

NOT FOR PUBLICATION

NOS. 24227 and 24261

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

NO. 24227

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JAMES KIMO AKAHI, also known as James
Akahi Nui, Defendant-Appellant
(CR. NO. 97-0725)

AND

NO. 24261

STATE OF HAWAI'I, Plaintiff-Appellee, v.
TERRY N. KAAHANUI, Defendant-Appellant
(CR. NO. 97-0727)

APPEAL FROM THE SECOND CIRCUIT COURT

SUMMARY DISPOSITION ORDER

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

This is a consolidated appeal in which Defendant-Appellant James Kimo Akahi, also known as James Akahi Nui (Akahi), and Defendant-Appellant Terry N. Kaahanui (Kaahanui) appeal from their respective Judgments, both filed in the Circuit Court of the Second Circuit¹ (circuit court) on March 29, 2001.

I. DEFENDANT-APPELLANT AKAHI

Following a jury trial in Cr. No. 97-0725 in which Akahi was convicted of Count One, Criminal Trespass in the

¹The Honorable Shackley F. Raffetto presided.

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Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-814(1)(a) (1993); and Count Two, Escape in the Second Degree, in violation of HRS § 710-1021(1) (1993),² Akahi's motion for a new trial was granted. On January 29, 2001, Akahi entered a conditional plea of no contest to Counts One and Two, reserving his right to appeal the circuit court's adverse determination of his pretrial motions to dismiss "based upon his Native Hawaiian rights". Finding that Akahi voluntarily entered his plea, the circuit court adjudged him guilty of both counts.

Akahi appeals on the grounds that (1) the circuit court committed plain error by accepting Akahi's waiver of his right to assistance of counsel so he could represent himself and by accepting Akahi's conditional no-contest plea given an invalid waiver of his constitutional rights, or alternatively that the plea was induced by a mistaken belief that Akahi had a viable appeal, or alternatively that Akahi had not adequately been advised of his right to testify or not testify; and (2) standby trial counsel provided ineffective assistance of counsel. Upon careful review of the record, we disagree with Akahi's contentions and affirm.

²/Count Three, Theft in the Fourth Degree, was dismissed prior to trial.

Akahi argues that his conditional plea³ was induced by a mistaken belief that he had reserved a potentially successful

³Hawai'i Rules of Penal Procedure (HRPP) Rule 11 states in pertinent part:

Rule 11. Pleas.

(a) *Alternatives.*

(1) In general. 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.

(2) Conditional Pleas. With the approval of the court and the consent of the State, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specific pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) *Nolo contendere.* 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.

(c) *Advice to defendant.* The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that he understands the following:

(1) the nature of the charge to which the plea is offered;
and

(2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and

(3) that he has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he is not a citizen of the United States, a conviction of the offense for which he has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(d) *Insuring that the plea is voluntary.* The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from any plea agreement.

right to appeal his conviction on the basis of his "Native Hawaiian rights." However, Akahi alleges only mistakenly induced plea and ineffective assistance of counsel claims on the ground that he was not informed that his "lack of jurisdiction" claim was futile; he does not directly raise error based on his Native Hawaiian rights in this appeal. Akahi has failed to show that withdrawal of his plea is necessary to avoid manifest injustice. See State v. Cornelio, 68 Haw. 644, 646-47, 727 P.2d 1125, 1126-27 (1986); see also United States v. Ruiz, 536 U.S. 622, 630, 122 S. Ct. 2450, 2456 (2002). Assuming any error accrued, we conclude it did not amount to manifest injustice. State v. Domingo, 82 Hawai'i 265, 268, 921 P.2d 1166, 1169 (1996).

Akahi also contends that his conditional plea was not made knowingly, intelligently, or voluntarily and should, therefore, be withdrawn. The circuit court received satisfactory answers from Akahi to its statements and queries made in accordance with Hawai'i Rules of Penal Procedure (HRPP) Rule 11. See State v. Merino, 81 Hawai'i 198, 223-26, 915 P.2d 672, 697-700 (1996). Akahi signed and dated the no contest plea form. In view of the adequate colloquy, the plea provision that Akahi could appeal the adverse ruling based on his Native Hawaiian rights, and the fact that Akahi was aware that a jury had convicted him of Counts One and Two in the prior trial, the record shows that the plea was entered voluntarily, knowingly,

and as an intelligent choice among the alternatives. State v. Topasna, 94 Hawai'i 444, 459-60, 16 P.3d 849, 864-65 (App. 2000); State v. Vaitogi, 59 Haw. 592, 600-02, 585 P.2d 1259, 1264-65 (1978).

Regarding the ineffective assistance of counsel claims, even assuming omissions or errors by counsel, no prejudice occurred because Akahi has not proven there was the withdrawal or substantial impairment of a potentially meritorious defense. State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 356 (2001).

Akahi's remaining claims are without merit because they were not expressly reserved as a condition of his no contest plea. State v. Kealaiki, 95 Hawai'i 309, 314, 22 P.3d 588, 593 (2001); State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1318 (1990) (overruled on other grounds); see also Domingo, 82 Hawai'i at 267-68, 921 P.2d at 1168-69.

Therefore, the Judgment entered in State v. Akahi in Cr. No. 97-0725 in the Circuit Court of the Second Circuit on March 29, 2001 is affirmed.

II. DEFENDANT-APPELLANT KAAHANUI

Following a jury trial in Cr. No. 97-0727 in which Kaahanui was convicted of Count Two, Escape in the Second Degree in violation of HRS § 710-1021(1) (1993), and Count Three, Hindering Prosecution in the Second Degree in violation of HRS

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§ 710-1030(1) (1993),⁴ Kaahanui's motion for a new trial was granted. On January 29, 2001, Kaahanui entered a conditional plea of no contest to Count Two, Escape in the Second Degree, with the attached provision that if co-defendant Akahi filed an appeal of the circuit court's adverse determination of Akahi's pretrial motion to dismiss based upon his Native Hawaiian rights and prevailed in such an appeal, the State would stipulate to the same disposition of Kaahanui's case.⁵ As part of the plea bargain, the State dismissed the Hindering Prosecution charge against Kaahanui. Based on the finding that Kaahanui voluntarily entered his plea, the circuit court adjudged him guilty of Escape in the Second Degree.

Kaahanui appeals on the grounds that the circuit court committed error by (1) accepting a plea that was not knowing, intelligent nor voluntary, (2) accepting a plea that was induced by a mistaken belief that the issues to be appealed were viable, although such issues were foreclosed by case law, and (3) accepting a plea in which Kaahanui waived his right to an independent appeal by allowing only Akahi to appeal on the

⁴Count Three, Theft in the Fourth Degree, was dismissed prior to trial, and Count Four, Hindering Prosecution in the Second Degree, was renumbered to become Count Three.

⁵The transcript indicates that Kaahanui was told by the circuit court that Kaahanui himself could file an appeal on this basis, although the written plea form states that Akahi should file the appeal. Regardless, neither Akahi nor Kaahanui raise their appeal under their rights as set forth in the plea agreement.

reserved ground; and on the grounds that trial counsel provided ineffective assistance of counsel by permitting Kaahanui to enter a conditional plea where the grounds for appeal had been foreclosed and wherein Kaahanui had waived his right to an independent appeal by allowing only Akahi to appeal on the reserved ground. Upon careful review of the record, we disagree with Kaahanui's contentions and affirm.

Kaahanui argues that his conditional plea⁶ was induced by a mistaken belief that he had reserved a potentially successful right to appeal his conviction on the basis of his "Native Hawaiian rights". However, Kaahanui alleges only mistakenly induced plea and ineffective assistance of counsel claims on the ground that he was not informed that his "lack of jurisdiction" claim was futile; he does not directly raise error based on his Native Hawaiian rights in this appeal. Kaahanui has not shown that withdrawal of his plea is necessary to avoid manifest injustice. Cornelio, 68 Haw. at 646-47, 727 P.2d at 1126-27; see also Ruiz, 536 U.S. at 630, 122 S. Ct. at 2456. Assuming any error accrued, we conclude it did not amount to manifest injustice. Domingo, 82 Hawai'i at 268, 921 P.2d at 1169.

Kaahanui also contends that his conditional plea was not entered knowingly, intelligently nor voluntarily and should,

⁶Pursuant to HRPP Rule 11; see n.3 herein.

therefore, be withdrawn. However, the circuit court received satisfactory answers from Kaahanui to its statements and queries made in accordance with HRPP Rule 11. See Merino, 81 Hawai'i at 223-26, 915 P.2d at 697-700. Kaahanui signed and dated the no contest plea form and stipulated to a factual basis for the charge. Because an adequate colloquy occurred, Kaahanui was aware that a jury had convicted him of the Escape in the Second Degree and Hindering Prosecution charges in the prior trial, the State had dropped the Hindering Prosecution charges against Kaahanui as part of the plea bargain, and Kaahanui's protestation of innocence was not necessarily inconsistent with his no contest plea, we conclude that Kaahanui's plea was made voluntarily as an intelligent choice among the alternatives. Topasna, 94 Hawai'i at 459-60, 16 P.3d at 864-65; Vaitoqi, 59 Haw. at 600-02, 585 P.2d at 1264-65.

Regarding Kaahanui's claimed waiver of his right to appeal, the transcript indicates that Kaahanui's conditional plea reserved his right to appeal on the basis of his Native Hawaiian rights. See State v. Lei, 95 Hawai'i 278, 283-84, 21 P.3d 880, 885-86 (2001). Thus, there was no waiver of Kaahanui's right to appeal. Assuming any error accrued, we conclude that it did not amount to manifest injustice. Barnett v. State, 91 Hawai'i 20, 28, 979 P.2d 1046, 1054 (1999).

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Regarding the ineffective assistance of counsel claims, even assuming omissions or errors by counsel, no prejudice occurred because Kaahanui has not proven there was the withdrawal or substantial impairment of a potentially meritorious defense on the basis of his Native Hawaiian rights or claimed waiver of appeal. Jones, 96 Hawai'i at 166, 29 P.3d at 356.

Kaahanui's remaining claims are without merit because those issues were not reserved as a condition of his no contest plea. Kealaiki, 95 Hawai'i at 314, 22 P.3d at 593; Morin, 71 Haw. at 162, 785 P.2d at 1318 (overruled on other grounds).

Therefore, the Judgment entered in State v. Kaahanui in Cr. No. 97-0727 in the Circuit Court of the Second Circuit on March 29, 2001 is affirmed.

DATED: Honolulu, Hawai'i, April 25, 2003.

On the briefs:

Hayden Aluli for
defendant-appellant
James Kimo Akahi.

Acting Chief Judge

Mimi DesJardins for
defendant-appellant
Terry N. Kaahanui.

Associate Judge

Arleen Y. Watanabe,
Deputy Prosecuting Attorney,
County of Maui,
for plaintiff-appellee.

Associate Judge