

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27450

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Respondent-Appellant,
v.
STACI LEE, aka Stacy Yasutaki and Stacy L. Lee,
Petitioner-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 JUN 29 AM 8:56

FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(HPD Criminal NO. G57180)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Nakamura, JJ.)

Respondent-Appellant State of Hawaii (State) appeals from (1) the "Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Reconsider Order Summarily Denying Rule 40 Petition Without Hearing, Filed on February 14, 2005 and Granting Defendant's Withdrawal of Guilty Plea and Setting Aside of Deferral [sic] Acceptance of Guilty Plea" filed on June 22, 2005 (June 22, 2005 Order); and (2) the Order denying the "State's Motion to Reconsider Order Filed June 22, 2005, Granting Defendant's Motion to Reconsider Order Summarily Denying Rule 40 Hearing, Filed on February 14, 2005, and Granting Defendant's Withdrawal of Guilty Plea and Setting Aside of Deferred Acceptance of Guilty Plea" filed on August 12, 2005, in the District Court of the First Circuit, Honolulu Division (district court).^{1/}

Petitioner-Appellee Staci Lee, aka Stacy Yasutaki and Stacy L. Lee, (Lee) waived her right to counsel and pled guilty to Theft in the Second Degree in the district court on July 2, 1984. On October 2, 1984, the district court granted her a deferred acceptance of guilty plea for six months. Lee complied

^{1/} The Honorable Lono J. Lee presided.

with the conditions of her deferred plea, and the district court dismissed her case on April 1, 1985.

On December 10, 2004, Lee was charged with Theft in the Second Degree in the Circuit Court of the First Circuit (circuit court). Lee entered a no contest plea on December 15, 2004 and moved to defer her plea. While the deferral of her circuit court plea was pending, Lee filed a "Motion to Set Aside Defective Guilty Plea and Withdrawal of Deferred Acceptance of Guilty Plea by Defendant Staci Lee" on January 19, 2005 in the district court. In her affidavit attached to the motion, Lee alleged that, based upon her recollection, she had not been fully informed of her constitutional rights and the nature and consequences of her 1984 plea and that the audio tape recording of her plea no longer existed to refute her recollection due to the destruction of her records pursuant to the Hawai'i Supreme Court Records Retention Schedule. Since Lee's motion to set aside her plea was for post-conviction relief, the district court chose to treat it as a petition filed pursuant to Hawai'i Rules of Penal Procedure Rule 40 (Rule 40 Petition). On February 14, 2005, the district court filed its Order Summarily Denying Rule 40 Petition Without Hearing.

On March 9, 2005, Lee moved for reconsideration, and the State filed its opposition on April 4, 2005. The district court heard the motion on April 5, 2005, allowed Lee to withdraw her 1984 guilty plea, and set aside Lee's deferred acceptance of guilty plea. The district court then entered its June 22, 2005 Order; on July 29, 2005, the State moved for reconsideration. On August 12, 2005, the district court heard and denied the State's motion for reconsideration and entered its Order.

The State timely filed its notice of appeal within the extended appeal period. On November 2, 2005, the district court entered its "Findings of Fact, Conclusions of Law and Order Denying State's Motion to Reconsider Order Granting Defendant's Motion to Reconsider Order Summarily Denying Rule 40 Petition

Without Hearing, Filed on February 14, 2005, and Granting Defendant's Withdrawal of Guilty Plea and Setting Aside of Deferred Acceptance of Guilty Plea" (November 2, 2005 Order).

On appeal, the State contends:

(1) The district court erroneously granted Lee's HRPP Rule 40 motion where Lee's motion did not qualify for Rule 40 relief.^{2/} The State argued that Lee did not have a previous conviction because after she had complied with the terms of her deferred plea, the court had dismissed her case, and, therefore, Rule 40 could not apply.

(2) The district court erroneously found that Lee had been subjected to an illegal sentence.^{3/}

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we conclude that the State's contention on appeal is without merit.

As the district court correctly noted, HRPP Rule 32 had been amended to require Lee to proceed by HRPP Rule 40 in moving to withdraw a guilty plea. The basis for setting aside a plea pursuant to a Rule 40 petition ("manifest injustice") is set forth in HRPP Rule 32(d), and is not found in HRPP Rule 40(a)(1)

^{2/} The State challenges Conclusion of Law 5 contained in the June 22, 2005 Order:

5. The court finds that although [Lee] was never convicted, Rule 40, of the Hawaii Rules of Penal Procedure (hereinafter H.R.P.P.) is the appropriate and equitable avenue of relief available to [Lee] and therefore will hear the matter pursuant [to] Rule 40[.]

^{3/} The State challenges the following Finding of Fact and Conclusion of Law from the November 2, 2005 Order:

[FOF] 24. However, the issue of "waiver" is moot as H.R.P.P. Rule 40(a)(3) states, in part: "Except for a claim of an illegal sentence" (Emphasis added.) [Lee] not only set out in her Rule 40 Motion a claim of an illegal sentence, but this Court has already previously found and concluded that an illegal sentence occurred because it was not based on a knowing and voluntary waiver of [Lee's] constitutional rights.

[COL] 13. This Court finds that [Lee] was subjected to an illegal sentence.

and (2) (addressing relief from judgments of conviction and relief from custody based on judgments of conviction). Rule 40 was therefore the appropriate means for Lee to move to withdraw her plea. The issue on appeal is whether the district court abused its discretion in granting Lee's Rule 40 Petition and allowing her to withdraw her plea. Whether or not Lee had been subjected to an illegal sentence is not the issue in reviewing a district court's grant of a motion to withdraw a plea after imposition of sentence. "A defendant is entitled to withdraw his or her guilty plea after imposition of a sentence only upon a showing of manifest injustice. Manifest injustice occurs when a defendant makes a plea involuntarily or without knowledge of the direct consequences of the plea." Foo v. State, 106 Hawai'i 102, 111, 102 P.3d 346, 355 (2004)^{4/} (internal quotation marks, citations, and brackets omitted).

The State does not challenge the following Findings of Fact made by the district court in its November 2, 2005 Order:

3. [Lee] was not represented by counsel at both her change of plea and at sentencing.

4. The first time that [Lee] learned of what constitutes a proper change of plea colloquy was in August 2004 when she met with her current attorney, . . . , who reviewed with [Lee] all of the questions involved and required during a proper colloquy.

5. It was during this August 2004 meeting that [Lee] had with her attorney that it was determined that only a very few questions were asked of [Lee] during her July 2, 1984 change of plea proceeding.

6. It was also during this same August 2004 meeting [Lee] had with her attorney that it was realized that [Lee's] constitutional rights had been violated.

7. Just one month before, in July of 2004, Rule 32 of the Hawai'i Rules of Penal Procedure (hereinafter H.R.P.P.) was amended so as to require a defendant to proceed by way of H.R.P.P. Rule 40 instead of H.R.P.P. Rule 32 when more than 10 days have passed since imposition of sentence.

^{4/} A motion to withdraw a plea of guilty before a sentence is imposed or the imposition of a sentence is suspended requires only the demonstration of a "fair and just reason" and no "substantial prejudice" to the State. State v. Topasna, 94 Hawai'i 444, 451, 16 P.3d 849, 856 (App. 2000).

8. This Court has already found and concluded that H.R.P.P. Rule 11 was violated because [Lee's] plea was not properly taken on July 2, 1984.

9. This Court has already accepted [Lee's] declarations that, at the time of her change of plea:

a. Lee was not represented by legal counsel when she entered her change of plea;

b. [Lee] was not informed of her constitutional right to proceed to trial in this matter, and that she would be giving up this right if she entered a change of plea;

c. [Lee] was not informed of her right to a trial by jury;

d. There was no mention that the State was required to prove its case beyond a reasonable doubt, and that [Lee] would be giving up this right if she entered a change of plea;

e. There was no mention that [Lee] had the right to question witnesses, or to present witnesses on her behalf, and that she would be giving up this right if she entered a change of plea;

f. There was no mention of [Lee's] right to testify or not to testify in a trial, and that she would be giving up this right by entering a change of plea;

g. There was no mention that [Lee] would be giving up her right to appeal if she entered a change of plea;

h. [Lee] was not afforded the opportunity to be referred to the Office of the Public Defender for free legal consultation prior to her change of plea;

i. [Lee] was not informed that she could retain her own private counsel if she did not qualify for the services of the Office of the Public Defender;

j. [Lee] was not informed that a deferred plea could only be used once in a person's life;

k. [Lee] was not informed of the consequences of being unable to use a deferred plea at a later time if she was subsequently arrested and charged with a crime[.]

10. There has been no affirmative showing by the State of an on-record colloquy between the court and [Lee] at her change of plea.

11. Where the record is silent, it is presumed that [Lee] did not voluntarily and knowingly enter a guilty plea.

12. Where the record is silent, the State has the burden of proving that [Lee] voluntarily and intelligently waived her right to counsel.

13. When [Lee] entered her guilty plea on July 2, 1984, the record is less than complete and only states that she waived her right to counsel.

14. There is no evidence in the record that the court conducted a colloquy regarding the waiver of [Lee's] right to counsel.

15. There is no record that the Court did a colloquy and asked questions such as, "Do you understand that you have a constitutional right to counsel at all stages of the criminal proceedings against you, including the entering of your plea." and "If you cannot afford an attorney, one can be appointed for you." The record is silent in these areas.

16. In the July 2, 1984 change of plea, there is no evidence that [Lee] was given any of the advisements required by Wong v. Among, 52 Haw. 420 (Haw. 1970).

18. At the May 12, 2005 clarification hearing, this Court found [Lee's] affidavit to be credible and uncontroverted. This Court accepted the matters asserted therein to be taken as true.

19. The State has had several opportunities to contest the facts asserted in [Lee's] affidavit.

20. By the State's own prior admission, they have no contradictory evidence to present.

21. The State's Motion to Reconsider has not raised any relevant new evidence.

25. [Lee] was not made aware of the inadequate plea colloquy until she met with her attorney . . . in August of 2004.

26. Due to the amendments to H.R.P.P. Rule 32 effective July 1, 2004, [Lee's] only appropriate avenue for relief was through the filing of a motion under H.R.P.P. Rule 40, which she has done.

27. This Court finds that this is the first time that [Lee] has raised these issues and there was no "knowing and understanding" waiver.

28. This Court finds that "extraordinary circumstances" did exist to justify [Lee's] failure to previously raise the issue.

29. The substance of [Lee's] plea was inadequate in light of the requirements of H.R.P.P. Rule 11.

30. [Lee] did not understand the issues of a deferral and its applicability.

31. A defendant faced with a criminal offense and the possibility of jail is entitled to an attorney and a full and complete understanding of the proceedings before

entering a plea. There is no evidence this occurred when [Lee] entered her guilty plea on July 2, 1984.

32. There is also no evidence that the court at the July 2, 1984 change of plea explained or that [Lee] understood that she would be afforded only one deferral and generally could not use it a second time in her lifetime except for narrow exceptions.

33. [Lee] could not have knowingly, intelligently, and voluntarily been informed of the consequences of accepting a deferral without an attorney and/or a record showing a knowing waiver of the right to counsel.

"Findings of fact . . . not challenged on appeal are binding on the appellate court." Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002). Given the unchallenged findings of fact of the district court, we cannot conclude the district court abused its discretion in granting Lee's Rule 40 Petition. State v. Topasna, 94 Hawai'i 444, 452, 16 P.3d 849, 857 (App. 2000).

Therefore,

The "Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Reconsider Order Summarily Denying Rule 40 Petition Without Hearing, Filed on February 14, 2005 and Granting Defendant's Withdrawal of Guilty Plea and Setting Aside of Deferral [sic] Acceptance of Guilty Plea" filed on June 22, 2005, and the Order filed on August 12, 2005, in the District Court of the First Circuit, Honolulu Division, are affirmed.

DATED: Honolulu, Hawai'i, June 29, 2007.

On the briefs:

Neil N. Murakami,
Deputy Attorney General,
for Respondent-Appellant.

Dwight C.H. Lum
for Petitioner-Appellee.



Presiding Judge



Associate Judge



Associate Judge