NO. 23061

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee,

vs.

DONALD HENRY, Defendant-Appellant.
(No. 23061 (Cr. No. 98-1018))

STATE OF HAWAI‘I, Plaintiff-Appellee/Cross-Appellant,

vs.

DONALD HENRY, Defendant-Appellant/Cross-Appellee.
(No. 23062 (Cr. No. 98-2576))

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NOS. 98-1018 AND 98-2576)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, JJ.,
and Circuit Judge Amano, assigned by reason of vacancy,
and Acoba, J., concurring separately.)

The defendant-appellant/cross-appellee Donald Henry appeals, in Cr. No. 98-2576, from the amended judgment/guilty conviction and sentence of the first circuit court, the Honorable Reynaldo D. Graulty presiding, filed on January 5, 2000 and convicting Henry of and sentencing him for the offenses of promoting a dangerous drug in the third degree, in violation of HRS § 712-1243 (1993), unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993), and theft in the third degree, in violation of HRS § 708-832(1)(a) (1993). Henry argues that the circuit court abused its discretion in denying his

motion to withdraw his no contest pleas on the basis that he presented the circuit court with two "fair and just" reasons for permitting him to withdraw the pleas.[1]

The plaintiff-appellee/cross-appellant State of Hawai'i (the prosecution) cross-appeals from the circuit court's order granting Henry's motion for release pending appeal, filed on January 21, 2000, on the basis that Henry failed to present the circuit court with a "substantial question of law or fact" that he planned to raise on appeal.

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 affirm the circuit court's amended judgment and vacate its order granting bail pending appeal.

First, assuming arguendo that Henry's failure to argue in the circuit court that his pleas were coerced when he first sought to withdraw them does not preclude him from advancing the argument on appeal, we agree with the prosecution that the circuit court's extensive and detailed colloquy at the time of Henry's change of pleas demonstrates that the no contest pleas were knowing, voluntary, and intelligent. Henry represented to the circuit court (1) that his mind was clear and that he was not under the influence of any drugs or alcohol, (2) that he understood the charges against him, (3) that he understood the rights that he was waiving by entering no contest pleas,

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[1] Correlatively, in Cr. No. 98-1018, Henry appeals from the circuit court's revocation of his probation due to his convictions in Cr. No. 98-2576, although he advances no arguments in this regard on appeal. (His appeals in the two matters were consolidated as S.Ct. No. 23061 pursuant to this court's order, filed on February 18, 2001.) Assuming arguendo that Henry has not waived his right to challenge the circuit court's order of resentencing in Cr. No. 98-1018, we affirm the foregoing order based on the convictions affirmed herein.

including the rights associated with a trial by jury, (4) that he understood the maximum sentence that he faced, and (5) that he was pleading no contest of his own free will; notably, Henry avowed that no one, including his defense counsel, was "forcing" or "threatening" him to plead no contest to the charges. Cf. State v. Merino, 81 Hawai‘i 198, 225-26, 915 P.2d 672, 699-700 (1996) (characterizing the foregoing factors as indicative of a knowing, voluntary, and intelligent plea).

Furthermore, although Henry's memorandum in support of his motion to withdraw his no contest pleas contained a vague allegation that defense counsel "may have coerced" him into pleading no contest, in light of Henry's representations to the circuit court noted supra, as well as the fact that Henry never alluded to any coercion in any of his colloquies with the circuit court, the allegation lacks any support in the record.

Second, although we agree with Henry that the circuit court misconstrued the law regarding de minimis violations, pursuant to HRS § 702-236, in relation to HRS § 712-1243, see State v. Vance, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979) ("the possession of a microscopic amount [of a narcotic] in combination with other factors indicating an inability to use or sell the narcotic, may constitute a de minimis infraction within the meaning of HRS § 702-236 and, therefore, warrant dismissal of the charge otherwise sustainable under HRS § 712-1243"), the error was harmless, inasmuch as the expert testimony of George W. Read, Ph.D., in the other cases offered by defense counsel at the hearing on the motion did not constitute "new information" or "changed circumstances." Put simply, the record is devoid of any evidence that, "at the time the [no contest] plea was entered, [Dr. Read] was unwilling or unavailable to testify and that this

was a consideration in [Henry's] decision to enter" a no contest plea. State v. Jim, 58 Haw. 574, 579, 574 P.2d 521, 524 (1978). Indeed, the record suggests that Henry's failure to bring a motion to dismiss on de minimis grounds prior to entering his no contest plea as to Count I was the product of defense counsel's failure to invoke this court's relevant case law regarding de minimis drug possession offenses -- i.e., Vance -- and to consult an expert witness regarding whether the amount of cocaine residue in the present case met the standard suggested in Vance. Cf. Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 259-60, 948 P.2d 1055, 1100-01 (1997) (noting that a defendant seeking a new trial based on new evidence must demonstrate, inter alia, that the evidence was "'previously undiscovered even though due diligence was exercised'") (quoting Orso v. City and County of Honolulu, 56 Haw. 241, 250, 534 P.2d 489, 495 (1975)); Matsumoto v. Asamura, 5 Haw. App. 628, 631, 706 P.2d 1311, 1313 (1985) (noting that Orso requires that due diligence was exercised in discovering the "new evidence" alleged in a motion based on newly discovered evidence made pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 59 or Rule 60(b)(2)).

Third, the circuit court did not abuse its discretion in permitting defense counsel, Jerry I. Wilson, to argue Henry's motion for withdrawal of his no contest pleas during the pendency of the motion to withdraw as counsel. It is well established that the trial court has inherent power to govern proceedings before it. See State v. Maddagan, 95 Hawai'i 177, 181, 19 P.3d 1289, 1293 (2001) ("the trial court has inherent power to govern proceedings before it"); Compass Dev., Inc. v. Blevins, 10 Haw. App. 388, 402, 876 P.2d 1335, 1341 (1994) (noting "'[t]he power of the [trial] court to prevent undue delays and to achieve the

orderly disposition of cases'"). It was within the circuit court's discretion to decide which motion to address first in order to prevent undue delays and to achieve the orderly disposition of cases. Although Henry contends on appeal that defense counsel should not have argued the motion to withdraw Henry's no contest pleas due to a conflict of interest, Hawai‘i Rules of Professional Conduct (HRPC) Rule 1.7(b) permits a lawyer to represent a client, even assuming arguendo that such a conflict of interest exists, if: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. HRPC Rule 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. . . . "). The record reflects that the circuit court afforded Henry an opportunity to consult with defense counsel regarding the motion and, after consultation, that Henry wanted Wilson to argue the motion to withdraw his no contest pleas. Thus, it was reasonable for Wilson to believe that he could adequately represent Henry on the motion and further, that Henry agreed to the representation. The rules of professional conduct did not preclude the trial court from exercising its discretion to have the motion to withdraw Henry's no contest pleas heard before the motion to withdraw as counsel.

Finally, we agree with the prosecution that the circuit court abused its discretion in granting Henry's motion for release and bail pending appeal, because Henry failed to identify to the circuit court (1) a "substantial question of law or fact," i.e., "one which is either novel, which has not been decided by

controlling precedent, or which is fairly doubtful," (2) that he planned to raise on appeal, and (3) that was "sufficiently important to the merits that a contrary appellate ruling" was "likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." State v. Cullen, 86 Hawai'i 1, 14-15, 946 P.2d 955, 968-69 (1997) (quoting United States v. Miller, 753 F.2d 19, 23-24 (3d Cir. 1985)) (emphasis in original). Indeed, Henry's decision not to advance the "change-of-mind" argument, which he presented to the circuit court, on appeal belies his contention that the point was fairly debatable. We note that Henry did not represent to the circuit court that he planned to argue on appeal that his pleas were not knowing, voluntary, and intelligent or that the circuit court had misconstrued his de minimis arguments. But even if he had, he would nevertheless have failed to satisfy the substantiality test, because Henry's plea was clearly knowing, voluntary, and intelligent and his de minimis argument only had the potential of vacating his conviction of and sentence for Count I (promoting a dangerous drug in the third degree). Therefore,

IT IS HEREBY ORDERED (1) that the circuit court's amended judgment/guilty conviction and sentence from which the appeal is taken is affirmed, without prejudice to Henry filing a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition in the circuit court challenging his conviction as to Count I on the basis that he was denied effective assistance of counsel due to defense counsel's failure adequately to investigate the legal and factual basis for a motion to dismiss on de minimis grounds, pursuant to HRS § 702-236, prior to counseling Henry regarding his no contest plea, (2) that the circuit court's order granting bail pending appeal is vacated, and (3) that the matter is

remanded to the circuit court for further proceedings consistent with this summary disposition order.

DATED: Honolulu, Hawai‘i,

On the briefs:

Glenn D. Choy, for
the defendant-appellant/
cross-appellee
Donald Henry

Mangmang Qiu Brown, Deputy
Prosecuting Attorney, for
the plaintiff-appellee/
cross-appellant
State of Hawai‘i

I concur in the result.