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NO. 24945

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
CONSTANCIO BOLO, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT  
(CR. NO. 93-0346)

MEMORANDUM OPINION

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

Defendant-Appellant Constancio Bolo (Bolo) appeals from the "Findings of Fact, Conclusions of Law, and Order Denying Defendant Constancio Bolo's Motion to Set Aside Judgment of Conviction and Withdraw Guilty Plea" (Order) filed January 31, 2002 in the Circuit Court of the First Circuit<sup>1</sup> (circuit court). Bolo contends the circuit court "erred when it denied his motion to set aside the judgment of conviction and withdraw guilty plea and found that manifest injustice did not exist," and "erred when it denied his motion to set aside the judgment of conviction and withdraw guilty plea and found that there was a voluntary plea."

We affirm the circuit court's Order.

**I. BACKGROUND**

The circuit court made the following findings of fact and conclusions of law:<sup>2</sup>

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<sup>1</sup>The Honorable Gail C. Nakatani presided.

<sup>2</sup>The circuit court lumped the findings of fact and conclusions of law together without expressly stating which were findings of fact and which were conclusions of law, stating in the Order: "If any of these findings of fact  
(continued...)"

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### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Rule 32(d) of the Hawaii Rules of Penal Procedure provides:

Withdrawal of guilty plea. A motion to withdraw a plea of guilty or of nolo contendere may be [made] only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence shall set aside the judgment of conviction and permit the defendant to withdraw his plea.

2. After sentence has been imposed, a defendant is entitled to withdraw his guilty or no contest plea only upon a showing by the defendant of manifest injustice. State v. Cornelio, 68 Haw. 644, 727 P.2d 1125 (1986); State v. Smith, 61 Haw. 552, 606 P.2d 86 (1980); State v. Jim, 58 Haw. 574, 574 P.2d 521 (1978).

3. The trial court may hold an evidentiary hearing to determine the plausibility and legitimacy of the defendant's reasons for requesting withdrawal of his guilty or no contest plea. The determination of the plausibility and legitimacy of the defendant's reasons for withdrawing his plea is left to the sound discretion of the trial court and will not be overturned on appeal absent a clear abuse of discretion. See State v. Smith, 61 Haw. 552, 606 P.2d 86 (1980); State v. Jim, 58 Haw. 574, 574 P.2d 521 (1978).

4. This Court finds and concludes that the record in this case, including the Guilty Plea form, the change of plea transcript, and the sentencing transcript all establish that there was a sufficient factual basis for Defendant's guilty plea and that Defendant Constancio Bolo (hereinafter "Defendant") voluntarily entered his plea with an understanding of the nature of the charge against him and the consequences of his plea, including possible deportation.

5. In open Court during the change of plea, the Defendant acknowledged reviewing the Guilty Plea form with his attorney. He acknowledged that his lawyer explained all of the different terms and provisions thereof.

6. The Defendant stated that he did not have any questions about his guilty plea. After thorough questioning by the Court, the Defendant executed his signature on the guilty plea form, thus assenting to the plea.

7. The Court found that the Defendant knowingly, voluntarily and intelligently entered his guilty plea.

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<sup>2/</sup>(...continued)  
are conclusions of law, they shall so be deemed. Should any of these conclusions of law be findings of fact, they shall so be deemed."

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8. At the time of the filing of the instant motion, the Defendant's sentence has been completely served.

9. This Court finds and concludes that Defendant Constancio Bolo has failed to establish manifest injustice in order to justify withdrawal of his guilty plea.

10. The Defendant now intimates that he did not fully understand the change of plea proceedings. However, the Court finds and concludes that this argument fails because the Defendant had the assistance of an interpreter during the proceedings and used the interpreter to assist him in understanding the proceedings. The record, including the Guilty Plea form and the transcripts, demonstrates that the Defendant fully understood and knowingly, intelligently and voluntarily pled guilty.

11. The Defendant provided a written factual basis for his guilty plea, and with the aid of an interpreter, confirmed in open Court that it was a correct statement.

12. Defendant's second claim of manifest injustice based upon possible immigration consequences fails because he was fully and properly informed of the possible deportation consequences. Paragraph 11 of the Guilty Plea form properly advised the Defendant of the deportation, exclusion, and denial of naturalization consequences of his guilty plea.

13. In open Court at the change of plea hearing, the Defendant acknowledged understanding that a consequence of his plea was possible deportation if he was not a U.S. citizen. He was thoroughly advised of the full, possible immigration consequences of his plea both in writing and orally by the Court.

14. This Court finds and concludes that the Guilty Plea form and the transcript clearly demonstrate that the Defendant was duly informed of the consequences of his plea regarding his alien status. Furthermore, at the hearing on the instant motion to withdraw his guilty plea, the Defendant did not testify that he was not advised of the deportation consequences of his plea. The Defendant testified that he did not recall whether or not he had been so advised. It is clear that not recalling over eight years later is not equivalent to not understanding the deportation consequences at the time the guilty plea was entered.

15. The Defendant's third claim that there is manifest injustice because the Defendant disputes whether or not he committed the crime also fails. The Defendant continues to argue that he did not perceive his situation as criminal based upon cultural differences, but does not deny that he committed the offense. The Defendant in fact admits that he committed the sexual assault. This Court continues to find an adequate factual foundation to support his guilty plea.

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16. If any of these findings of fact are conclusions of law, they shall so be deemed. Should any of these conclusions of law be findings of fact, they shall so be deemed.

On appeal, the only findings of fact or conclusions of law Bolo challenges in his points of error are numbers 4 and 15:

4. This Court finds and concludes that the record in this case, including the Guilty Plea form, the change of plea transcript, and the sentencing transcript all establish that there was a sufficient factual basis for Defendant's guilty plea and that Defendant Constancio Bolo (hereinafter "Defendant") voluntarily entered his plea with an understanding of the nature of the charge against him and the consequences of his plea, including possible deportation.

. . . .

15. The Defendant's third claim that there is manifest injustice because the Defendant disputes whether or not he committed the crime also fails. The Defendant continues to argue that he did not perceive his situation as criminal based upon cultural differences, but does not deny that he committed the offense. The Defendant in fact admits that he committed the sexual assault. This Court continues to find an adequate factual foundation to support his guilty plea.

**II. STANDARDS OF REVIEW**

**A.**

HRPP Rule 32(d) provides that:

[T]o correct manifest injustice the court after sentence shall set aside the judgment of conviction and permit the defendant to withdraw his plea.

. . . [T]here is no manifest injustice when the trial court has made an affirmative showing by an on-the-record colloquy between the court and the defendant wherein the defendant is shown to have a full understanding of what the plea of guilty connotes and its consequences.

State v. Cornelio, 68 Haw. 644, 646-47, 727 P.2d 1125, 1126-27 (1986) (internal quotation marks omitted).

**B.**

A trial court's findings of fact are reviewed under the "clearly erroneous" standard of review. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994).

A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made.

State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (. . . internal quotation marks omitted). "The circuit court's conclusions of law are reviewed under the right/wrong standard." State v. Pattioay, 78 Hawai'i 455, 459, 896 P.2d 911, 915 (1995)[.]

State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997) (ellipsis in original). "A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan, 76 Hawai'i at 428, 879 P.2d at 533 (internal quotation marks omitted).

**III. DISCUSSION**

The circuit court did not err when it denied Bolo's motion to set aside the judgment of conviction and withdraw his guilty plea. Bolo's challenge to findings of fact and conclusions of law numbers 4 and 15 is without merit. Contrary to Bolo's contentions, the circuit court's findings that Bolo admitted he had committed sexual assault and his guilty plea was voluntary are supported by substantial evidence. At the

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October 4, 1993 plea hearing, the circuit court<sup>3</sup> specifically directed Bolo to his plea agreement form and asked him if he had read paragraph 6 on the third page, which stated:

On or about July 31, 1991, to and including the 14th day of November, 1991, I knowingly subjected to sexual contact [the complaining witness], who is less than fourteen years old and not my spouse, by placing my hand on her vagina. This incident took place in the City and County of Honolulu, State of Hawaii.

The circuit court asked Bolo if he had read this statement, and the following exchange took place between Bolo and the circuit court:

THE COURT: . . . Ask him if he's read that statement.

A. [BOLO] My lawyer read it to me.

Q. Ask him if he understands that statement?

A. It was clarified to me and I understand it.

Q. Ask him if it's a correct statement?

A. Your Honor, I know that statement and I say that it is correct.

Q. Based on that statement then how does he plead to this charge. Guilty[, ] not guilty or no contest?

. . .

A. Your Honor, I plead guilty.

When the circuit court asked Bolo what he was charged with, the following exchange took place:

Q. [THE COURT] What's the charges against you? Tell me in your own words what the charge is.

A. [BOLO] Five years.

Q. No. What the charge is. What are they saying you did wrong?

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<sup>3</sup>/The Honorable James Aiona presided.

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A. Third degree.

Q. Third degree what?

A. Sexual assault.

Q. What does it mean, sexual assault to you, sexual assault to you?

(Through interpreter).

A. I understand that I touched the vagina of the child.

Q. Is the child older or younger than 14 years old?

A. (Through interpreter). Younger, Your Honor.

The record is clear that Bolo entered his plea voluntarily. When the circuit court asked Bolo if anyone was forcing him or threatening him or making him plead guilty, Bolo answered, "I am the only one who makes the decision, Your Honor." The circuit court was aware of the possible difficulty of a language barrier, and the following dialogue ensued to make sure there was no misunderstanding on Bolo's part:

THE COURT: . . . Mr. Bolo, did you understand everything that was said today by your interpreter?

A. [BOLO] Yes, I understand Your Honor.

THE COURT: You understand what I was saying when I did ask you things?

A. Yes.

THE COURT: Okay.

There is a line over here for you to sign if you understand. You have any questions now?

A. No.

THE COURT: Anything you didn't understand?

A. No, no more questions.

THE COURT: Anything you want to ask me?

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A. No.

THE COURT: You sure?

A. Yes.

THE COURT: Positive?

A. Yes.

THE COURT: Okay.

Furthermore, in his opening brief, Bolo does not challenge findings of fact and conclusions of law numbers 5, 6, 10, 11, 12, 13, and 14, which stated that Bolo reviewed the guilty plea form with his attorney and his attorney explained the different terms and provisions to him; Bolo had the assistance of an interpreter during the proceedings; Bolo did not have any questions about his guilty plea; Bolo executed his signature on the guilty plea form, assenting to the plea; the record, including the guilty plea form and the transcripts, demonstrates that Bolo fully understood the plea and knowingly, intelligently and voluntarily pled guilty; Bolo provided a written factual basis for his guilty plea and, with the aid of an interpreter, confirmed it was a correct statement; Bolo was fully and properly informed of possible deportation consequences; Bolo acknowledged understanding that a consequence of his plea was possible deportation; and the guilty plea form and transcript clearly

demonstrate that Bolo was duly informed of the consequences of his plea regarding his alien status.<sup>4</sup>

**IV. CONCLUSION**

The "Findings of Fact, Conclusions of Law, and Order Denying Defendant Constancio Bolo's Motion to Set Aside Judgment of Conviction and Withdraw Guilty Plea" filed January 31, 2002 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, May 30, 2003.

On the briefs:

David F. Klein  
for defendant-appellant

Chief Judge

Alexa D.M. Fujise,  
Deputy Prosecuting Attorney,  
City and County of Honolulu,  
for plaintiff-appellee.

Associate Judge

Associate Judge

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<sup>4</sup>Hawai'i Rules of Appellate Procedure Rule 28(b)(4) provides that an opening brief shall contain:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

. . . .  
(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error[.]

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.