

**Electronically Filed
Intermediate Court of Appeals
CAAP-19-0000625
05-APR-2022
07:55 AM
Dkt. 72 SO**

NO. CAAP-19-0000625

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

NELSON NAHINU WAIKIKI, JR., Petitioner-Appellant,
v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 2PR151000005 and CR. NO. 2PC131000428)

SUMMARY DISPOSITION ORDER

(By: Ginoza, Chief Judge, Hiraoka and McCullen, JJ.)

Self-represented Petitioner-Appellant Nelson Nahinu **Waikiki**, Jr. appeals from the "Findings of Fact, Conclusions of Law, and **Order** Dismissing Petitioner's Non-Conforming Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" entered by the Circuit Court of the Second Circuit on August 7, 2019.¹ For the reasons explained below, we affirm the Order.

On May 1, 2015, Waikiki was convicted of securities fraud, failure to meet securities registration requirements, and failure to meet broker-dealer requirements and exemptions. He was sentenced to 20 years in prison. He filed two direct appeals, representing himself. The appeals were consolidated. His only discernible argument was that he was a citizen of the

¹ The Honorable Rhonda I.L. Loo presided.

Kingdom of Hawai'i and not subject to prosecution by the State of Hawai'i. We affirmed the conviction and sentence based upon State v. Fergerstrom, 106 Hawai'i 43, 55, 101 P.3d 652, 664 (App. 2004), aff'd, 106 Hawai'i 41, 101 P.3d 225 (2004) and State v. Kaulia, 128 Hawai'i 479, 487, 291 P.3d 377, 385 (2013). State v. Waikiki, Nos. CAAP-15-0000415, CAAP-15-0000416 (Consolidated), 2016 WL 4062843, at *1 (Haw. App. July 26, 2016) (SDO) (**Waikiki I**).

Waikiki also filed a **Petition** to Vacate, Set Aside, or Correct Judgment or to Release Petitioner From Custody, under Rule 40 of the Hawai'i Rules of Penal Procedure (**HRPP**) on May 18, 2015. The Petition was dismissed for non-payment of fees. Waikiki filed an **Amended Petition** on November 1, 2018. The Order, which dismissed the Amended Petition without a hearing, was entered on August 7, 2019. This appeal followed.

Waikiki argues four issues on appeal:² **(1)** violation of his right to a speedy trial; **(2)** illegal plea agreement; **(3)** illegal sentence; and **(4)** lack of jurisdiction.³ We review a circuit court's order denying an HRPP Rule 40 petition without a hearing based on no showing of a colorable claim de novo, under the right/wrong standard of review. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

HRPP Rule 40 provides for post-conviction relief subject to the following:

² Waikiki's opening brief does not comply with Rule 28(b)(4) of the Hawai'i Rules of Appellate Procedure (**HRAP**). However, to promote access to justice the Hawai'i Supreme Court instructs that pleadings prepared by self-represented litigants should be interpreted liberally, and self-represented litigants should not automatically be foreclosed from appellate review because they fail to comply with court rules. Erum v. Llego, 147 Hawai'i 368, 380-81, 465 P.3d 815, 827-28 (2020). Accordingly, we address what we discern to be Waikiki's arguments.

³ Waikiki also claims that the State "denied Waikiki case 'Discovery' still to this day." We disregard this issue because Waikiki's opening brief presents no discernible argument on it. See Kaho'ohanohano v. Dep't of Hum. Servs., State of Haw., 117 Hawai'i 262, 297 n.37, 178 P.3d 538, 573 n.37 (2008) (stating that supreme court will "disregard a particular contention if the appellant makes no discernible argument in support of that position") (cleaned up). See also HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

(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.

(Emphasis added.)

1. Waikiki contends he was deprived of his right to a speedy trial under the federal and state constitutions and HRPP Rule 48. Waikiki moved to dismiss his criminal case on that basis. The circuit court denied the motion. Waikiki could have, but did not, directly appeal the denial. Waikiki presents no extraordinary circumstances to justify his failure to raise the issue on direct appeal. The issue is waived. HRPP Rule 40(a)(3).

2. Waikiki contends the plea agreement he was offered was illegal and he never signed the change of plea form.⁴ Waikiki made this argument to the circuit court in his criminal case. The circuit court rejected his arguments. He could have, but did not, directly appeal the circuit court order. Waikiki presents no extraordinary circumstances to justify his failure to raise the issue on direct appeal. The issue is waived. HRPP Rule 40(a)(3).

3. Waikiki contends his sentence is illegal. He pleaded guilty in his criminal case pursuant to a plea agreement. In exchange for his guilty plea, the State agreed to (among other things) reduce each count in his indictment from a class A felony to a class B felony. On May 1, 2015, the circuit court sentenced Waikiki to ten years on each of the four counts of the

⁴ Waikiki's signature appears on the second page of the Guilty Plea filed on April 11, 2014.

indictment, with counts 1 and 2 to run concurrently, counts 3 and 4 to run concurrently, and counts 1 and 2 to run consecutively with counts 3 and 4, for a total of 20 years. Waikiki moved to reconsider his sentence. The circuit court denied reconsideration.

Waikiki contends his sentence is illegal because it is an "enhanced sentence" that was not charged in his indictment and not presented to a jury, citing State v. Boyd, Nos. 24525, 24526, 24527, 2004 WL 909729 (Haw. April 29, 2004) (SDO). Waikiki's sentence was not "enhanced," nor was it an "extended term" sentence, see Hawaii Revised Statutes (HRS) § 706-661 (2014). Waikiki was sentenced for four class B felonies. The maximum length of imprisonment for a class B felony is ten years. HRS § 706-660(1)(a) (2014). The circuit court imposed consecutive sentences after considering the factors set forth in HRS § 706-606,⁵ as authorized under HRS § 706-668.5,⁶ and stated its

⁵ HRS § 706-606 (2014) provides:

Factors to be considered in imposing a sentence. The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:
 - (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
 - (b) To afford adequate deterrence to criminal conduct;
 - (c) To protect the public from further crimes of the defendant; and
 - (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and
- (4) The need to avoid unwarranted sentence disparities among defendants with similar

(continued...)

reasons as to why a consecutive sentence rather than a concurrent one was required. State v. Hussein, 122 Hawai'i 495, 509, 229 P.3d 313, 327 (2010) (holding that "a court must state its reasons as to why a consecutive sentence rather than a concurrent one was required"). Waikiki's sentence was not illegal.

4. Waikiki contends in his opening brief that he "is not subject to the Laws of the STATE OF HAWAII" because "the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that has been under 100 years, years of a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation[.]" His argument was considered and rejected in Waikiki I.

Based upon the foregoing, we affirm the "Findings of Fact, Conclusions of Law, and Order Dismissing Petitioner's Non-Conforming Petition to Vacate, Set Aside, or Correct Judgment or to Release Petitioner from Custody" entered by the circuit court on August 7, 2019.

DATED: Honolulu, Hawai'i, April 5, 2022.

On the briefs:

Nelson Nahinu Waikiki, Jr.,
Self-represented Defendant-
Appellant.

Albert Cook,
Deputy Attorney General,
Department of the Attorney
General, State of Hawai'i.

/s/ Lisa M. Ginoza
Chief Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Sonja M.P. McCullen
Associate Judge

⁵(...continued)

records who have been found guilty of similar conduct.

⁶ HRS § 706-668.5 (2014) provides, in relevant part:

Multiple sentence of imprisonment. . . .

(2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.