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NO. CAAP-24-0000721

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DAVID H. KAAWA, IV, Petitioner-Appellant,
v.
STATE OF HAWAII, Respondent-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CASE NO. 3PR15100007K (3PC11100277K))

SUMMARY DISPOSITION ORDER

(By: Nakasone, Chief Judge, Leonard and McCullen, JJ.)

Petitioner-Appellant David Haili **Kaawa**, IV, appeals from the Circuit Court of the Third Circuit's (**Rule 40 Court**) June 26, 2024 order denying his Hawai'i Rules of Penal Procedure (**HRPP**) Rule 40 petition without an evidentiary hearing (**Order Denying HRPP Rule 40 Petition**).¹

On appeal, Kaawa challenges the denial of his Rule 40 petition (**Petition**) without a hearing. Kaawa contends he is

¹ The Honorable Robert D.S. Kim presided over the HRPP Rule 40 proceedings.

entitled to a hearing because he presented colorable claims of ineffective assistance of counsel and jury instruction error.²

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the issues raised and the arguments advanced, we resolve the points of error as discussed below and vacate and remand.

The factual background of this case is detailed extensively in this court's 2014 memorandum opinion, but a brief

² Kaawa's points of error (**POE**) are presented as follows:

1. The [Rule 40 Court] erred when it failed to grant Mr. Kaawa an evidentiary hearing based upon the violation of Mr. Kaawa's Constitutional rights because the [trial court] failed to give a specific unanimity instruction and lesser included jury instruction on Count 2. . . .
2. The [Rule 40 Court] erred when it failed to grant Mr. Kaawa an evidentiary hearing based upon his colorable claim of ineffective assistance of counsel because trial counsel failed to object to the [trial court's] failure to give a specific unanimity instruction and lesser included jury instruction on Count 2. . . .
3. The [Rule 40 Court] erred when it failed to grant Mr. Kaawa an evidentiary hearing based upon his colorable claim of ineffective assistance of counsel because appeal counsel failed to object to the [trial court's] failure to give a specific unanimity instruction and lesser included jury instruction on Count 2. . . .
4. The [Rule 40 Court] erred when it failed to grant Mr. Kaawa an evidentiary hearing based upon his colorable claim of ineffective assistance of counsel because trial counsel failed to object to the illegal consecutive sentence. . . .
5. The [Rule 40 Court] erred when it failed to grant Mr. Kaawa an evidentiary hearing based upon his colorable claim of ineffective assistance of counsel because appeal counsel failed to appeal the illegal consecutive sentence[.]

overview is provided below. State v. Kaawa, 133 Hawai'i 451, 330 P.3d 389, No. CAAP-12-0000670, 2014 WL 715713, at *1-6 (App. Feb. 25, 2014) (mem. op.).

In 2011, a grand jury indicted Kaawa on two counts of sexual assault for sexually abusing his ex-girlfriend's minor daughter (**Minor**), over the course of several years. Kaawa, 2014 WL 715713, at *1.

Count 1 (Continuous SA – Under 14) charged Kaawa with Continuous Sexual Assault of a Minor Under the Age of Fourteen, in violation of Hawai'i Revised Statutes (**HRS**) § 707-733.6 (Supp. 2007),³ for engaging in three or more acts of sexual

³ HRS § 707-733.6 provides:

[\$707-733.6] Continuous sexual assault of a minor under the age of fourteen years. (1) A person commits the offense of continuous sexual assault of a minor under the age of fourteen years if the person:

- (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and
- (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under the age of fourteen years.

(2) To convict under this section, the trier of fact, if a jury, need unanimously agree only that the requisite number of acts have occurred; the jury need not agree on which acts constitute the requisite number.

(3) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section, unless the other charged offense occurred outside the period of the offense charged under this section, or the other offense is charged in the alternative. A defendant may be charged with only one

(continued . . .)

contact or penetration with Minor when she was under the age of fourteen years:

On or between the 29th day of November, 2004, and the 28th day of November, 2007, the exact dates and times being unknown, but in a continuing course of conduct, in the County and State of [Hawai'i], DAVID KAAWA, IV, a person who resided in the same home with a minor, [Minor], who was under the age of fourteen years, or who had recurring access to the minor, did intentionally, knowingly, or recklessly engage in three or more acts of sexual penetration or sexual contact with the minor over a period of time while the minor was under the age of fourteen years, thereby committing the offense of Continuous Sexual Assault of a Minor Under the Age of Fourteen Years, in violation of Sections 707-733.5 and 707-733.6, [HRS], as amended.

Count 2 (SA1 – Ages 14-15) charged Kaawa with Sexual Assault in the First Degree, in violation of HRS § 707-730(1)(c) (1993 & Supp. 2009)⁴ for knowingly engaging in sexual penetration with Minor when she was fourteen or fifteen years old:

(. . . continued)

count under this section, unless more than one victim is involved, in which case a separate count may be charged for each victim.

(4) Continuous sexual assault of a minor under the age of fourteen years is a class A felony.

⁴ HRS § 707-730(1)(c) (1993 & Supp. 2009) provides:

§707-730 Sexual assault in the first degree. (1) A person commits the offense of sexual assault in the first degree if:

.

(c) The person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor[.]

On or about the 29th day of November, 2007 and the day of [sic] 29th day of November, 2009, DAVID KAAWA, IV, in [Ka'ū], County and State of [Hawai'i], knowingly engaged in sexual penetration with a person, [Minor], who was at least fourteen years old but less than sixteen years old and DAVID KAAWA, IV was not less than five years older than the minor and not legally married to the minor thereby committing the offense of Sexual Assault in the First Degree, in violation of Section 707-730(1)(c), [HRS], as amended.

During trial, Minor testified to repeated instances of sexual assault. Kaawa denied sexually assaulting Minor. After less than three hours of deliberation, the jury reached its verdict of guilty on both counts. The trial court sentenced Kaawa to a twenty-year term of imprisonment for each count, to be served consecutively.

Trial counsel withdrew and appellate counsel was appointed. On direct appeal, Kaawa challenged the admission of evidence and sufficiency of the evidence. Kaawa did not challenge the assistance of trial counsel or instructions to the jury. This court affirmed the judgment of conviction, and the Hawai'i Supreme Court denied Kaawa's application for writ of certiorari. Kaawa, 2014 WL 715713, at *9; State v. Kaawa, No. SCWC-12-0000670, 2014 WL 3952678, at *1 (Aug. 12, 2014).

In 2015, Kaawa (self-represented) filed the instant Petition. Kaawa raised three grounds for relief:

(1) ineffective assistance by trial counsel for opening the door to damaging testimony, (2) lack of unanimity instruction as to

Count 2 (SA1 – Ages 14-15), and (3) inaccuracies in the presentence investigation report.

In 2019, the Rule 40 Court appointed Kaawa counsel. Kaawa (through counsel) then supplemented his Petition, presenting additional grounds for relief: ineffective assistance by trial counsel for failing to object to Kaawa's consecutive sentence and the lack of an unanimity instruction as to Count 2 (SA1 – Ages 14-15); and ineffective assistance by appellate counsel for failing to appeal for the same reasons.

In June 2024, the Rule 40 Court denied the Petition without a hearing. Kaawa appealed.⁵

We review a trial court's denial of an HRPP Rule 40 petition without a hearing de novo. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

The court must hold a hearing where "a petition alleges facts that if proven would entitle the petitioner to relief," but a hearing need not be held where the claim is patently frivolous and without a trace of support in the record:

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. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without

⁵ Kaawa's appeal was untimely, but he asked this court to accept his appeal "because the failure to timely appeal was solely due to court-appointed counsel's ineffective assistance." We accepted his appeal.

trace of support either in the record or from other evidence submitted by the petitioner.

HRPP Rule 40(f).

"The question on appeal of a denial of a Rule 40 petition without a hearing is whether the trial record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court." Dan, 76 Hawai'i at 427, 879 P.2d at 532 (emphasis omitted) (quoting State v. Allen, 7 Haw. App. 89, 92-93, 744 P.2d 789, 793 (App. 1987)). A colorable claim exists where the petition alleges facts that, if true, "would change the verdict [or outcome], however, a petitioner's conclusions need not be regarded as true." Id. (quoting Allen, 7 Haw. App. at 92, 744 P.2d at 792); Quach v. State, 158 Hawai'i 9, 581 P.3d 1240, No. CAAP-23-0000696, 2025 WL 3689019, at *2 (App. Dec. 19, 2025) (SDO), cert. denied, 2026 WL 930616, at *1 (Apr. 6, 2026).

(1) Kaawa first contends the Rule 40 Court should have held a hearing on his Petition because the trial court "failed to give a specific unanimity instruction" (POE 1) as to Count 2.⁶

⁶ Kaawa also contends the Rule 40 Court should have held a hearing on his Petition because the trial court failed to give a "lesser included jury instruction on Count 2." Kaawa, however, fails to show that there was a rational basis to acquit him of Sexual Assault in the First Degree. See State v. Flores, 131 Hawai'i 43, 51, 314 P.3d 120, 128 (2013) ("[J]ury instructions on lesser-included offenses must be given where there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.").

"The right of an accused to a unanimous verdict in a court of this state is guaranteed by article I, sections 5 and 14 of the Hawai'i Constitution." State v. Valentine, 93 Hawai'i 199, 208, 998 P.2d 479, 488 (2000) (citation modified) (quoting State v. Arceo, 84 Hawai'i 1, 30, 928 P.2d 843, 872 (1996), superseded in part by constitutional amendment, Haw. Const. art. I, § 25 (2006)). As such,

"when separate and distinct culpable acts are subsumed within a single count charging sexual assault—any one of which could support a conviction thereunder—and the defendant is ultimately convicted by a jury of the charged offense, the defendant's constitutional right to a unanimous verdict is violated" unless either the prosecution elects the specific conduct upon which it intends to rely to establish the conduct element of the offense or the trial court gives the jury a specific unanimity instruction.

Id. (emphasis omitted) (quoting Arceo, 84 Hawai'i at 32-33, 928 P.2d at 874-75).

Here, there were multiple bases upon which the jury could find Kaawa guilty of Sexual Assault in the First Degree of Minor as charged in Count 2. The jury instructions, as written and as read, show that a unanimity instruction was not given as to Count 2.⁷ And the State does not point to where in the record

⁷ We note that the trial court gave an unanimity instruction specific to Count 1 (Continuous SA - Under 14):

In order for the prosecution to prove the element of the offense of Continuing Sexual Assault of a Minor Under the Age of 14 Years in Count 1, that the defendant engaged in three or more acts of sexual penetration or sexual contact with another person, [Minor], all twelve jurors must unanimously agree that the same acts have been proven beyond a reasonable doubt.

(continued . . .)

it elected the specific conduct on which it relied. See Int'l Bhd. of Elec. Workers, Loc. 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 332, 713 P.2d 943, 956 (1986) ("[A]n appellate court is not required to sift through a voluminous record for documentation of a party's contentions.").

In other words, Kaawa's factual allegation that a unanimity instruction was not given, if proven, would show his constitutional right to a unanimous verdict was violated. See Valentine, 93 Hawai'i at 208, 998 P.2d at 488. And because the record appears to support Kaawa's claim that his right to unanimous verdict as to Count 2 was violated, we cannot say his claim is patently frivolous. See Dan, 76 Hawai'i at 427, 879 P.2d at 532; HRPP Rule 40(f). Thus, the Rule 40 Court erred by denying the Petition without a hearing.

(2) Next, Kaawa contends the Rule 40 Court should have held a hearing because he presented colorable claims that his trial counsel and appellate counsel were ineffective.⁸

(. . . continued)

This instruction reflected the caselaw that applied at the time of the offense alleged in Count I, although it did not reflect the law at the time the instruction was given in 2012. See State v. Rabago, 103 Hawai'i 236, 254, 81 P.3d 1151, 1169 (2003), abrogated by Haw. Const. art. I, § 25 (2006).

⁸ We note that Kaawa neglected to serve his opening brief on counsel who were allegedly ineffective, in contravention of Hawai'i Rules of Appellate Procedure Rule 28(a) ("If a brief raises ineffective assistance of counsel as a point of error, the appellant shall serve a copy of the brief on the attorney alleged to have been ineffective.").

(a) Trial counsel (POE 2 and 4). Rule 40 proceedings are not available where an issue raised was previously ruled on or has been waived, and an issue is waived where it could have been previously raised but was not:

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.

HRPP Rule 40(a)(3) (emphases added).

Kaawa could have, but did not, raise as an issue on direct appeal whether trial counsel was ineffective. See Kaawa, 2014 WL 715713, at *1. Kaawa appears to assert that he did not raise the issue of ineffective assistance of trial counsel because his appellate counsel was also ineffective. Thus, we turn to whether Kaawa raised a colorable claim that appellate counsel was ineffective.

(b) Appellate counsel (POE 3 and 5). Kaawa contends appellate counsel failed to raise the trial court's omission of a "specific unanimity instruction and lesser included jury instruction on Count 2" and failed to challenge his consecutive sentence as illegal.

Ineffective assistance of counsel claims are colorable where an attorney's performance falls below the level of competence demanded of counsel for criminal defense counsel. Briones v. State, 74 Haw. 442, 467, 848 P.2d 966, 978 (1993). "To determine whether defense counsel rendered ineffective assistance on appeal, a petitioner must show that counsel did not raise an 'appealable issue,' which is an error or omission by counsel that results in the withdrawal or substantial impairment of a potentially meritorious defense." Batalona v. State, 142 Hawai'i 84, 98, 414 P.3d 136, 150 (2018) (citing Briones, 74 Haw. at 465-66, 848 P.2d at 977).

Kaawa first points to the omission of a unanimity instruction as to Count 2, and appellate counsel's failure to raise this as an issue on appeal. As discussed above, the Rule 40 Court erred by denying the Petition without a hearing because Kaawa raised a colorable claim as to the omission of a unanimity instruction for Count 2. For the same reason, the Rule 40 Court also erred by denying the Petition without a hearing based on Kaawa's claim that appellate counsel was ineffective for failing to raise the omission of a unanimity instruction for Count 2. See State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001) ("Whether we review the jury instructions in this case for plain error by the trial court or as an ineffective assistance of counsel claim, the ultimate

question is whether the erroneous instructions prejudiced Defendant's rights.").

Kaawa next points to his consecutive sentence, arguing that appellate counsel was ineffective for failing to raise this issue on appeal.

Two years before Kaawa was sentenced in 2012, the Hawai'i Supreme Court explained in State v. Hussein that, although we presume "a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment under HRS § 706-606" (1993), the sentencing court nevertheless "must state on the record at the time of sentencing the reasons for imposing a consecutive sentence." 122 Hawai'i 495, 503, 510, 229 P.3d 313, 321, 328 (2010) (emphasis added).

"[R]easons identify the facts or circumstances within the range of statutory factors that a court considers important in determining that a consecutive sentence is appropriate," and in so doing, "provide[] a meaningful rationale to the defendant, the victim, and the public." Id. at 509, 229 P.3d at 327. Accordingly, upon its entry, Hussein required circuit courts to provide "[a]n express statement, which evinces not merely consideration of the factors, but recites the specific circumstances that led the court to impose sentences consecutively in a particular case." Id.

Here, the trial court identified the portion of the Presentence Investigation Report that considered the HRS § 706-606 factors, read the statutory factors aloud, and summarily stated that "[t]he Court has considered those factors":

THE COURT: Okay. The Court will receive the pre-sentence report, which will be kept under seal.

The jury having found you guilty of Continuous Sexual Assault of a Minor Under the Age of 14 and Sexual Assault in the First Degree, the Court having accepted the jury's verdict and adjudged you guilty of said offenses, the only issue before the Court is whether the defendant shall be sentenced to a consecutive term of imprisonment or a concurrent term of imprisonment. The statute mandates this Court without any discretion to sentence the defendant to 20 years for each of those counts.

Under 706-668.5, the Court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in 706-606.

706-606, which has been considered by the probation officer on page 17, states: "The nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

The Court shall consider all of the other kinds of sentences available and the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.

The Court has considered those factors. The Court, having sat as the trial judge in this trial, finds that the factors leading to consecutive sentence has been satisfied.

Counter to Hussein's mandate, the circuit court did not provide an express statement that recited the specific facts and circumstances underlying its decision to run Kaawa's two

twenty-years terms of imprisonment consecutively. See id. at 509, 229 P.3d at 327.

Kaawa's factual allegations that appellate counsel failed to raise appealable issues, if proven, would establish that appellate counsel provided ineffective assistance. See Batalona, 142 Hawai'i at 98, 414 P.3d at 150. And because the record appears to support Kaawa's claim of ineffective assistance of appellate counsel, we cannot say his claim is patently frivolous. See Dan, 76 Hawai'i at 427, 879 P.2d at 532; HRPP Rule 40(f). Thus, the Rule 40 Court erred by denying the Petition without a hearing.

Based on the foregoing, we vacate the Rule 40 Court's June 26, 2024 Order Denying HRPP Rule 40 Petition and remand this case for proceedings consistent with this summary disposition order.

It is further ordered that by August 31, 2026, Kaawa shall:

1. serve trial counsel Alfred P. **Lerma**, Jr. and appellate counsel Richard D. **Gronna** with a copy of Kaawa's opening brief; and
2. file in this case a declaration of service or written explanation as to why it is not possible or appropriate to do so.

The appellate clerk shall serve a copy of this summary disposition order on Lerma and Gronna at their addresses on file with the Hawai'i State Bar Association.

DATED: Honolulu, Hawai'i, August 27, 2026.

On the briefs:

/s/ Karen T. Nakasone
Chief Judge

R. Hermann Heimgartner,
for Petitioner-Appellant.

/s/ Katherine G. Leonard
Associate Judge

Charles E. Murray III,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Respondent-Appellee.

/s/ Sonja M.P. McCullen
Associate Judge