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NO. 25334

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
JUSTIN K. H. AETO, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(TRAFFIC HPD NOS. 99158501, 99158473,  
99158498, 99158499, AND 99158500)

MEMORANDUM OPINION

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

Defendant-Appellant Justin K. H. Aeto (Aeto) appeals from the August 22, 2002 Findings of Fact, Conclusions of Law, and Order that denied the Motion to Withdraw No Contest Plea filed on May 28, 2002, and the Amended Motion to Withdraw No Contest Plea filed on July 15, 2002 (FsOF, CsOL, and Order), entered by Judge Clarence A. Pacarro. We affirm.

RELEVANT COURT RULES

Hawai'i Rules of Penal Procedure (HRPP) Rule 11 (1993) states, in relevant part, as follows:

**(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

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(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.

. . . .

**(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.

HRPP Rule 32(d) (1994) states as follows:

**Withdrawal of Plea of Guilty.** 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.

HRPP Rule 35 (1980)<sup>1/</sup> states in relevant part:

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the

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<sup>1/</sup> Amended effective July 1, 2003, Hawai'i Rules of Penal Procedure (HRPP) Rule 35 states as follows:

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

(a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of these rules. A motion to correct a sentence that is made within the 90 day time period shall empower the court to act on such motion even though the time period has expired.

(b) Reduction of Sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

HRPP Rule 40 (2000) states, in relevant part, as

follows:

**POST-CONVICTION PROCEEDING.**

(a) **Proceedings and Grounds.** The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including *habeas corpus* and *coram nobis*; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) *From Judgment.* At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;

. . . . .

(iii) that the sentence is illegal[.]

**BACKGROUND**

On May 8, 1999, Aeto was arrested for, and on July 1, 1999, Aeto was orally charged with, the following traffic offenses in the following cases:

1A, Driving Under the Influence of Intoxicating Liquor (DUI), Hawaii Revised Statutes (HRS) § 291-4 (1993);

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2A, Noncompliance with Speed Limit, HRS § 291C-102  
(1993);

3A, Driving While License Suspended or Revoked for  
Driving Under the Influence of Intoxicating Liquor, HRS § 291-4.5  
(1993);

4A, Operation of a Vehicle Without a Certificate of  
Inspection, HRS § 286-25 (1993); and

5A, Driving Without No-Fault Insurance, HRS § 431:10C-104  
(Supp. 1997).

On September 22, 1999, while represented by a deputy  
public defender, and pursuant to a plea agreement, Aeto pled "no  
contest" to the charges in cases 1A and 5A and an amended charge  
in case 3A, Driving Without a License, HRS § 286-102 (Supp.  
1998). Judge George Y. Kimura spoke with Aeto, in relevant part,  
as follows:

THE COURT: In case 3A, the charge is driving while license  
is suspended as a result of a prior DUI conviction which entails  
an automatic jail sentence and other penalties. They want to  
amend that to driving without a license which is a lesser charge  
in that there's no automatic jail. You understand?

[AETO]: Yes, sir.

THE COURT: Any objection to the change or the amendment?

[AETO]: No, sir.

THE COURT: So amended. Mr. Aeto, you understand all of  
these charges?

[AETO]: Yes, sir.

THE COURT: All right. You understand the plea arrangement?

[AETO]: Yes, sir.

THE COURT: You go along with the plea arrangement?

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[AETO]: Yes, sir.

THE COURT: All right. In case 1A, do you understand the charge of driving under the influence of intoxicating liquor?

[AETO]: Yes, sir.

THE COURT: This is your second offense, correct?

[AETO]: Yes.

THE COURT: Maximum penalty is as follows: . . . . You understand, sir?

[AETO]: Yes, sir.

THE COURT: In case 3A, you understand the amended charge of driving without a license?

[AETO]: Yes, sir.

THE COURT: Is this your second offense?

. . . .

[AETO]: I think so.

[COUNSEL FOR AETO]: I believe it is, sir.

THE COURT: All right. Maximum penalty . . . .

. . . .

THE COURT: . . . [Y]ou understand?

[AETO]: Yes, sir.

. . . .

THE COURT: You understand these charges and these penalties?

[AETO]: Yes, sir.

. . . .

THE COURT: I find that [Aeto] has voluntarily entered pleas of no contest in TD1A, 3A and 5A knowing full well the consequence of his plea; accordingly, the same are accepted, and I find [Aeto] guilty as charged.

. . . .

THE COURT: Now the next time you come for DUI, it will be your third offense, yeah? You're going to jail. The probabilities are great. And the fourth offense is lifetime. So you better get your act together and if you have a problem with alcohol, then you better get help and there is help available.

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Pursuant to the plea agreement, the court dismissed cases 2A and 4A. Judge Kimura sentenced Aeto as follows:

1A: Suspension of driver's license for one year, fine of \$750, 100 hours of community service, alcohol assessment and treatment if warranted at Aeto's expense, \$107 driver education assessment, and \$25 compensation assessment;

3A: Jail for thirty days, suspended for a period of six months on condition that Aeto not violate any state, federal, or county law, and be arrest- and conviction-free; and

5A: Fine of \$1,500 and one year suspension of license, to run concurrently.

On August 11, 2001, Aeto was arrested for a fourth DUI offense within a 10-year period.<sup>2/</sup>

On May 28, 2002, Aeto filed a Motion to Withdraw No Contest Plea. On July 15, 2002, Aeto filed an Amended Motion to Withdraw No Contest Plea. In his declaration in support of the amended motion, counsel for Aeto wrote, in relevant part, as follows:

It is clear from the plea colloquy that there are several problems with the taking of the plea which entitle [Aeto] to

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<sup>2/</sup> At the September 22, 1999 hearing, the Deputy Prosecuting Attorney advised the court, in relevant part as follows:

[DEPUTY PROSECUTING ATTORNEY]: . . . [W]e note for the record that his first offense was 10/21/98. Seven months thereafter was -- this is a second conviction. He has an old case in '92. And therefore, the State believes because the blow was so high, .222, . . . I would have requested jail at this point. However, I accepted the agreement that the last prosecutor had recommended . . . for jail suspension.

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withdraw his no contest plea at this time. First, the reading of the charge was waived. As the attached Memorandum of law suggests, this is a jurisdictional defect in District Court. Second, [Aeto] was misled into believing that he was pleading to a "second" DUI and that it would take an additional two DUI convictions before [Aeto] faced a "lifetime" revocation and more serious charges. Actually, the DUI conviction in this case was [Aeto's] *third* DUI conviction (although his first conviction was in 1992 so for purposes of this case it was proper to treat [Aeto's] DUI conviction in this case as a second conviction for sentencing purposes).

After a hearing on the amended motion on August 7, 2002, Judge Pacarro entered the FsOF, CsOL and Order, in relevant part, as follows:

4. On . . . September 22, 1999, a deputy public defender appeared with [Aeto] before the Honorable George Y. Kimura.

5. A plea agreement between the parties had been reached . . . .

6. Also pursuant to that plea agreement, the defense waived a reading of the charges and stipulated to a factual basis.

7. The Court asked defense counsel if that was in fact the agreement, and defense counsel agreed.

8. [Aeto] understood the charges to which he pled "no contest".

9. [Aeto] agreed with the plea agreement that was reached.

10. [Aeto] understood the charge of Driving Under the Influence of Intoxicating Liquor, which was his second offense in the past five years.

11. The Court advised [Aeto] of the maximum penalties for a second DUI offense.

. . . .

15. The Court then asked [Aeto] a second time if he understood the charges and penalties. [Aeto] answered in the affirmative.

16. The Court asked [Aeto] a series of questions regarding waiver of his right to a trial.

. . . .

19. [Aeto] was given an opportunity to ask any questions he had regarding his pleas, but [Aeto] did not have any.

. . . .

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29. A defendant is not entitled to be informed by the court of all the possible collateral consequences of a guilty plea.

30. On September 22, 1999, [Aeto] knowingly, intelligently, and voluntarily plead [sic] "no contest" to the charges of Driving Under the Influence of Intoxicating Liquor, Driving Without a License, and Driving Without No-Fault Insurance.

31. On September 22, 1999, [Aeto] knowingly, intelligently, and voluntarily waived his right to a trial.

32. The court did not mislead [Aeto] into pleading "no contest".

33. The Court was not obligated to inform [Aeto] of a future felony DUI, inasmuch as such is a collateral consequence of his "no contest" plea on September 22, 1999.

34. The Court was not obligated to inform [Aeto] of a potential lifetime administrative license revocation, inasmuch as such is a collateral consequence of his "no contest" plea on September 22, 1999.

35. [Aeto] has failed to meet his burden of showing manifest injustice in this case.

36. H.R.P.P. Rule 35 is inapplicable to the instant case.

37. H.R.P.P. Rules 40(a)(1)(i) and (iii) are inapplicable to the instant case.

(Citations omitted.)

POINTS OF ERROR

In this appeal, Aeto challenges only FsOF 8 and 10 and CsOL nos. 30, 31, and 35. He reasonably does not challenge FOF no. 32.

Aeto contends that FsOF "nos. 8 and 10 are clearly erroneous because the lower court failed to conduct a sufficient on-the-record colloquy that demonstrated the content of Aeto's understanding as to the nature of the charges to which pleas were being offered."

Aeto contends that CsOL nos. 30 and 31, which are



findings of fact, are clearly erroneous for the following reasons:

HRPP Rule 11(c) requires that the court, before accepting a no contest plea, address the defendant in open court to determine if he understands the nature of the charge to which a plea is being offered. HRPP Rule 11(c)(1). Here, the court failed to determine if Aeto actually understood the nature of the charges. Therefore, the court erroneously concluded in COL No. 30 that Aeto knowingly and intelligently entered his no contest pleas.

A no contest plea, if accepted, constitutes a simultaneous waiver of one's fundamental trial-related rights. State v. Christian, 88 Hawaii 407, 422-423, 967 P.2d 239, 254-255 (1998). Since Aeto did not knowingly and intelligently enter his no contest pleas, he could not have knowingly and intelligently waived his fundamental trial-related rights. Therefore, the lower court's COL no. 31 was erroneous.

Aeto contends that COL no. 35 is wrong because "[m]anifest injustice occurs when the court fails 'to address the defendant personally to determine if the defendant actually understood the charges against him[.]' State v. Vaitoqi, 59 Haw. 592, 601, 585 P.2d 1259, 1264-1265 (1978)."

STANDARD OF REVIEW

[W]hen a defendant moves to withdraw a plea of nolo contendere under [Hawai'i Rules of Penal Procedure Rule] 32(d) after imposition of sentence, only a showing of manifest injustice will entitle the defendant to withdraw his or her plea. When a trial court denies a motion to withdraw a plea, the trial court's determination will not be disturbed on appeal unless abuse of discretion is clearly shown. The burden of establishing abuse of discretion is on appellant and a strong showing is required to establish it.

State v. Ngyuen, 81 Hawai'i 279, 286, 916 P.2d 689, 696 (1996)

(citations and quotation marks omitted).<sup>3/</sup>

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<sup>3/</sup> The word "manifest" "is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident." BLACK'S LAW DICTIONARY 962 (6th ed. 1990). "Manifest injustice" is defined as "[a]n error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds." BLACK'S LAW DICTIONARY 974 (7th ed. 1999). That being so, query why the abuse of discretion standard of review, rather than the right/wrong

DISCUSSION

In support of his points on appeal, Aeto argues, in relevant part, as follows:

The lower court did not delve into the content of Aeto's understanding of the nature of the charges by reciting the elements of each offense . . . .

HRPP Rule 11(c) requires that the court, before accepting a no contest plea, address the defendant in open court to determine if he understands the nature of the charge to which a plea is being offered. HRPP Rule 11(c)(1). Here the court failed to determine if Aeto actually understood the nature of the charges . . . .

A no contest plea, if accepted, constitutes a simultaneous waiver of one's fundamental trial related rights. Since Aeto did not knowingly and intelligently enter his no contest pleas, he could not have knowingly and intelligently waived his fundamental trial-related rights . . . .

. . . .

. . . Manifest injustice occurs when a defendant pleads no contest without a full understanding of the direct consequences of his or her plea . . . .

. . . In this case, manifest injustice occurred because the lower court accepted Aeto's no contest pleas without making an on-the-record inquiry into Aeto's actual understanding of his pleas and the consequences thereof.

. . . .

The lower court found that Aeto understood the nature of all charges even though the record did not reflect a recitation of the material elements of each charge or an inquiry into the sufficiency of Aeto's understanding of the nature of the charges . . . .

. . . .

. . . [T]he court failed to engage Aeto in an on-the-record inquiry that elucidated the actual content of Aeto's understanding of the nature of all charges against him. Thus, Aeto suffered manifest injustice because the court failed to ascertain the sufficiency of Aeto's understanding of all charges against him.

Additionally, the court only referred to the DUI charge as "driving under the influence of intoxicating liquor[.]" The court did not mention the specific statutory subsection that Aeto was

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standard of review, is applied to the trial court's decision that the required showing of a "manifest injustice" has not been made.

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alleged to have violated, nor recite the material elements of the charge . . . .

. . . .

In this case, the ambiguity of the phrase "driving under the influence of intoxicating liquor" is amplified by the fact that one violation of HRS § 291-4 can be charged pursuant to two different subsections, each with different material elements that must be proven beyond a reasonable doubt. . . . However, it is not apparent from the court's plea colloquy as to whether Aeto was [sic] pled no contest to a DUI charge pursuant to HRS § 291-4(1)(a) or § 291-4(1)(b). . . . Thus, because the trial court did not read the specific DUI charge or recite the material elements of the offense to Aeto, there was no on-the-record showing that Aeto understood the nature of the specific DUI charge.

. . . .

Contrary to its failure to recite the material elements of the charges to which pleas were being offered, the court did recite the fundamental trial-related rights to Aeto. However, without Aeto's requisite understanding of the nature of the specific charges against him, Aeto could not have had a full understanding of the direct consequences of his pleas.

An accepted no contest plea constitutes a simultaneous waiver of one's fundamental trial-related rights. And, a court's acceptance of a defendant's no contest plea without first confirming the defendant's understanding of his or her fundamental trial-related rights constitutes manifest injustice . . . .

In this case, Aeto lacked the requisite full understanding of his no contest pleas. As a result, he simultaneously lacked a full understanding of his fundamental trial-related rights and the waiver thereof. Thus, the lower court failed to correct the manifest injustice by denying the withdrawal of Aeto's no contest pleas.

. . . .

Furthermore, Aeto has suffered prejudice as a result of the lower court's disregard for HRPP Rules 32(d) and 11(c). First, the DUI conviction that resulted from Aeto's uninformed no contest plea was one of three predicate convictions used to charge Aeto with a Habitual DUI offense in violation of HRS § 291-4.4 . . . .

Second, Aeto has been prejudiced by the invalid conviction because he has already completed the sentences for each conviction[.]

(Citations omitted.)

Aeto's argument exhibits a misunderstanding of the burden of proof imposed on him by HRPP Rule 32(d). To prevail on

his HRPP Rule 32(d) motion, it was Aeto's burden to prove the occurrence of a "manifest injustice."

Where the record pertaining to the motion to withdraw guilty plea is complete, as it is in this case, "[t]he defendant has the burden of establishing plausible and legitimate grounds for the withdrawal." [State v. Merino, 81 Hawai'i 198, 223, 915 P.2d 672, 697 (1996)] (citation and internal quotation marks omitted; brackets in the original); Reponte v. State, 57 Haw. 354, 361, 556 P.2d 577, 582 (1976) (defendant must carry this burden by a preponderance of the evidence). Cf. Carvalho v. Olim, 55 Haw. 336, 342-43, 519 P.2d 892, 896-97 (1974) (where the record is silent, it is presumed that the defendant did not voluntarily and knowingly enter his or her guilty plea and the burden is on the State to rebut that presumption).

State v. Topasna, 94 Hawai'i 444, 451, 16 P.3d 849, 856 (App. 2000).

To satisfy his burden, Aeto had to prove his allegation that he pled guilty without a sufficient understanding of the charges against him. Assuming the fact that the lower court accepted Aeto's no contest pleas "even though the record did not reflect a recitation of the material elements of each charge or an inquiry into the sufficiency of Aeto's understanding of the nature of the charges" is not proof that Aeto pled no contest without a sufficient understanding of the charges against him. In light of the evidence, and the absence of any evidence that Aeto pled no contest without a sufficient understanding of the charges against him, the August 22, 2002 order must be affirmed.

CONCLUSION

Accordingly, we affirm the August 22, 2002 Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Withdraw No Contest Plea Filed May 28, 2002, and Amended Motion to Withdraw No Contest Plea Filed July [15], 2002.

DATED: Honolulu, Hawai'i, July 23, 2004.

On the briefs:

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

Chief Judge

Cindy A.L. Goodness and  
Deborah L. Kim,  
Deputy Public Defenders  
for Defendant-Appellant.

Associate Judge

Associate Judge