

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellant, v.
HARRY PAUL SOMBELON, III, Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT,
WAILUKU DIVISION
(CASE NO.: CB1: 8/15/00)

MEMORANDUM OPINION

(By: Burns, C.J., Lim, and Foley, JJ.)

The State of Hawai'i (State) appeals the August 15, 2000 judgment of the district court of the second circuit, the Honorable Ruby A. Hamili, judge presiding, that dismissed with prejudice the criminal case against Defendant-Appellee Harry Paul Sombelon, III (Sombelon).

Sombelon was charged with theft in the fourth degree, in violation of Hawaii Revised Statutes (HRS) § 708-833(1) (1993).¹ At his arraignment, Sombelon pleaded *nolo contendere*

^{1/} Hawaii Revised Statutes (HRS) § 708-833(1) (1993) provides:

Theft in the fourth degree. (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of \$100.

(2) Theft in the fourth degree is a petty misdemeanor.

(continued...)

to the charge, which plea the court immediately accepted. However, after the court heard a proffered version of the case, and questioned Sombelon on the circumstances, the court *sua sponte* withdrew Sombelon's plea and dismissed the case with prejudice.

The State contends on appeal that the court abused its discretion in dismissing the case against Sombelon. We agree. Accordingly, we vacate the judgment of dismissal and remand for entry of a plea of not guilty and further proceedings consistent with this opinion.

I. BACKGROUND.

Sombelon came before the court for arraignment on August 15, 2000. The following transpired:

[DEFENSE COUNSEL]: Good morning, Your Honor, Public Defender . . . on behalf of [Sombelon], who is present in court.

THE COURT: Good morning. Thank you for seeing [Sombelon].²

[DEFENSE COUNSEL]: [Sombelon] would take responsibility for his actions on that date and plead no contest to the Theft in the Fourth Degree, Your Honor. I'll be moving to defer the acceptance of no contest. This is [Sombelon's] first time in court.

¹(...continued)

HRS § 708-830(1) (1993) provides that "[a] person commits theft if the person . . . obtains, or exerts control over, the property of another with intent to deprive the other of the property."

² In an earlier proceeding that day, Sombelon appeared *pro se*. He was served with a copy of the complaint and said that he understood the charge. The court explained to him that he was charged with a crime, a petty misdemeanor carrying a thirty-day jail term and a \$1000 fine. The court then referred him to the public defender for representation.

[PROSECUTOR]: Actually, that is not quite true. This is [Sombelon's] first conviction for Theft in the Fourth Degree, Your Honor. He has been in court before on a disorderly conduct and (indiscernible) involving minors. He was convicted of disorderly conduct 12-9-98 (phonetic).

[DEFENSE COUNSEL]: This is the first time for a theft, Your Honor.

[PROSECUTOR]: Yes, that is correct.

[DEFENSE COUNSEL]: [Sombelon] had informed me.

THE COURT: Good morning, [Sombelon]. You are here for the Theft in the Fourth Degree charge. Do you know what the maximum penalties are?

[SOMBELON]: Yes. Yes, ma'am.

THE COURT: And your counsel indicates you're entering a plea of no contest. Is that correct?

[SOMBELON]: Yes, ma'am.

THE COURT: Anybody putting any pressure on you?

[SOMBELON]: No, ma'am.

. . . .

THE COURT: At this time, this Court will accept this plea of no contest, but your counsel indicates that she'll be moving to defer this plea, okay.

Any questions on that?

[SOMBELON]: No, ma'am.

THE COURT: The Court will accept the plea of no contest.

Where did this happen?

[PROSECUTOR]: Your Honor, this actually occurred at the police station, he made a written statement in which he relates, I'm writing a statement of what happened (inaudible). I found a purse at the Old Navy Store, decided to take the purse to safer hands (phonetic). On the way to the police station, I took \$100. I regret doing what I did and now I can see (inaudible) will hurt me more -- hurt more than me, but the owner, as well. I'll never touch anything that doesn't belong to me again.

What happened was, he was at the police station and just outside was observed by the dispatcher who

was outside on a break, to open the wallet, take \$100 out and then go into the police station. He then turned in the purse as part of the lost and found, but the dispatcher had seen him, remove the \$100 prior to returning the item.

[DEFENSE COUNSEL]: Correct, Your Honor. We stipulate to the fact, [Sombelon] did explain to me what happened. He was in the process of returning a purse that he found to the police department, but unfortunately, he made a mistake and took out the money that was in the purse, Your Honor.

He's very nervous today and he realized what he did was wrong and he wishes to take responsibility for this.

THE COURT: [Sombelon], is there anything you'd like to say?

[SOMBELON]: No, ma'am.

THE COURT: What happened here? Why did that happen? Where did you find this purse?

[SOMBELON]: I found it outside of the store, Old Navy.

THE COURT: Old Navy. And then, you took it all the way to the police station?

[SOMBELON]: Yes, ma'am.

[PROSECUTOR]: Your Honor, (inaudible) lady that she had put it down while shopping and then when she turned back she couldn't find it. So she reported it stolen.

THE COURT: You said you found it outside of Old Navy?

[SOMBELON]: Yes, ma'am.

THE COURT: Where was it, where outside?

[SOMBELON]: Right near the -- next to the door. It was right before exiting the door, it was like right on the -- it was still inside of the store, but it was like outside of the laundry. It was like on the counter, basically, mostly outside of the store.

THE COURT: So you found the purse there?

[SOMBELON]: Yes, ma'am.

THE COURT: How come you didn't take it to [the] people in the store if it was still in the store?

[SOMBELON]: No reason, ma'am, just decided to take it to the police station.

[PROSECUTOR]: Your Honor, the police report said [Sombelon] handed the officer at the time at the police station, the purse, that he found it within the Old Navy clothing store. There's also a substation right there in the structure, the mall, police station.

THE COURT: So what was going through your mind, [Sombelon]? You picked up a purse in the store, you decided -- what was going on there? Were you thinking, oh, you found the purse, perhaps there is some money in it, what should I do with it, nobody will notice it's missing? What did you think?

[SOMBELON]: It was very tempting, ma'am, but I had gone to the police station.

THE COURT: You were tempted?

[SOMBELON]: And then on the way I was deciding to return the purse (inaudible).

THE COURT: What caused you to finally decide that it wasn't yours for the taking?

[SOMBELON]: When I entered the police station and I realized, I did this in front of a police station, it wasn't a brilliant idea at all. I knew I was in trouble, so might as well return the purse.

[PROSECUTOR]: Your Honor, from what he is telling this Court, he took that purse from within the Old Navy, left without the intention of returning, later decided he was going to return it. Then going to the police station (inaudible).

THE COURT: What this Court is concerned with is [Sombelon], you're here, you're nervous, you've entered your plea of no contest, you're asking that this Court consider that this theft be removed from your record if you comply. What this court is concerned with is, what was going on there, is this something that you're going to try again in the future?

You're going to -- the purse was actually in a place where you could have returned it ASAP, and then the owner wouldn't have been as worried or had to report it.

How long did it take you to get from Old Navy to the police station? Did you go straight there, were you --

[SOMBELON]: Approximately 45 minutes.

THE COURT: 45 minutes it took you.

[DEFENSE COUNSEL]: Your Honor, she said that she lost the purse at 1430 hours and it was turned in at the police station at 1528. So about an hour later.

THE COURT: So, [Sombelon], how would you convince this Court that this is not going to happen again? What would you be able to say? The circumstances seem so -- the intent there, to deceive.

[DEFENSE COUNSEL]: Your Honor, I also have further reading on this report, (inaudible) information that the woman whose purse it was returned to the store, because she couldn't find it in the store, went to see if she left it in her car, came back to the store and someone within the store told her that a male said he found her purse and took it to the police station to be turned in as found property.

THE COURT: Ah, saving grace, [Sombelon]. You reported it. You didn't tell this Court that. You're nervous.

This court was under the impression, you found it, you thought, okay, I'm just going to hold onto this thing and think about what to do with it, but it appears that when you found it, you reported it. That's good, [Sombelon], because now the owner knows where to go. That's good.

[DEFENSE COUNSEL]: So there is no intention to (inaudible) the owner of her purse, but he did admit to the mistake of opening it. He was acting responsibly by returning it to the police department.

THE COURT: So now, the other part was what you said, taking the \$100?

[DEFENSE COUNSEL]: He's informed me that he returned the \$100 that day, Your Honor.

THE COURT: How long did it take you until you decided that you were going to return it?

[DEFENSE COUNSEL]: Your Honor, the police (inaudible) that time, that time he was confronted by the police officer, he returned the money.

[SOMBELON]: The police officer asked me, did you take anything from this purse. I said, yes, sir. I returned the \$100 back to the police officer there.

THE COURT: How old are you, [Sombelon]?

[SOMBELON]: 21, ma'am.

[DEFENSE COUNSEL]: I did inform [Sombelon] of his rights, pre-sentence investigation report, our recommendation to waive that right and he understands that it will be entered (inaudible) recommendation to Your Honor and if he waives that right he can have this case read before you today.

THE COURT: [Sombelon], you're 21 years old, you use it for this deferred, you can't ever use this deferral again, if this should happen. Do you think it's going to happen again?

[SOMBELON]: No, ma'am.

THE COURT: What do you plan to do with yourself now? What are you going to do? You're going to school, are you going to go to work? You're going to stay out of this courtroom?

[SOMBELON]: That is my main goal, ma'am.

THE COURT: Main goal.

[SOMBELON]: Stay out of this courtroom.

[DEFENSE COUNSEL]: He informed me that he has [two] jobs that he just got laid off from Domino's, and where?

[SOMBELON]: Employer's Options (phonetic).

[DEFENSE COUNSEL]: Employer's Options. He's only working that one job currently now, but he was employed at Domino's and Employer's, but he just got laid off from Domino's.

Right?

[SOMBELON]: Yeah. I quit Domino's, ma'am. There was a run down on my vehicle, it was the first vehicle I ever had, wear and tear my first and only vehicle.

THE COURT: So [Sombelon], after hearing everything presented and I'm getting a better perspective of what happened here. The no contest plea that you entered is withdrawn. The matter is dismissed with prejudice.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[SOMBELON]: Thank you, ma'am.

THE COURT: [Sombelon], what you did was a good deed, but where you fell through is removing those items. Okay?

[SOMBELON]: Understood, ma'am.

[PROSECUTOR]: Your Honor, the State would object to the Court dismissing this matter (inaudible) no contest plea (inaudible).

THE COURT: The objection will be noted.

The bail that has been posted will be applied. It appears that this is more of a nightmare that [Sombelon] had ever thought the consequences would lead to.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE CLERK: The bail is returned.

(Footnote supplied.) Judgment of dismissal was entered on the court's calendar the same day. On August 21, 2000, the State filed this appeal.

II. ISSUE PRESENTED.

The State contends on appeal that the court abused its discretion in dismissing the charge with prejudice.

III. STANDARD OF REVIEW.

A trial court's dismissal of a criminal case with prejudice under the inherent powers of the courts is reviewed for an abuse of discretion. State v. Moriwake, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982). An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki

Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992)
(citation omitted).

IV. DISCUSSION.

Sombelon entered a plea of *nolo contendere*.³

Immediately after Sombelon entered his plea, the court accepted the plea.⁴ The court then proceeded to engage Sombelon, his counsel and the prosecutor in a colloquy. After hearing from the participants, the court *sua sponte* withdrew Sombelon's plea and dismissed the case with prejudice.

In doing so, it appears the court "disregarded rules or principles of law or practice to the substantial detriment of a party litigant[,]" Amfac, Inc., 74 Haw. at 114, 839 P.2d at 26 (citation omitted), the State, and thus abused its discretion.

^{3/} Before Sombelon entered his *nolo contendere* plea, the district court informed him that the charge against him was a crime and that he faced certain penalties upon conviction of that crime. In turn, Sombelon confirmed that he understood the charge and the applicable penalties, and that no one was putting any pressure on him. We question whether this colloquy was adequate to enable the court to determine, as required, the constitutional question whether Sombelon's plea was offered knowingly, intelligently and voluntarily. See State v. Topasna, 94 Hawai'i 444, 452-55, 16 P.3d 849, 857-60 (App. 2000); Hawai'i Rules of Penal Procedure (HRPP) Rule 11 (2000).

^{4/} That the court accepted Sombelon's *nolo contendere* plea immediately after it was entered is somewhat anomalous, because the court during the balance of the hearing appeared to be deciding whether to defer acceptance of the plea pursuant to HRS chapter 853 (1993 & Supp. 2000) (providing, in relevant part, that the court may defer acceptance of a guilty or *nolo contendere* plea for a term and under conditions, and that upon the defendant's completion of such term in compliance with such conditions, the court shall discharge the defendant and dismiss the charge). At any rate, we observe that HRPP Rule 11(b) provides: "A defendant may plead *nolo contendere* only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

Hawai'i Rules of Penal Procedure (HRPP) Rule 11(a)(1) (2000)

provides that

[a] defendant may plead not guilty, guilty or *nolo contendere*. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or *nolo contendere* or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(Emphasis supplied.) After the court refused to accept Sombelon's *nolo contendere* plea, it was required to enter a plea of not guilty and proceed on with the case.

Sombelon argues, however, that because a factual basis for his plea was lacking, the court properly refused to accept the plea, pursuant to HRPP Rule 11(f) ("Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."). But this argument is neither here nor there, because the issue on appeal is not whether the court erred in refusing to accept the plea, but whether the court abused its discretion in *sua sponte* dismissing the charge with prejudice after it had withdrawn the plea. The argument is, in any event, not well taken on its own terms, because Sombelon's plea was *nolo contendere*, not guilty, and a *nolo contendere* plea may be accepted by the court without a factual basis therefor. State v. Merino, 81 Hawai'i 198, 219, 915 P.2d 672, 693 (1996).

Sombelon also argues that the court possessed the inherent power to *sua sponte* dismiss the charge with prejudice.

Sombelon relies upon the Hawai'i Supreme Court's opinion in Moriwake, supra.

Moriwake was indicted for manslaughter and went through two trials, both of which resulted in hung juries. Before a third trial could be had, Moriwake brought a motion to dismiss. Because all three trials would have involved virtually the same evidence, and in light of the two hung juries and the various hardships a third trial would have visited upon Moriwake, the trial court dismissed the charge with prejudice. Moriwake, 65 Haw. at 48-50, 647 P.2d at 708-09.

In affirming, the supreme court held:

That aspect of the judicial power which seeks to administer justice is properly invoked when a trial court *sua sponte* dismisses an indictment with prejudice following the declaration of one or more mistrials because of genuinely deadlocked juries[.]

Id. at 55, 647 P.2d at 712 (internal quotation marks omitted).

The supreme court described that power, thus:

But speaking generally, the inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists.

Id. at 55, 647 P.2d at 712 (citation and internal quotation marks omitted). See also id. at 55 n.13, 647 P.2d at 712 n.13; HRS § 603-21.9 (1993) (in pertinent part, "[t]he several circuit courts shall have power: . . . (6) To . . . do such other acts and take such other steps as may be necessary to carry into full

effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them").

The supreme court in Moriwake set down an analytical framework for use in deciding whether to invoke this particular inherent power of the courts:

Simply put, it is a matter of balancing the interest of the state against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the court system. The factors which the trial court should consider in undertaking this balance include the following: (1) the severity of the offense charged; (2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; (3) the character of prior trials in terms of length, complexity and similarity of evidence presented; (4) the likelihood of any substantial difference in a subsequent trial, if allowed; (5) the trial court's own evaluation of relative case strength; and (6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

Moriwake, 65 Haw. at 56, 647 P.2d at 712-13 (brackets, citations and internal quotation marks omitted).

Clearly, considering the facts of Moriwake, its holding, and the analytical framework presented therein, the inherent power described and applied in Moriwake was not properly applied here, where there was no previous trial at all. The supreme court confirmed this conclusion in State v. Alvey, 67 Haw. 49, 678 P.2d 5 (1984), wherein it observed:

Alvey has not cited a single authority for the proposition that a trial judge has the inherent power to dismiss an otherwise valid indictment prior to the defendant's first trial. Nor could we, for a judge's inherent power to dismiss an indictment is not so broad. Within the federal system,

a federal court is empowered to dismiss an indictment on the basis of governmental or

prosecutorial misconduct. . . . However, such supervisory power will be used to dismiss an indictment only when the misconduct represents "a serious threat to the integrity of the judicial process."

United States v. Everett, 692 F.2d 596, 601 (9th Cir. 1982); see also, United States v. Samango, 607 F.2d 877 (9th Cir. 1979). Other state courts require a "clear denial of due process," People v. Miller, 100 Ill. App. 3d 122, 426 N.E.2d 609, 614 (1981), evidence some constitutional right has been violated, State v. Gaffey, 92 N.J. 374, 456 A.2d 511, 515 (1983), arbitrary action, or governmental misconduct. State v. Dailey, 93 Wash.2d 454, 610 P.2d 357, 359 (1980).

Id. at 57-58, 678 P.2d at 10 (reversing the trial court's decision, based in part upon its inherent power `a la Moriwake, to dismiss a prison drug possession charge without a trial because a prison disciplinary committee had previously concluded there was insufficient evidence to sustain the charge).

The charge against Sombelon was dismissed without a trial; indeed, without any proper evidence before the court. Short shrift, if any, was given to the State's interest, Moriwake, 65 Haw. at 56, 647 P.2d at 712-13, and we cannot avoid the conclusion that the court abused its discretion in dismissing the charge.

In this respect, Sombelon argues that the court's Moriwake dismissal of the charge was proper because its colloquy revealed no probable cause to believe he had committed the charged offense of theft in the fourth degree. Sombelon contends the colloquy showed, instead, that he was a Good Samaritan turning the purse in to the police lost-and-found.

The inherent power of the court invoked in Moriwake does not include, however, the power to find the evidence wanting before trial and hence to dismiss. As the supreme court stated in State v. Lincoln, 72 Haw. 480, 825 P.2d 64 (1992):

In Alvey we made clear that, even if "there are serious questions" about a material element of a crime, it is not within the trial court's discretion to usurp the function of the trier of fact before trial. 67 Haw. at 58 n.6, 678 P.2d at 11 n.6.

In the instant case, the lower court was not confronted with the prospect of a third trial based on evidence which had failed to convict a defendant two previous times. Rather, the trial court faced the prospect of a third trial following two prior convictions, albeit with a lesser quantum of evidence than previously available. While it might be true that significant evidence cannot be presented if [the murder-for-hire triggerman] does not testify, the State still possesses some evidence against [the murder-for-hire employer]. It is not for the trial court to weigh the evidence in determining whether to proceed to trial.

Id. at 491-92, 825 P.2d at 71 (footnote omitted). We must leave for further proceedings the question Sombelon would have the trial court preempt.

V. CONCLUSION.

Accordingly, we vacate the district court's August 15, 2001 judgment of dismissal and remand for entry of a plea of not guilty and further proceedings consistent with this opinion.

Thereupon Sombelon may, of course, again tender a plea of *nolo contendere* or guilty, for deferral or acceptance, as he sees fit.

DATED: Honolulu, Hawaii, November 26, 2001.

On the briefs:

Benjamin M. Acob, First
Deputy Prosecuting Attorney,
for plaintiff-appellant.

Chief Judge

Matthew L. Hall,
Deputy Public Defender,
for defendant-appellee.

Associate Judge

Associate Judge