NOS. 24246 AND 24481

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

No. 24246

MARSHALL MARTINEZ, Petitioner-Appellant, v.
STATE OF HAWAIʻI, Respondent-Appellee
(S.P.P. NO. 00-1-0016)

No. 24481

MARSHALL MARTINEZ, Petitioner-Appellant v.
STATE OF HAWAIʻI, Respondent-Appellee
(CR. NO. 7716)

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT

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

Petitioner Marshall Martinez (Martinez) appeals from the orders of the Circuit Court of the Second Circuit denying his petitions for post-conviction relief as follows: (1) in appeal No. 24481, Martinez appeals from the July 26, 2001 "Order Denying Motion to Correct Illegal Sentence" and (2) in appeal No. 24246, he appeals from the April 9, 2001 "Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or to Correct Judgment, or to Release Petitioner from Custody," Judge Shackley F. Raffetto presiding. Both appeals were consolidated on May 5, 2003. As to appeal No. 24481, we affirm. As to appeal No. 24246, we vacate in part and affirm.

I.

Appeal No. 24481

BACKGROUND

February 8, 1955	Martinez was born.
March 8, 1978	In Arizona, Martinez was convicted of Rape in the Second Degree.
January 17, 1979	In Arizona, after Martinez entered an Alford plea,[1] Martinez was convicted of Attempted Sexual Abuse.

[1/] In North Carolina v. Alford, 400 U.S. 25, 36-38 (1970) (citations and footnotes omitted), Alford insisted on his innocence to both the greater offense and the lesser offense but pled guilty to the lesser offense. The Supreme Court did not

> perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. . . . Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.
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> . . . Alford now argues in effect that the State should not have allowed him this choice but should have insisted on proving him guilty of murder in the first degree. The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.

November 17, 1983	In Hawai‘i, the Kidnapping and Attempted Rape in the First Degree allegedly occurred.
January 20, 1984	Martinez was indicted.
October 18, 1984	The jury decided that Martinez was guilty as charged.
December 10, 1984	Pursuant to Hawaii Revised Statutes (HRS) §§ 706-661 and 706-662, Judge Kase Higa entered a judgment sentencing Martinez to an extended term of life imprisonment with the possibility of parole.
February 4, 1986	In appeal No. 10356, this court entered a Memorandum Opinion affirming the judgment.
August 11, 1987	The circuit court granted Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 relief and vacated the extended term sentence.
January 7, 1988	There was a resentencing hearing.
January 27, 1988	Judge E. John McConnell entered Findings of Fact, Conclusions of Law, and Order concluding that Martinez "is a multiple offender within the meaning of" HRS § 706-662(4), and sentencing him, pursuant to HRS § 706-661(1), "to an extended term of imprisonment of life imprisonment with possibility of parole."
July 9, 2001	Martinez filed a HRPP Rule 35 motion seeking correction of an illegal sentence.
July 26, 2001	Judge Raffetto entered the Order Denying Motion to Correct Illegal Sentence.

POINTS ON APPEAL

Martinez contends that the extended term sentence imposed on January 27, 1998, is illegal because: (1) in 1984, Attempted Rape in the First Degree was a felony without classification and, as a result, was a class C felony punishable

at the maximum by incarceration for five years and, therefore, did not qualify Martinez for enhancement of his sentence pursuant to HRS § 706-662(4)[2] and (2) at the hearing for the extended sentence, the circuit court violated Hawai'i Rules of Evidence (HRE) Rule 410 by admitting and considering a prior conviction that resulted from his Alford guilty plea.

A.

HRS § 706-610 (1993) states that "a crime declared to be a felony, without specification of class, is a class C felony[.]" Based on this statute, Martinez contends that Attempted Rape in the First Degree was a class C felony because it was a felony without specification of class and, therefore, did not qualify Martinez for an extended term of imprisonment under HRS § 706-662. We disagree.

Prior to 1986, the crime now named "Sexual Assault in the First Degree," HRS § 707-730, was named "Rape in the First Degree." This crime was in 1983, and is now, a class A felony.

[2/] Hawaii Revised Statutes (HRS) § 706-662(4) (Supp. 2002) requires, in relevant part, as follows:

> The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
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> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or
>
> (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively would equal or exceed in length the maximum of the extended term imposed, or would equal or exceed forty years if the extended term imposed is for a class A felony.

Criminal attempt is defined in HRS § 705-500 (1993). At all relevant times, in 1983 and now, HRS § 705-502 has stated that "[a]n attempt to commit a crime is an offense of the same class and grade as the most serious offense which is attempted." Therefore, at the relevant time in 1983, Attempted Rape in the First Degree was a class A felony.

B.

HRE Rule 410 states, in relevant part, that "[e]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: . . . (2) A plea of nolo contendere[.]"

Martinez contends that HRE Rule 410 prohibited use of the conviction that resulted from his Alford plea when deciding whether to impose an extended term of imprisonment. We disagree. Assuming HRE Rule 410 prohibits evidence of an Alford plea, it does not, when deciding whether to impose an extended term of imprisonment, prohibit evidence of a judgment of conviction resulting from an Alford plea.

II.

Appeal No. 24246

On December 6, 2000, Martinez filed a HRPP Rule 40 petition challenging the September 12, 2000 denial by the Hawai‘i Paroling Authority (HPA) of his request for parole. The HPA's

written denial stated, "Your participation in sex offender treatment while incarcerated will significantly enhance success on parole."

Martinez contended that the HPA (1) has refused his applications to enter the HRS Chapter 353E Sex Offender Treatment Program (SOTP) and is denying his right to due process by summarily denying his request, (2) never gave him a due process hearing to determine if he is to be classified as a sex offender, (3) is discriminating against him for being a sexual offender, (4) is violating his rights under the Eighth Amendment, HRS § 353E-2, and the SOTP Master Plan, (5) is violating his right to equal protection under the federal and state constitutions, and (6) is improperly considering his prior sexual offenses which did not occur in the State of Hawai‘i.

On April 9, 2001, Judge Raffetto entered Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or to Correct Judgment or to Release Petitioner from Custody deciding, in essence, that

> [o]nce [Martinez] was sentenced to a life term of imprisonment on December 19, 1984, he came under the jurisdiction of the Department of Public Safety and its subsidiary, the Hawaii Paroling Authority. The function of granting and revocation of parole by the paroling authority is an executive and not judicial function.

In its answering brief, Appellee State of Hawai‘i (the State) admits that, in light of Turner v. Hawai‘i Paroling Authority, 93 Hawai‘i 298, 1 P.3d 768 (App. 2000), Judge Raffetto's reason for

his decision was wrong. In Turner, this court concluded "that because a denial of parole continues physical custody, such denial is a proper subject of a writ of habeas corpus and, therefore, an inmate denied parole may be entitled to relief through the mechanism of a HRPP Rule 40 petition." Id. at 307, 1 P.3d at 777.

Some of the arguments made by Martinez in his opening brief are that the HPA is violating Martinez's rights under the equal protection clauses of the Hawai‘i Constitution and the United States Constitution, the Ex Post Facto clause of the Fourteenth amendment of the United States Constitution, and the First Amendment.

Martinez also alleges that

> [Martinez] at this time is alleging "**DESPARATE TREATMENT**" as he is being treated very differently than the other inmates in being able to parole, ([Martinez] is at this time is being labeled a sex offender) and [Martinez] doesn't even have ghoust of recourse from the Hawaii Paroling Authority, as they see him in a different light than the other inmates.
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> [Martinez] has to complete his S.O.T.P. when the other inmates do not; [Martinez] has to take a polygraph test to be able to parole, where the other inmates do not; [Martinez] has to pass a peter meter test, where the other inmates do not, before he can parole; [Martinez] has to pass a psych panel before he can parole, again, where the other inmates do not, so, this court can clearly see the unfairness any Equal Protection that [Martinez] may have[.]

This is not the first time Martinez has stated these complaints in court. Martinez previously presented these complaints to the federal court. The following is the relevant part of the decision by the Ninth Circuit Court of Appeals:

> After an exhaustive review of the inmates' arguments on appeal, we conclude that the district court correctly granted summary judgment to all of the defendants on the inmates' ex post facto, Fifth Amendment, and Eighth Amendment claims. We therefore AFFIRM the district court's summary judgment orders on those claims. . . . Because Martinez has received all of the process to which he is due by virtue of his prior convictions, we AFFIRM the district court's summary judgment order for the defendants in Martinez's case (No. 95-16790) in its entirety.

Neal v. Shimoda, 131 F.3d 818, 833-34 (9th Cir. 1997).

In light of the record and the Ninth Circuit Court's opinion in Neal, we conclude that (1) Martinez has properly been classified as a sex offender, (2) the reason his application to enter the SOTP has been unsuccessful is his refusal to sign and complete the SOTP Contract and Consent to Treat form requiring him to agree with the following statement: "I admit that I committed the offense(s) charged against me, and I agree to take full responsibility for my sexual behaviors[,]" (3) the HPA is authorized to deny parole to Martinez so long as Martinez fails to complete the SOTP, and (4) most of the other grounds asserted by Martinez were decided against him in federal court and any that were not have no merit.

III.

CONCLUSION

As to appeal No. 24481, we affirm the July 26, 2001 "Order Denying Motion to Correct Illegal Sentence." As to appeal No. 24246, we affirm the April 9, 2001 "Findings of Fact, Conclusions of Law, and Order Denying Petition to Vacate, Set Aside, or to Correct Judgment, or to Release Petitioner from

Custody," except that we vacate the following sentence: "The function of the granting and revocation of parole by the paroling authority is an executive and not judicial function."

DATED: Honolulu, Hawai‘i, July 1, 2003.

On the briefs:

Marshall Martinez,
Appellant, *pro se*. Chief Judge

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