) by stating simply "Significant factors identified in determining level of punishment: (1) Nature of Offense; (2) Degree of Loss to Person."

"Under the Degree of Injury/Loss to Person or Property criteria, the standard for a Level III level of punishment is met if the injury or loss suffered by the victim(s) was more than those experienced by similarly situated victims." St. Clair, mem. op. at *5 (brackets and internal quotation marks omitted). In St. Clair, we held that where a defendant was convicted of vehicular manslaughter and the victim was killed almost instantaneously, the HPA erroneously relied on the "Degree of Injury/Loss to Person" because the victim did not suffer any loss greater than other manslaughter victims. Id. at *6. This court explained, "for purposes of applying the Degree of Injury/Loss to Person criteria to St. Clair's manslaughter conviction, ['similarly situated victims'] are not victims of drunk driving in general where the underlying offense is less serious than manslaughter, but refer to manslaughter victims." Id. St. Clair is of no help to Knight. Knight's Level III argument was available before St. Clair was decided. Knight's challenge to his minimum-term of imprisonment was previously ruled upon or waived.

Third, Knight argued that the HPA violated his rights by not providing him with adverse material prior to the minimum-term hearing as required by De La Garza v. State, 129 Hawai'i 429, 302 P.3d 697 (2013). In De La Garza, the Hawai'i Supreme Court held that due process under the Hawai'i Constitution "requires that the prisoner have timely access to all of the adverse information contained in the HPA file. The HPA must disclose such information 'soon enough in advance' that the inmate has a 'reasonable opportunity to prepare responses and rebuttal of inaccuracies.'" De La Garza, 129 Hawai'i at 442, 302 P.3d at 710 (quoting Labrum v. Utah State Bd. of Pardons, 870 P.2d 902, 909 (Utah 1993)). Knight has failed to rebut the presumption that his failure to previously raise this argument constituted a knowing and understanding failure and to demonstrate the existence of extraordinary circumstances to justify his failure to raise the argument. Since this argument was not previously raised by Knight, it was waived.

IV. CONCLUSION

Therefore, the "Order Denying Petitioner John E. Knight's Petition for Post-Conviction Relief Without a Hearing" entered on May 8, 2015 in the Circuit Court of the First Circuit is affirmed.

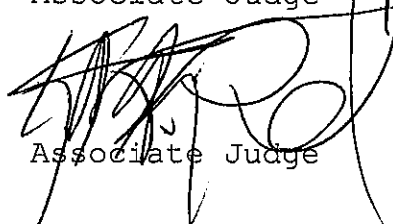
DATED: Honolulu, Hawai'i, May 16, 2016.

On the briefs:

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Chief Judge


Associate Judge

Associate Judge