NO. 24049

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

STATE OF HAWAI`I, Plaintiff-Appellee, v.
BERNARD K. B. YOUNG, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(Cr. Nos. 99-311777 and 99-311799)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Defendant-Appellant Bernard K. B. Young (Young) appeals from the December 15, 2000 Order of the District Court of the First Circuit (the district court),[1/] denying his Motion to Withdraw Plea of No Contest, Set Aside Sentence and to Reset Case for Arraignment, which he had filed on October 27, 2000. We dismiss this appeal for lack of appellate jurisdiction.

A.

The record reflects that following an altercation with his brother, Young was charged on September 22, 1999, via penal summons complaint, with committing the offenses of harassment, in violation of Hawaii Revised Statutes (HRS) § 711-1106 (Supp.

[1/] Judge Michael Marr presided over the proceedings before the District Court of the First Circuit.

2001),[2/] and criminal property damage in the fourth degree, in violation of HRS § 708-823 (1993).[3/] On July 14, 2000, Young appeared in the district court with his counsel, pleaded no contest to the charges, and moved for a deferred acceptance of no contest (DANC) plea, pursuant to HRS chapter 853, for each charge. The district court granted the motion for each charge, deferring acceptance of Young's no contest plea for six months, as long as Young "remain[ed] arrest and conviction free for 6 months and follow[ed] the usual terms and conditions of the DANC plea being granted." On October 27, 2000, Young filed a motion to withdraw his no contest pleas, claiming that "it was not fair that his brother would get away with it and that he, the Defendant, was not getting compensation for the damages caused to

---

[2/] Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2001) provides as follows:

> **Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
>
> (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

[3/] HRS § 708-823 (1993) states:

> **Criminal property damage in the fourth degree.** (1) A person commits the offense of criminal property damage in the fourth degree if the person intentionally damages the property of another without the other's consent.
>
> (2) Criminal property damage in the fourth degree is a petty misdemeanor.

his stereo by his brother[.]"[4/] The district denied Young's motion on December 15, 2000.

On December 29, 2000, the district court held a proof of compliance hearing on Young's DANC pleas. Compliance was found as to the terms and conditions of the criminal property damage DANC plea, but not as to the harassment DANC plea. The harassment case was rescheduled for proof of compliance on June 15, 2001. Meanwhile, on January 16, 2001, Young filed the instant appeal from the December 15, 2000 order denying his motion to withdraw his no contest pleas.

B.

The Hawai`i Supreme Court has emphasized that "the right of appeal in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision. Therefore, the right of appeal, and, by extension, the parameters of appellate jurisdiction, are limited as provided by the legislature through statute." State v. Domingo, 82 Hawai`i 265, 268-69, 921 P.2d 1166, 1169-70 (1996) (block formatting, brackets, citations, and quotation marks omitted).

The parameters of appellate jurisdiction from district court criminal cases are set forth in HRS § 641-12 (1993), which provides, in relevant part:

[4/] Defendant-Appellant Bernard K. B. Young did not claim in his motion that his no contest plea was not entered voluntarily, intelligently, or knowingly.

> **From district courts**. Appeals upon the record shall be allowed from all final decisions and final judgments of district courts in all criminal matters. Such appeals may be made to the supreme court, subject to chapter 602 whenever the party appealing shall file notice of the party's appeal within thirty days, or such other time as may be provided by the rules of the court.

Thus, this court's jurisdiction with respect to appeals by defendants in district court criminal cases is confined to appeals from "final decisions and final judgments." State v. Valiani, 57 Haw. 133, 134, 552 P.2d 75, 76 (1976). A "final decision" or "final judgment" for purposes of HRS § 641-12 is a decision that "terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined." Id. (ellipsis and internal quotation marks omitted) (quoting Berman v. United States, 302 U.S. 211, 212-13 (1937).

In State v. Kealaiki, 95 Hawai`i 309, 312, 22 P.3d 588, 590-91 (2001), the Hawai`i Supreme Court held that

> [u]nder HRS § 641-11, "the sentence of the court in a criminal case" is "the judgment" from which an appeal is authorized. Because "there is no 'conviction' when the acceptance of a plea is deferred," an order granting "a DANC plea such as the one issued here is not a conviction nor is it a sentence. There having been no conviction and sentence in this case, there can be no appeal under HRS § 641-11 from the March 28, 2000 order granting Defendant's plea deferral.

(Brackets, citations, and ellipses omitted.) The supreme court further stated:

> HRS § 853-1 sets three preconditions to the court's consideration of granting a . . . DANC plea, one of which is that the defendant "voluntarily plead . . . nolo contendere." If the defendant's motion is not granted, judgment and sentencing result. *See* HRS § 853-2. Because a defendant enters his or her plea voluntarily, the defendant

is precluded, upon denial of his motion and acceptance of his plea, "from later asserting any nonjurisdictional claims on appeal, including constitutional challenges."

But if the motion is granted, acceptance of the plea is then deferred. *See* HRS § 853-1(a). Further proceedings in the case are also suspended pending satisfaction of conditions which are specified in HRS § 706-624 (1993), the provision relating to terms and conditions permitted with respect to a sentence of probation. *See* HRS § 853-1(3)(b). Successful completion of the deferral period results in dismissal of the charge and can lead to expungement of the defendant's criminal record. *See* HRS § 853-1(c) and (e).

> In enacting HRS chapter 853, the legislature found "that in certain criminal cases, particularly those involving first time, accidental, or situational offenders, it is in the best interest of the prosecution and the defendant that the defendant be given *the opportunity to keep his or her record free of a criminal conviction*, if he or she can comply with certain terms and conditions during a period designated by court order." 1976 Haw. Sess. L. Act 154, § 2, at 279 (emphasis added). Therefore, "the purpose of HRS chapter 853 was to establish a means whereby a court in its discretion may defer acceptance of a guilty plea for a certain period on certain conditions." *Id.* The legislature further explained that "the completion of such period in compliance with such conditions may then result in the discharge of the defendant and expungement of the matter from his or her record." *Id. The effect of a DAGP was, thus, to enable a defendant to retain a "record free of a criminal conviction" by deferring a guilty plea for a designated period* and imposing special conditions which the defendant was to successfully complete. *Id.* (emphasis added).

[*State v.] Putnam*, 93 Hawai`i [362] at 367-68, 3 P.3d at 1244-45 (brackets omitted).

Under the foregoing procedure, there has been no plea entered for purposes of HRPP Rule 11(a)(2) in this case. By virtue of the HRS chapter 853 order, Defendant's plea has yet to be accepted by the court, much less judgment and sentence imposed. *See* HRS § 853-2. Because its acceptance has been delayed, there is, in effect, no plea to which a HRPP Rule 11(a)(2) reservation of the right to appeal can attach.

95 Hawai`i at 315, 22 P.3d at 594 (citations and footnote omitted).

In this case, the district court granted Young's DANC pleas to both the harassment and criminal property damage charges. When Young subsequently moved to withdraw his no contest pleas to both charges, acceptance of both pleas had already been deferred. Since the deferral period was in effect, no judgment and sentence had been imposed. If Young complied with the conditions of his DANC pleas, no judgment and sentence would ever be imposed. Moreover, the record reflects that the criminal property damage charge against Young was ultimately dismissed after proof of Young's compliance with the conditions of his DANC plea to that charge was produced. Young has not shown that he was in any way aggrieved by the dismissal of this charge, which he sought through the DANC procedure. He, therefore, lacks standing to appeal therefrom.

C.

In Kealaiki, the supreme court acknowledged, even if it had no appellate jurisdiction, that it could, in its discretion, assert supervisory jurisdiction over the trial courts under HRS § 602-4 (1993)[5/] "to prevent and correct errors and abuses

[5/] HRS § 602-4 (1993) provides that "[t]he supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

therein where no other remedy is expressly provided for by law." 95 Hawai`i at 317, 22 P.3d at 596 (brackets omitted). This court, however, does not have the same supervisory jurisdiction over the trial courts that the supreme court has under HRS § 602-4.

CONCLUSION

For the reasons discussed above, we dismiss Young's appeal for lack of appellate jurisdiction.

DATED: Honolulu, Hawai`i, September 26, 2002.

Acting Chief Judge

Associate Judge

Associate Judge