

NO. 22468

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

HANS P. DUBACH, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT COURT
(CASE NO. CTP1: 3/5/99)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama
Ramil, and Acoba, JJ.)

The defendant-appellant Hans P. Dubach appeals the judgment of the district court of the second circuit convicting him of and sentencing him for the offense of assault in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 707-712(1)(a) (1993). On appeal, Dubach contends that the district court erred in: (1) accepting his no contest plea without first (a) advising him of his right to a jury trial and obtaining a waiver thereof and (b) advising him of the maximum sentence he faced if convicted of third degree assault; and (2) arbitrarily and capriciously sentencing him to fifteen days' incarceration.

Upon carefully reviewing 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, we hold as follows:

First, the district court did not err in accepting Dubach's no contest plea at a proceeding, which was scheduled as a preliminary hearing, without first informing Dubach of his

right to trial by jury and obtaining a waiver of that right. Neither Hawai'i Rules of Penal Procedure (HRPP) Rule 5(c) (2000), setting forth the procedure for a preliminary hearing, nor HRPP Rule 11 (1996) require that a defendant be informed of his or her right to a jury trial before the court accepts the defendant's no contest plea. Moreover, until he pled no contest to the offense of third degree assault, Dubach was charged with committing, inter alia, a felony offense, i.e., burglary in the first degree, in violation of HRS § 708-810(1)(c) (1993). Accordingly, HRPP Rule 5(b) (2000), which sets forth the procedures applicable to a defendant charged only with offenses other than a felony and requires that the defendant be informed of his or her right to trial by jury when arraigned, did not apply to the proceeding.

Second, Dubach claims that his plea was invalid because the district court did not inform him of the maximum penalty he faced. Although the record clearly reflects that the district court asked Dubach whether he knew and understood the maximum penalty for the offense to which he was pleading no contest, the district court did not inform Dubach specifically of the maximum applicable penalty. See HRPP Rule 11(c)(2) (1996) ("The court shall not accept a plea of . . . *nolo contendere* without first addressing the defendant personally in open court and determining that he [or she] understands . . . the maximum penalty provided by law."). However, even if the district court's colloquy with Dubach was technically deficient, any erroneous failure to inform Dubach with specificity of the maximum sentence he faced upon conviction of third degree assault was harmless beyond a reasonable doubt because the district court did not in fact impose the maximum sentence. See State v. Cornelio, 68 Haw. 644, 647, 727 P.2d 1125, 1127 (1986) (reviewing a denial of a motion

to withdraw a no contest plea and holding that, where trial court mistakenly informed defendant that maximum penalty was ten years' incarceration when the applicable maximum penalty was twenty years' incarceration, the failure to adhere to HRPP Rule 11(c)(2) was harmless error "because the court sentenced [the defendant] to a lesser term of imprisonment than was possible").

Finally, inasmuch as the sentence imposed by the district court was within the range of sentences authorized by the applicable statutes, and the record fails to reflect that the district court exceeded the bounds of reason or disregarded applicable rules or principles of law or practice to Dubach's substantial detriment, cf. State v. Gaylord, 78 Hawai'i 127, 144, 890 P.2d 1167, 1184 (1995) (citations omitted), we decline to disturb the district court's sentence in the present matter. Therefore,

IT IS HEREBY ORDERED that the judgment of conviction and sentence from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, December 20, 2000.

On the briefs:

Richard Icenogle, for the
defendant-appellant,
Hans P. Dubach

Mark K. Miyahira (Deputy
Prosecuting Attorney), for
the plaintiff-appellee,
State of Hawai'i