

FOR PUBLICATION

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

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STATE OF HAWAI'I, Plaintiff-Appellee, v.
GERVEN^{1/} SORINO, Defendant-Appellant

NO. 26009

APPEAL FROM THE FIRST CIRCUIT
(CR. NO. 98-0347)

JUNE 29, 2005

FOLEY, J.; WITH NAKAMURA, J., CONCURRING SEPARATELY; AND
WATANABE, ACTING C.J., CONCURRING SEPARATELY AND DISSENTING

OPINION OF THE COURT BY FOLEY, J.

Defendant-Appellant Gerven Sorino (Sorino) appeals from the "Order Denying Defendant's Motion to Set Aside Judgment of Conviction, to Allow Defendant to Withdraw His Plea of No Contest and to Set Case for Trial" filed on July 2, 2003 in the Circuit Court of the First Circuit (circuit court).^{2/}

On appeal, Sorino contends (1) the circuit court erred when it concluded it had complied with the requirement of Hawaii

^{1/} Gerven is incorrectly spelled as Gervin in the lower court and appeal records.

^{2/} The Honorable Sandra A. Simms presided.

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Revised Statutes (HRS) § 802E-2 (1993)^{3/} that it administer the statutory advisement on the record to Sorino; (2) the circuit court erred when it denied "Defendant's Motion to Set Aside Judgment of Conviction, to Allow Defendant to Withdraw His Plea of No Contest and to Set Case for Trial" (Motion to Withdraw Plea) filed April 8, 2003 because a grant of the motion was mandatory, pursuant to HRS § 802E-3 (1993),^{4/} where the court failed to comply with HRS § 802E-2; and (3) Sorino was denied effective assistance of counsel with respect to the Motion to

^{3/} Hawaii Revised Statutes (HRS) § 802E-2 (1993) provides:

§802E-2 Court advisement concerning alien status required.

Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have 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.

Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section.

^{4/} HRS § 802E-3 (1993) provides:

§802E-3 Failure to advise; vacation of judgment. If the court fails to advise the defendant as required by section 802E-2 and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, on defendant's motion, the court shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

Withdraw Plea because his counsel failed to provide any legal authority other than HRS §§ 802E-2 and 802E-3 and his counsel argued that the circuit court should apply the manifest injustice standard.

I.

On April 13, 1998, Sorino pled no contest to Terroristic Threatening in the First Degree in violation of HRS § 707-716(1)(d) (1993).^{5/} The circuit court sentenced Sorino to five years of probation, and Judgment was entered on August 11, 1998. On July 9, 2002, the circuit court revoked Sorino's probation, sentenced him to five years of imprisonment, and filed its Order of Resentencing/Revocation of Probation.

On April 8, 2003, Sorino filed the Motion to Withdraw Plea, asking the circuit court to allow him to withdraw his no contest plea and to set his case for trial "on the grounds:
1) that the Court did not advise Defendant of his immigration status prior to accepting Defendant's plea of no contest and

^{5/} HRS § 707-716 (1993) provides in relevant part:

§707-716 Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

.

(d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

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2) manifest injustice." Sorino argued that the circuit court had failed to advise him pursuant to HRS § 802E-2, and, therefore, pursuant to HRS § 802E-3, the circuit court was mandated to vacate the Judgment, permit him to withdraw his plea of no contest and enter a plea of not guilty, and set the case for trial. Attached to the motion was the April 13, 1998 transcript of proceedings at which Sorino had entered his no contest plea and a copy of a "Notice to Appear In removal proceedings under section 240 of the Immigration and Nationality Act" (Notice) from the Immigration and Naturalization Service (INS) (served on Sorino on September 19, 2002). The Notice stated that Sorino was deportable because he was not a citizen or national of the United States and because he had been convicted of Terroristic Threatening in the First Degree (committed against a person with whom he shared a child in common) on August 11, 1998 in the circuit court. The Notice further stated that Sorino was subject to removal from the United States pursuant to § 237(a)(2)(E)(i) of the Immigration and Naturalization Act, as amended, because Sorino was an alien who, after entry, had been convicted of "a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment."

On May 28, 2003, the State filed a memorandum opposing the Motion to Withdraw Plea, arguing that Sorino did "not hold an absolute right to withdraw his plea" and there had been no

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showing of "manifest injustice" entitling Sorino to withdraw his plea. The State argued that the record showed Sorino had been advised by the circuit court and fully understood the immigration consequences of his plea.

On June 2, 2003, the circuit court held a hearing on the Motion to Withdraw Plea. The circuit court issued its July 2, 2003 order denying the Motion to Withdraw Plea based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On March 20, 1998, Defendant's counsel requested a misdemeanor charge for his client because of "immigration consequences."
2. On April 3, 1998, the Court, by way of a Pre-trial Conference, advised Defendant's counsel to contact the Immigration and Naturalization Service regarding immigration consequences for his client.
3. On April 13, 1998, Defendant was warned on the record that his plea could have a bearing on his relationship with the Immigration and Naturalization Service; and based upon a colloquy with the court, Defendant was sufficiently advised and fully understood the potential immigration consequences of his plea.
4. On April 13, 1998, Defendant signed a Change of Plea form which warned him that if he was not a citizen of the United States, a conviction might have the consequence of deportation.

CONCLUSIONS OF LAW

1. The Court is not required to resort to a ritualistic litany when advising a Defendant of the consequences of his plea. State v. Cornelio, 68 Haw. 644, 727 P.2d 1125 (1986).
2. The Court may use additional sources other than the Defendant to find a sufficient basis for his plea. State v. Tachibana, 67 Haw. 573, 698 P.2d 287 (1985).
3. Based upon the Findings of Fact above, Defendant has failed to make a showing of manifest injustice and therefore cannot withdraw his plea. State v. Adams, 76 Haw. 408, 879 P.2d 513 (1994).

II.

Sorino contends the circuit court was required to personally address him in open court prior to accepting his plea of no contest and apprise him of the required advisement under HRS § 802E-2:

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have 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.

Hawai'i Rules of Penal Procedure (HRPP) Rule 11(c)(5)

provides:

Rule 11. Pleas.

. . . .

(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:

. . . .

(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.

The language of HRPP Rule 11(c)(5) requires the court to personally address the defendant in open court and determine that the defendant understands the advisement set forth in HRS § 802E-2 and HRPP Rule 11(c)(5).

In 1998 when Sorino moved to withdraw his plea, HRPP Rule 32(d) read as follows:

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Rule 32. Sentence and judgment.

. . . .

(d) *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.^{6/}

(Emphasis and footnote added.)

"The standard of review for the withdrawal of a nolo contendere plea after sentence is based on a showing of necessity to avoid manifest injustice." State v. Cornelio, 68 Haw. 644, 646, 727 P.2d 1125, 1126 (1986).

HRPP Rule 32(d) provides that

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

Id. . . . [The Hawai'i Supreme Court] has held that there 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.

68 Haw. at 646-47, 727 P.2d at 1126-27 (internal quotation marks and citations omitted).

^{6/} Hawai'i Rules of Penal Procedure (HRPP) Rule 32(d) was amended effective July 1, 2004 to read as follows:

(d) *Withdrawal of Plea.* A motion to withdraw a plea of guilty or of nolo contendere may be made before sentence is imposed or imposition of sentence is suspended; provided that, to correct manifest injustice the court, upon a party's motion submitted no later than ten (10) days after imposition of sentence, shall set aside the judgment of conviction and permit the defendant to withdraw the plea. At any later time, a defendant seeking to withdraw a plea of guilty or nolo contendere may do so only by petition pursuant to Rule 40 of these rules and the court shall not set aside such a plea unless doing so is necessary to correct manifest injustice.

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Under HRS § 802E-3, a different standard applies. If the court failed

to advise defendant as required by section 802E-2 and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, . . . on defendant's motion, the court shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

Id.

Hawaii Revised Statutes Chapter 802E was enacted on June 15, 1988. 1988 Haw. Sess. Laws Act 382, §§ 1-3 at 749-50; State v. Nguyen, 81 Hawai'i 279, 289, 916 P.2d 689, 699 (1996). Rule 11(c) (5) of HRPP was promulgated by the Hawai'i Supreme Court, effective September 2, 1988, adopting the advisement contained in HRS § 802E-2. Nguyen, 81 Hawai'i at 288, 916 P.2d at 698. There was no corresponding amendment made to HRPP Rule 32(d) adopting the language of HRS § 802E-3.

Rules 11(c) (5) and 32(d) of HRPP were promulgated by the Hawai'i Supreme Court pursuant to Article VI, § 7 of the Hawai'i Constitution. Article VI, § 7 provides that the "supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure, and appeals, which shall have the force and effect of law." To the extent a rule promulgated by the Hawai'i Supreme Court relating to process, practice, procedure and appeals in the courts is inconsistent with a prior act of the

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legislature governing the same, the rule of the Hawai'i Supreme Court prevails. Kudlich v. Ciciarelli, 48 Haw. 290, 299-300, 401 P.2d 449, 455 (1965)^{2/} (Hawai'i Rules of Civil Procedure were adopted in 1953 under §§ 214-14 to 214-17 of R.L.H. 1955 and when effective on June 14, 1954, "superseded any statute in conflict therewith," except for statutes of limitation); see also State v. Hawaiian Dredging Co., 48 Haw. 152, 159, 397 P.2d 593, 599 (1964).

There is no inconsistency between HRS § 802E-2 and HRPP Rule 11(c)(5). Rule 11(c)(5) adopts the advisement contained in HRS § 802E-2, making it clear that the court shall address the defendant personally in open court and determine that the defendant understands the advisement contained in Rule 11(c)(5) and HRS § 802E-2. Nguyen, 81 Hawai'i at 288, 916 P.2d at 698.

Rather than reciting the advisement contained in HRPP Rule 11(c)(5) and HRS § 802E-2, the circuit court stated:

Q. [Court] And then, lastly, you do not have to tell me if you are or are not, but I'm required to tell you that if you're not a citizen, this plea may have a bearing on whatever relationship you have with the Immigration and Naturalization Service. Do you understand that?

A. [Sorino] Yes, Your Honor.

^{2/} In Kudlich v. Ciciarelli, 48 Haw. 290, 300 401 P.2d 449, 455 (1965), the Hawai'i Supreme Court discussed the fact that the 1960 revision of the First Circuit Court rules were adopted and promulgated by order of the supreme court under Article V, § 6 of the Hawai'i Constitution. As a result of the 1978 Hawai'i Constitutional Convention, the articles were renumbered and Article V, § 6 became Article VI, § 7.

Sorino did, however, sign a plea form that contained the required advisement. In answer to the circuit court's questions, Sorino answered that he had read the plea form with his lawyer, understood it, and had no questions about the form. Sorino acknowledged that he understood and spoke English.

In Nguyen, the Hawai'i Supreme Court discussed the relationship among HRS §§ 802E-2 and 802E-3 and HRPP Rules 11(c)(5) and 32(d). Although Nguyen concerned a withdrawal of plea pursuant to HRPP Rule 32(d) prior to the effective date of HRS Chapter 802E, the Hawai'i Supreme Court, in quoting HRS § 802E-3, indicated that HRS § 802E-3, not HRPP 32(d), would govern the withdrawal of a plea based on a court's failure to comply with the advisement required under HRS § 802E-2:

Nevertheless, Nguyen correctly asserts that a statute, HRS Chapter 802E, currently requires courts, prior to accepting a plea of nolo contendere, to advise defendants that, if they are not citizens of the United States, their convictions "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." HRS § 802E-2 (1993). Effective September 2, 1988, an amendment to HRPP Rule 11(c)(5) also requires courts to determine that such defendants understand the collateral consequence of possible deportation. "If the court fails to advise the defendant as required by section 802E-2 and the defendant shows that conviction of the offense to which the defendant pleaded . . . nolo contendere may have the consequence for the defendant of deportation, . . . the court shall vacate the judgment." HRS § 802E-3 (1993).

Nguyen, 81 Hawai'i at 288-89, 916 P.2d at 698-99 (brackets and footnotes omitted).

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The circuit court therefore erred as a matter of law in considering Sorino's Motion to Withdraw Plea under HRPP Rule 32(d) as opposed to HRS § 802E-3.

Under HRS § 802E-3, the circuit court was required to grant Sorino's Motion to Withdraw Plea if the court had failed to advise Sorino as required by HRS § 802E-2. Under HRPP Rule 11(c)(5), which adopted the advisement of HRS § 802E-2, that advisement was to be done by the circuit court addressing Sorino personally in open court and determining he understood that if he was "not a citizen of the United States, a conviction of the offense for which he [had] 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."

Although the circuit court did not recite this advisement orally to Sorino, Sorino did state in open court, in response to an inquiry from the circuit court, that he had read this advisement with his attorney and understood it. Although the circuit court applied the wrong standard in denying Sorino's Motion to Withdraw Plea, under the standard set forth in HRS § 802E-3, Sorino's motion should have been denied.

Sorino's argument that his trial counsel was ineffective in the filing and arguing of Sorino's Motion to Withdraw Plea is without merit.

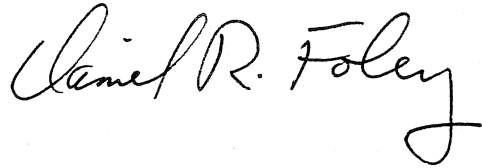
III.

The July 2, 2003 "Order Denying Defendant's Motion to Set Aside Judgment of Conviction, to Allow Defendant to Withdraw His Plea of No Contest and to Set Case for Trial" is affirmed.

On the briefs:

Cynthia A. Kagiwada
for defendant-appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

A handwritten signature in cursive script that reads "Daniel R. Foley". The signature is written in black ink and is positioned to the right of the typed names of the attorneys.