NO. 22728

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CHARLES E. MENDES, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 97-0298)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Charles E. Mendes (Mendes) appeals the circuit court's July 29, 1999 Order Summarily Denying Defendant's Motion to Correct or Reduce Sentence Filed on July 6, 1999, Without a Hearing (July 29, 1999 Order). We affirm.

BACKGROUND

The guilty plea filed by Mendes on August 14, 1997, states, in relevant part, as follows: "On September 30, 1995, I intentionally entered a building with intent to commit theft, and while committing theft, I was armed with a knife and threatened force against another person."

For its part of the plea bargain, Plaintiff-Appellee State of Hawaiʻi (State) agreed not to seek an extended, consecutive, or mandatory minimum sentence.

The October 23, 1997 Judgment sentenced Mendes to concurrent prison terms as follows:

Count 1: Robbery in the First Degree
(imprisonment for twenty years)

Count 2: Burglary in the Second Degree
(imprisonment for five years)

On July 6, 1999, Mendes, acting *pro se*, filed a Motion to Correct or Reduce Sentence (July 6, 1999 Motion). This motion stated that it was based on Hawai‘i Rules of Penal Procedure (HRPP) Rule 35 which pertains to "CORRECTION OR REDUCTION OF SENTENCE." The sole ground asserted in support of the July 6, 1999 Motion was as follows:

> The plain language of [Hawai‘i Revised Statutes (HRS) § 701-109(1)(b)] **PROHIBITS CONVICTING A PERSON OF TWO OFFENSES,or [sic] more**, when one offense consists **"only"** of a conspiracy to commit the other. State v. Hackett, 7 Haw. App. 626, 783 P.2d 1232, cert. denied, 71 Haw. 668, 833 P.2d 901 (1989).
>
> In order to remedy the HRS § 701-109 violation, the conviction and sentence for one of the two offenses **must be reversed**. When a defendant is convicted of an offense and a **"lesser"** included offense.[sic] Court [sic] will reverse conviction, and **convict defendant of the lower of the two convictions**.
>
> This solution is fair to the defendant because it remedies the § 701-109 violation, and it is fair to the Prosecution and the Public, because it sustains the conviction of which the defendant was convicted.
>
> [Mendes] is seeking in this instant case, that the conviction in Count One (1) Robbery in the First Degree be vacated, and defendant be convicted of Burglary in the Second Degree, in Count Two (2) to Five years of imprisonment, and the minimum term be reset by the Hawaii Paroling Authority, and its maximum time of imprisonment to be completed May 14, 2002.

(Emphases in original.)

On July 29, 1999, the circuit court entered its July 29, 1999 Order denying the July 6, 1999 Motion on the basis that "this court finds that [Mendes] is represented by counsel,

. . . , and pursuant to State v. Hirano, 8 Haw. App. 330, 802 P.2d 482 (1990), [Mendes] has no right to hybrid representation."

On August 9, 1999, at 4:13 p.m., Mendes filed a notice of waiver of his right to be represented by the Office of the Public Defender and of his intent to proceed *pro se* "from this day forward."

On August 9, 1999, at 4:13 p.m., Mendes filed a notice of appeal of the July 29, 1999 Order.

In his opening brief, Mendes states, in relevant part, as follows:

> [S]ince one charge was conducted in the same episode, with **one intent in mind**, and **All** of the charges brought against Mendes are of the **same offense**, therefore, **only one offense has been committed, if any**. Therefore, Count (1) **must** be reversed and remanded for the following reason.
>
> Mendes burglarized the premises, and in the process of that burglary, he made some noise that was noticed by two men passing by. These two person's [sic] waited for Mendes to exit the facility, upon which time Mendes was held by these individuals until the police arrived and placed Mendes into custody.
>
> Mendes being only five feet and one inch (5'") in hight [sic] and only weighing about 100 pounds, had been held by two persons approximately 6feet [sic] tall, and weighing considerable more than he, and having his hands full of the merchandise taken from the premises, it would be ironic for Mendes to rob these two persons, or even make an attempt there of.[sic] The charge in Count (1), Robbery in the First Degree, is plainly a charge of **surplusage**, and must be stricken from the record. It seems that if any mention of an attempted robbery should enter the scene, it would be the other two persons that might be interested in performing that deed. Furthermore, Mendes pled guilty to the charge of burglarizing said premises, and the charges of robbery were entered later.
>
> . . . Furthermore, if Mendes pled guilty to the robbery, he should have received a reduction in the sentence imposed, which he did not, as he has been given the full twenty (20) years of imprisonment for that crime. Here again, the prosecution acted with overzealous motive to convict Mendes of a crime that he did not commit.
>
> . . . .

> . . . [I]n the instant case, information had been withheld from the court, and defendant had been convicted of additional charges.
>
> In order to remedy the HRS § 701-109 violation, the conviction and sentence for the greater offenses **must be reversed**, ...
>
> . . . Double Jeopardy Clause protects against multiple prosecutions and punishments for the same offense.

(Emphases in original.)

DISCUSSION

A.

Mendes expressly based his July 6, 1999 Motion on HRPP "Rule 35, CORRECTION OR REDUCTION OF SENTENCE." However, HRPP Rule 35 is not relevant with respect to most of the points on appeal absent favorable action under HRPP "Rule 32. SENTENCE AND JUDGMENT" and HRPP "Rule 40. POST-CONVICTION PROCEEDING." Thus, in this appeal, we consider the July 6, 1999 Motion as having been based on HRPP Rules 32, 35, and 40.

B.

The July 6, 1999 Motion was summarily denied on the basis that Mendes "has no right to hybrid representation." That being the basis, the court should have dismissed the July 6, 1999 Motion rather than denying it.

C.

Although the circuit court did not decide the merits of the July 6, 1999 Motion, this appeal by Mendes seeks our review of those merits.

In light of (1) the August 9, 1999 notice filed by

Mendes waiving his right to be represented by the Office of the Public Defender and of his intent to proceed *pro se* and (2) the fact that the July 6, 1999 Motion presents only questions of law, we will decide the merits of the July 6, 1999 Motion.

D.

Hawai‘i Revised Statutes (HRS) § 701-109 (1993) states, in relevant part, as follows:

> **Method of prosecution when conduct establishes an element of more than one offense.** (1) When the same conduct of a defendant may establish an element of more than one offense, the defendant may be prosecuted for each offense of which such conduct is an element. The defendant may not, however, be convicted of more than one offense if:
>
> (a) One offense is included in the other, as defined in subsection (4) of this section; or
>
> (b) One offense consists only of a conspiracy or solicitation to commit the other; or
>
> . . . .
>
> (4) A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> . . . .
>
> (c) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

Mendes appears to argue that the robbery offense was included in the burglary offense and/or that the robbery offense consisted only of a conspiracy or solicitation to commit the burglary offense. We conclude that this argument lacks any factual support in the record.

E.

Mendes appears to allege that he did not commit the robbery. Unless and until his plea of guilty is set aside, however, this argument is not relevant.

HRPP Rule 32(d) limits the situations in which a judgment of conviction may be set aside. It states that "to correct manifest injustice the court after sentence shall set aside the judgment of conviction and permit the defendant to withdraw his plea." Mendes has not alleged or shown any facts rising to the level of a "manifest injustice."

F.

Mendes argues that if he "pled guilty to the robbery, he should have received a reduction in the sentence imposed[.]" However, Mendes cites no authority in support of this argument and we know of none.

G.

Mendes alleges that he "pled guilty to the charge of burglarizing said premises, and the charges [sic] of robbery were [sic] entered later." He further alleges that "information had been withheld from the court, and [he] had been convicted of additional charges." However, these allegations have no

support in the record and are contradicted by both the August 14, 1997 plea of guilty and the October 23, 1997 Judgment.

CONCLUSION

Accordingly, we affirm the circuit court's July 29, 1999 Order Summarily Denying Defendant's Motion to Correct or Reduce Sentence Filed on July 6, 1999, Without a Hearing.

DATED: Honolulu, Hawai‘i, January 11, 2001.

On the briefs:

Charles E. Mendes,
Defendant-Appellant, *pro se*.

Chief Judge

James M. Anderson,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Associate Judge

Associate Judge