

NOS. 27837 and 27838

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

STATE OF HAWAI'I, Plaintiff-Appellee,  
v.  
NATHANIEL RUSSELL, also known as BOBO RUSSELL,  
Defendant-Appellant.

E.M. RIMANDO  
 CLERK OF APPELLATE COURTS  
 STATE OF HAWAI'I

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APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NOS. 04-1-0350(1) and 04-1-0259(1))

SUMMARY DISPOSITION ORDER

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

In these consolidated appeals (Appeal No. 27837/Cr. No. 04-1-0350(1) and Appeal No. 27838/Cr. No. 04-1-0259(1)), Defendant-Appellant Nathaniel Russell (Russell) appeals from the Amended Judgment that the Circuit Court of the Second Circuit (circuit court) entered in both Cr. No. 04-1-0259(1) and Cr. No. 04-1-0350(1) on March 14, 2006.<sup>1</sup> In Cr. No. 04-1-0259(1), Russell was charged with first degree criminal property damage. In Cr. No. 04-1-0350(1), Russell was charged with first degree assault against a law enforcement officer (Count 1); resisting arrest (Count 2); abuse of a family or household member (Count 3); third degree assault (Count 4); second degree terroristic threatening (Count 5); and disorderly conduct (Count 6).

Trial in both cases was initially set for September 27, 2004, but was delayed through a series of stipulated continuances, the last of which reset trial in both cases for May 23, 2005. On May 23, 2005, pursuant to plea agreements, Russell pleaded no contest to the included offense of second degree criminal property damage in Cr. No. 04-1-0259(1) and no contest

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<sup>1</sup> The Honorable Joel E. August presided in both Cr. No. 04-1-0259(1) and Cr. No. 04-1-0350(1).

to all six counts as charged in Cr. No. 04-1-0350(1). In addition to allowing Russell to plead to a reduced charge in Cr. No. 04-1-0259(1) and agreeing not to seek extended terms of imprisonment on the felony offenses in both cases, Plaintiff-Appellee State of Hawai'i ("the prosecution"), as part of the plea agreements, agreed to recommend that any sentence Russell received in Cr. No. 04-1-0259(1) and any sentence he received in Cr. No. 04-1-0350(1) shall run concurrently. Sentencing in both cases was scheduled for July 22, 2005, but was continued several times by stipulation.

After entering his no-contest pleas, Russell was arrested on federal drug charges and held in federal custody. On February 17, 2006, he filed motions to withdraw his no-contest pleas in Cr. No. 04-1-0259(1) and Cr. No. 04-1-0350(1). In his motions, Russell indicated that he had entered a guilty plea in the federal case on January 20, 2006, that his federal sentence was anticipated to result in about twenty years of incarceration, and that his federal sentencing was scheduled for September 25, 2006. Russell asserted that his exposure to punishment in the federal case constituted changed circumstances that provided fair and just reasons for the withdrawal of his no-contest pleas.

On February 22, 2006, the circuit court held a combined hearing on Russell's motions to withdraw his no-contest pleas and his sentencing in Cr. No. 04-1-0259(1) and Cr. No. 04-1-0350(1). Russell, among other things, explained that he wanted to withdraw his state no-contest pleas because of his concern that the federal sentence would be run consecutive to his state sentences if the state sentencing took place before the federal sentencing. The circuit court denied Russell's motions to withdraw his no-contest pleas. It also denied Russell's oral motion to delay his state sentencing until after his sentencing in the federal case. The court then sentenced Russell to five years of imprisonment in Cr. No. 04-1-0259(1) and to various terms of imprisonment of five

years or less in Cr. No. 04-1-0350(1), all terms in both cases to run concurrently with each other.

I.

On appeal, Russell argues that the circuit court erred in denying his motions to withdraw his no-contest pleas because: 1) the prosecution violated the plea agreements; and 2) the post-plea institution of federal drug charges against him was a changed circumstance or new information presenting a fair and just reason for the withdrawal of his no-contest pleas. Russell also argues that the circuit court erred in denying his motion to continue the sentencing in his state cases until after his federal sentencing.

After careful review of the record and the briefs submitted by the parties, we conclude that Russell's arguments are without merit and affirm the Judgment. We resolve Russell's arguments on appeal as follows:

1. Russell argues that the Deputy Prosecuting Attorney (DPA) breached the plea agreements when at sentencing the DPA: a) urged the court to make no recommendation on whether the state sentences would run consecutive to or concurrent with the federal sentence; and b) stated that when the prosecution makes its recommendation to the Hawai'i Paroling Authority, it would recommend that the state sentences not run concurrent with but run consecutive to any federal sentence of incarceration Russell received. Russell further argues that the circuit court committed plain error in not *sua sponte* recognizing that the DPA's comments constituted a breach of the plea agreements and using this breach as the basis for granting Russell's motions to withdraw his no-contest pleas. We disagree with Russell's arguments.

The plea agreements only required the prosecution to recommend that any sentence Russell received in each of his state cases shall run concurrently. The prosecution made no promise that it would recommend that the state sentences would run concurrently with any potential federal sentence. Thus, the

DPA's comments at sentencing did not breach the plea agreements, and the circuit court did not err in failing *sua sponte* to grant Russell's motions to withdraw his no-contest pleas based on the DPA's comments.

2. We hold that the circuit court did not abuse its discretion in determining that the post-plea institution of federal drug charges against Russell did not establish a fair and just reason for Russell to withdraw his no-contest pleas. See State v. Malivao, 105 Hawai'i 414, 416, 98 P.3d 285, 287 (2004) (stating that the denial of a motion to withdraw a plea prior to the imposition of sentence is reviewed for abuse of discretion). Russell has the burden of establishing plausible and legitimate grounds to withdraw his pleas. State v. Jim, 58 Haw. 574, 577, 574 P.2d 521, 523 (1978). The institution of federal drug charges against Russell after his state no-contest pleas did not constitute "new information or changed circumstances with factual support that, if believed by a reasonable juror, would exculpate the defendant." State v. Gomes, 79 Hawai'i 32, 39, 897 P.2d 959, 966 (1995). In addition, Russell's desire to avoid exposure to the imposition of a consecutive federal sentence did not constitute a fair and just reason for Russell to withdraw his no-contest pleas. Because Russell failed to provide a fair and just reason for the withdrawal of his no-contest pleas, the circuit court properly denied his motions to withdraw those pleas. See Jim, 58 Haw. at 576, 574 P.2d at 522-23.

3. We hold that the circuit court did not abuse its discretion in denying Russell's motion to continue his state sentencing until after his federal sentencing. See State v. Keck, 111 Hawai'i 457, 460, 142 P.3d 1286, 1289 (2006) (applying the abuse of discretion standard to a trial court's decision on a motion to continue sentencing). In denying Russell's motion for continuance, the circuit court noted that the state sentencing had already been delayed for seven months and that an additional seven-month delay would be required to accommodate Russell's request. We conclude that it was not an abuse of discretion to

deny Russell's motion for continuance which was based on his desire to avoid the imposition of a consecutive federal sentence. See State v. Lewchuck, 440 N.W.2d 229, 230 (Neb. 1989).

II.

We affirm the March 14, 2006, Amended Judgment that the circuit court entered in Cr. No. 04-1-0259(1) and Cr. No. 04-1-0350(1).

DATED: Honolulu, Hawai'i, December 31, 2007.

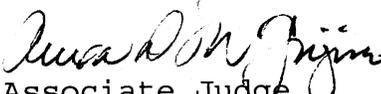
On the briefs:

Phyllis J. Hironaka  
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Peter A. Hanano  
Deputy Prosecuting Attorney  
County of Maui  
for Plaintiff-Appellee

  
Presiding Judge

  
Associate Judge

  
Associate Judge