

NOT FOR PUBLICATION

NO. 25632

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

STATE OF HAWAI'I, Plaintiff-Appellee v. KEOKI JAMES HUDDLESTON,
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 01-1-0210(3))

MEMORANDUM OPINION

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

Defendant-Appellant Keoki James Huddleston (Huddleston) timely appeals from the Judgment entered on January 21, 2003, in the Circuit Court of the Second Circuit.^{1/} On appeal, Huddleston claims that the trial court erred by: (1) failing to grant his motion to withdraw his no contest plea and (2) granting the State's motions for extended and consecutive term sentencing.

On review of the record, we conclude that the court did not abuse its discretion in denying Huddleston's motion to withdraw his plea nor did it err in granting the State's motions

^{1/} The Honorable Joseph E. Cardoza presided. Judge Cardoza also entered an Amended Judgment on January 30, 2003 in which the amount of the Crime Victim Compensation fee was added. Huddleston's Notice of Appeal, filed on February 11, 2003, does not reference this Amended Judgment and, in any event, Huddleston does not contest the amount of this fee on appeal.

On April 4, 2003, the State filed a notice of appeal, challenging the circuit court's "Order Granting Motion for Extended Terms of Imprisonment and Motion for Consecutive Terms of Imprisonment and Denying Motion for Imposition of Mandatory Minimum Period of Imprisonment." This appeal was assigned Supreme Court Number 25750. On July 8, 2003, the Hawai'i Supreme Court entered an order dismissing the State's appeal for lack of appellate jurisdiction.

for consecutive and extended term sentencing. We therefore affirm the January 21, 2003 Judgment.

I.

Huddleston was indicted on April 30, 2001, for a September 19, 2000 Burglary in the First Degree and two counts (Counts II and III) of Theft in the Second Degree. Huddleston entered his plea on August 6, 2001. Pursuant to the terms of the plea agreement, Huddleston pleaded "No Contest" to the reduced offense of Burglary in the Second Degree in Count I of the indictment, and to Counts II and III as charged. Attached as "Exhibit A" to the change of plea form was "Paragraph 8," which contained the terms of the plea agreement.^{2/} Pertinent to this appeal are the following plea agreement terms: "3. The State may ask for any applicable mandatory minimums. If a mandatory minimum is applied, the Defense reserves the right to appeal. 4. There are no other agreements as to sentencing."

^{2/} The terms of the plea agreement were,

1. The State shall reduce or amend Count I to Burglary in the Second Degree.
2. The Defendant shall plead No Contest to Counts I, II and III.
3. The State may ask for any applicable mandatory minimums. If a mandatory minimum is applied, the Defense reserves the right to appeal.
4. There are no other agreements as to sentencing.
5. A pre-sentence report will be ordered.

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Mr. James P. Brumbaugh, Esq., Huddleston's counsel at the time of his plea, filed a motion to withdraw as counsel on October 23, 2001, on the ground that, against his advice, Huddleston wished to withdraw his no contest plea^{3/} and, in the event of a hearing on a motion to withdraw, Brumbaugh would be a witness. On November 5, 2001, the motion was granted and Keith Tanaka, Esq., was appointed to represent Huddleston on November 26, 2001.

Mr. Tanaka moved to withdraw from the case on January 9, 2002, due to an alleged conflict of interest and, on January 28, 2002, Steven Booth Songstad, Esq., Huddleston's present counsel, was appointed.

On February 11, 2002, Mr. Songstad filed a motion to withdraw Huddleston's plea on the grounds that "defendant claims that he did not commit to [sic] offenses for which he has been charged that one Francisco Ramirez, AKA "Zachery" is the individual actually responsible for the offense [sic]." On March 14, 2002, the motion was heard and orally denied, and on April 2, 2003, the court filed its written order denying Huddleston's motion.

Meanwhile, on January 16, 2003, the State of Hawai'i filed three sentencing motions, for 1) mandatory minimum terms of

^{3/} In its "Memorandum in Opposition to Defendant's Motion to Withdraw No Contest Plea of August 6, 2001," the prosecution acknowledged that, "On October 18, 2001, the Defendant orally represented that he wished to withdraw his previously entered pleas of no contest."

imprisonment, 2) consecutive terms of imprisonment, and 3) extended terms of imprisonment, respectively. Huddleston filed no opposition papers to these motions.

Huddleston was sentenced, on January 21, 2003, to extended terms of ten (10) years for each count, with Counts II and III to run concurrently with each other and consecutive to Count I, for a maximum indeterminate term of twenty (20) years. The court denied the motion requesting mandatory minimum terms. On January 30, 2003, an amended judgment was filed, setting \$300 as the Crime Victim Compensation fee amount.

Huddleston appealed on February 11, 2003. On March 6, 2003, the "Order Granting Motion For Extended Terms of Imprisonment, Motion for Consecutive terms of Imprisonment and Denying Motion for Imposition of Mandatory Minimum Period of Imprisonment" was filed. This appeal was assigned to this court on January 22, 2004.

II.

A. *The Trial Court Did Not Err in Denying
Huddleston's Motion to Withdraw No Contest
Plea.*

Huddleston's first claim on appeal is that the trial court should have granted his motion to withdraw his no contest

plea.^{4/} A trial court's denial of a Hawai'i Rules of Penal Procedure (HRPP) Rule 32(d) motion to withdraw no contest plea is reviewed using the abuse of discretion standard of review. State v. Merino, 81 Hawai'i 198, 211, 915 P.2d 672, 685 (1996).

HRPP Rule 32(d)(1994) states:

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.

Where the defendant moves to withdraw his plea before sentencing, a more "liberal" approach is used to evaluate his request. Merino, 81 Hawai'i at 223, 915 P.2d at 697, citing State v. Jim, 58 Haw. 574, 575-576, 574 P.2d 521, 522-523 (1978). "[T]he motion should be granted if the defendant has presented a fair and just reason for his request and the [prosecution] has not relied upon the guilty plea to its substantial prejudice." Id. It is for the defendant to establish plausible and legitimate grounds for withdrawal of his or her plea. State v. Costa, 64 Haw. 564, 644 P.2d 1329 (1982). One type of "fair and just reason" is changed circumstances or new information justifying

^{4/} We note that, with regard to this claim, Huddleston's "Points of Error" section is in violation of Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) in that it does not indicate "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." We further note that, in violation of HRAP Rule 28(b)(3), counsel has failed to attach the order denying Huddleston's motion to withdraw no contest plea to the opening brief.

Counsel is warned that non-compliance with the rules may, in future, result in sanctions, including disregard of non-conforming points on appeal, and monetary penalties. HRAP Rules 28(b)(4) and 51.

withdrawal of the plea. Merino, 81 Hawai'i at 224, 915 P.2d at 698, citing State v. Gomes, 79 Hawai'i 32, 36, 897 P.2d 959, 963 (1995). In evaluating such a claim, the Hawai'i Supreme Court has instructed that the trial court may hold an evidentiary hearing to determine whether

(1) the defendant has never expressly admitted guilt; (2) the defendant advances a claim of new information or changed circumstances with factual support that, if believed by a reasonable juror, would exculpate the defendant; (3) there has been no undue delay in moving to withdraw the plea; and (4) the prosecution has not otherwise met its burden of establishing that it relied on the plea to its substantial prejudice.

Gomes, 79 Hawai'i at 39, 897 P.2d at 966.

Here, Huddleston has not alleged new information or changed circumstances. His reason for withdrawing his plea is nothing more than his assertion made as early as the time of his arrest, that Francisco Ramirez, aka "Zachery," was responsible for these offenses. Thus, his claim is not "new" and reflects no changed circumstances.

Moreover, the fact that someone else may have been involved, even as a principal, in this burglary and thefts does not exculpate Huddleston. As the percipient witnesses testified before the grand jury, Huddleston was discovered, by one of the occupants of the home he was accused of burglarizing, being in the home without authorization. While Huddleston denied "stealing" anything, when confronted by another occupant of the home, he produced the stolen items from under a seat in his car. As Huddleston has failed to present "fair and just" reasons, the

court did not abuse its discretion in denying his motion to withdraw his plea.

B. Huddleston Did Not Preserve His Claim that the State Breached His Plea Agreement Below; in Any Event, He Has Not Shown a Breach of the Plea Agreement.

Huddleston next contends that the State's motions for consecutive and extended-term sentencing were violations of the plea agreement between the parties.^{5/} As a preliminary matter, there is nothing in the record that shows Huddleston brought this claim to the attention of the trial court.^{6/} Fairness to the opposing party as well as to the trial court--not to mention this court--impels the complaining party to fully litigate alleged errors when they occur. Nevertheless, in criminal cases, HRPP Rule 52(b) may relieve a defendant from the omissions of counsel where substantial rights are affected. Specifically, the Hawai'i Supreme Court has long held that where "fundamental constitutional rights are involved, this court will take cognizance of the issue although it is raised in this court for

^{5/} As with his first point on appeal, Huddleston's second point does not state where his objection to the court's action was made. HRAP Rule 28(b)(4). To the extent that he intends to assert plain error with regard to this point, he should say so and not cause counsel and this court to search the record for where his objection might be found. Further, as he does not attach the order he complains of to his opening brief, he has violated HRAP Rule 28(b)(3) and is again reminded that future violations of court rules will result in sanctions.

^{6/} As noted above, Huddleston filed no opposition papers to the State's motions. Huddleston has also chosen not to make a transcript of the sentencing proceedings part of the record in this appeal.

the first time." State v. Yoshino, 50 Haw. 287, 290, 439, P.2d 666, 668 (1968).

While contract principles are employed in plea agreement interpretation, they are not dispositive. State v. Adams, 76 Hawai'i 408, 412, 879 P.2d 513, 517 (1994). The Hawai'i Supreme Court has recognized that the plea negotiation process "implicates constitutional considerations," Adams, 76 Hawai'i at 412, 879 P.2d at 517, as it involves the defendant waiving certain constitutional rights in exchange for concessions from the government and must, in any event, satisfy the imperatives of due process.

But we need not decide whether to remedy, on plain error, an alleged breach of a plea agreement here, as Huddleston has failed to make out a sufficient claim on appeal that the State violated its plea agreement. Again, the agreement specifically provided that the State could move for mandatory minimum terms of imprisonment. Immediately following this sentencing provision, the agreement stated, "There are no other agreements as to sentencing." This language, standing alone, clearly indicates that the parties had not agreed to any other aspect of sentencing.

Nevertheless, Huddleston now appears to claim that this stated lack of agreement became a bar to the State taking a position as to any other aspect of sentencing.

The touchstone for determining whether a breach of a plea agreement has occurred, however, "is whether the defendant has reasonable grounds for reliance on his interpretation of the prosecutor's promise, and whether the defendant in fact relied to his detriment on that promise." *Commonwealth v. Santiago*, 394 Mass. 25, 28, 474 N.E.2d 154, 157 (1985). This determination "requires an inquiry into the precise meaning of the language of the agreement as it was understood by the defendant and defendant's legitimate expectations arising therefrom." *People v. McCormick*, 839 P.2d 474, 479-80 (Colo. App. 1992) (reversed on other grounds).

State v. Abbott, 79 Hawai'i 317, 320, 901 P.2d 1296, 1299

(App. 1995).

Huddleston does not claim that he understood the State to have forfeited its ability to seek consecutive or extended terms with the insertion of the language "no other agreements as to sentencing" in the plea agreement, nor does he claim detrimental reliance upon such an interpretation. Rather, Huddleston says only that his interpretation is "[a] better argument." Whether this is a better argument is questionable. See Costa, 64 Haw. at 566-67, 644 P.2d at 1332.^{2/}

^{2/} In Costa, the relevant terms of the plea agreement read:

8. I have not been promised any kind of deal or favor or leniency by anyone for pleading guilty, except that I have been told that the government has agreed as follows:

That the office of the Prosecuting Attorney will recommend that the maximum sentence imposed by the court shall be 20 years and not life imprisonment.

State v. Costa, 64 Haw. 564, 566-67, 644 P.2d 1329, 1332 (1982). The Hawai'i Supreme Court held that,

the clear intent of this agreement was for the State to recommend only a maximum term of imprisonment, not a minimum term. Therefore, filing the motion for mandatory term of imprisonment did not breach the terms of the agreement, since the terms of the agreement did not foreclose pursuit of such an option by the State.

(continued...)

Even so, argument alone does not establish the reasonableness of his interpretation, nor does it support Huddleston's position that State breached their plea agreement. Huddleston has failed to establish the motions for consecutive, or extended-term sentencing breached his plea agreement with the State.

C. Huddleston Has Not Shown the Trial Court Abused its Discretion in Imposing Consecutive and Extended Terms of Imprisonment.

Finally, Huddleston claims^{8/} that the trial court abused its discretion in granting the motions for consecutive and extended terms because the prior convictions upon which the trial court based its decision occurred more than ten years earlier.

The Hawai'i Supreme Court has stated, "The authority of a trial court to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion or unless applicable statutory or

^{7/}(...continued)

Id. 64 Haw. at 67, 644 P.2d at 1332. Similarly, the language "no other agreements as to sentencing" used in the agreement at issue here, did not foreclose the State's motions for sentencing enhancements other than the mandatory minimum term sentencing explicitly included in the plea agreement.

^{8/} As with his earlier points, Huddleston has failed to comply with HRAP Rule 28(b)(4) in that he fails to show "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." In the alternative, to the extent he did not preserve this issue below, he has not claimed "plain error." Moreover, to the extent he contests the orders or judgment entered by the court in this regard, he violates HRAP Rule 28(b)(3) by not attaching the same as an appendix to his brief.

constitutional commands have not been observed." Barnett v. State, 91 Hawai'i 20, 26, 979 P.2d 1046, 1052 (1999) (citations omitted). "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Merino, 81 Hawai'i at 211, 915 P.2d at 685 (internal citations omitted).

As with the previous issue, there is nothing in the record to indicate that this issue was preserved on appeal and any review of this issue must be for plain error. Similarly, although HRPP Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court,"

[t]his court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system - - that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993).

In addition, Huddleston cites no rule, statute, case law, or constitutional authority that would support his proposition that basing an extended and/or consecutive term on convictions more than ten years old is impermissible. Since the record as it exists in this case is void of any indication that the trial court plainly "exceeded the bounds of reason, or that

it has disregarded any rules or principles of law or practice to the substantial detriment" of Huddleston, this court has no basis upon which to declare that the trial court abused its discretion in sentencing Huddleston to extended and consecutive terms of imprisonment.

III.

CONCLUSION

Accordingly, the January 21, 2003 Judgment entered in the instant case is affirmed.

DATED: Honolulu, Hawai'i, February 9, 2005.

On the briefs:

Steven Booth Songstad,
for defendant-appellant.

Chief Judge

J. Kevin Jenkins,
Deputy Prosecuting Attorney
County of Maui
for plaintiff-appellee.

Associate Judge

Associate Judge