

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27867

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
RONALD J. HOWE, Defendant-Appellant

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(Cr. No. 04-1-0873)

MEMORANDUM OPINION

(By: Recktenwald, C.J., Watanabe, and Nakamura, JJ.)

In this appeal, Defendant-Appellant Ronald J. Howe (Howe) challenges: (1) the Judgment entered by the Circuit Court of the First Circuit (the circuit court)<sup>1</sup> on March 8, 2006, convicting and sentencing him for Murder in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 707-701.5 (1993)<sup>2</sup>

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<sup>1</sup> The Honorable Dexter D. Del Rosario presided over all proceedings that prompted this appeal.

<sup>2</sup> Hawaii Revised Statutes (HRS) § 707-701.5 (1993) provides:

**Murder in the second degree.** (1) Except as provided in section 707-701, a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

(2) Murder in the second degree is a felony for which the defendant shall be sentenced to imprisonment as provided in section 706-656.

The relevant part of HRS § 706-656 (Supp. 2006) provides:

**Terms of imprisonment for first and second degree murder and attempted first and second degree murder.**

(2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole.

(continued...)

(the Judgment); and (2) the "Findings of Fact, Conclusions of Law and Order Denying [Howe's] Motion to Withdraw Plea[,]" entered by the circuit court on April 18, 2006 (the Order).

Howe contends that the circuit court erred in:

(1) accepting his no-contest plea "as it was not given in a voluntary manner[,]" but "to end the harassment to his family by taking the blame for the true culprits"; and (2) denying his motion to withdraw his no-contest plea.

Based on our review of the record and the briefs submitted by the parties, and having given due consideration to the arguments presented and the applicable statutes, case law, and court rules, we disagree and affirm.

#### BACKGROUND

On April 23, 2004, the body of Robyn Nakaji (Nakaji), wrapped in carpet and other materials and bound with tape, was found at the entrance to a goat farm in 'Ewa Beach. Nakaji had been beaten and her throat cut. Through interviews of witnesses, police learned of a dispute between Nakaji and Howe's sister, Patricia Malabey (Malabey), over an ounce of marijuana and that Howe was also involved in the dispute. The police also learned that Nakaji was killed at Malabey's apartment in Kapahulu. On April 28, 2004, police arrested Malabey, and on April 29, 2004, police arrested Howe in connection with the killing. On

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<sup>2</sup>(...continued)

The relevant part of HRS § 706-657 (Supp. 2006) provides:

**Enhanced sentence for second degree murder.** The court may sentence a person who has been convicted of murder in the second degree to life imprisonment without possibility of parole under section 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity . . . . As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime which is unnecessarily torturous to a victim[.]

April 30, 2004, police detectives interrogated Howe on three separate occasions.

During the first interrogation, which began at 9:30 a.m., Howe was deeply concerned about Malabey. He insisted that she "had no part of this" and wanted assurances that if he told "the truth[,] " she would be released and "get exonerated from court[.]" The interrogating officers told him they could give no such assurances. Howe eventually confessed to killing Nakaji and leaving her body in 'Ewa Beach. He also described in detail how he had killed Nakaji and disposed of her body.

During the second interrogation, which began at 5:10 p.m., Howe confirmed that he had killed Nakaji and disposed of her body.

During the third interrogation, which began at 7:05 p.m., Howe told police that Malabey was dealing marijuana for a man named Omar, who "was sending the guys over to strong-arm [Malabey] . . . [b]ecause she refused to sell methamphetamine, heroin and tar, Mexican tar." According to Howe, "[t]his guy had a lot of money, had a lot of power, he's in the Mexican mafia." Howe stated that people came to the apartment in Kapahulu, looking for Malabey. While these people were there, Nakaji came to the apartment and they killed her. Howe said he "never got involved[, . . .] stayed still[,]" and "made up everything for protect my family" because "[t]hey said if I said anything, they was going kill my family--me, [Malabey], [my nephew] Jonah, mom, everybody that carries our name."

On May 4, 2004, a grand jury indicted Howe for murdering Nakaji.

On October 31, 2005, against the advice of his counsel (Counsel), Howe pleaded no contest to the murder charge. At the change-of-plea hearing, Counsel told the circuit court that he had discussed with Howe "the possibilities of having a jury trial

on both the issue of whether or not he actually committed this murder, as well as whether or not it was heinous" and that Howe did "not want to fight this case at all."

The circuit court questioned Howe extensively to confirm that Howe's decision to enter a no-contest plea was knowing, intelligent, and voluntary. The circuit court confirmed that Howe was not under the influence of drugs or alcohol and that his mind was clear that morning. Howe acknowledged that he had signed a change-of-plea form provided by Counsel and had read and understood it before signing. Howe also indicated that he understood the charges against him, realized that the maximum penalty he faced was life imprisonment without the possibility of parole, and still wanted to plead no contest.

The circuit court asked Howe whether he understood that he had the following rights, which would be waived if he pleaded no contest: to have a trial, either before the court or a jury; to have Plaintiff-Appellee State of Hawai'i (the State) prove his guilt beyond a reasonable doubt; to call witnesses to testify on his own behalf; to question or cross-examine the State's witnesses; to testify or not testify; and to appeal an "unfavorable decision." Howe acknowledged that he understood these rights and knew that by pleading no contest, he would be waiving them.

The colloquy continued:

THE COURT: I want to be clear. If you plead no contest to this, your sentence is going to be life imprisonment without the possibility of parole, you understand that?

MR. HOWE: Yes.

THE COURT: Are you pleading no contest because anyone is threatening you or forcing you to do so?

MR. HOWE: No.

THE COURT: Has anyone put any pressure on you?

MR. HOWE: No.

THE COURT: Has anyone made any promises to you?

MR. HOWE: No.

THE COURT: Are you pleading no contest of your own free will?

MR. HOWE: Yes.

THE COURT: Mr. Howe, have you understood everything that I have told you?

MR. HOWE: Yes.

THE COURT: Is there anything that you would like explained to you?

MR. HOWE: I just like know this going end everything as far as trial or harassment towards my family or anything like that. That's all I like know, you know, if it stops here, not this kind later on they going bring up something. It's not going to be right, you know. That's all I wanted to know.

THE COURT: Mr. Howe, I can only talk about the trial because I don't know anything about harassment of your family, but as far as this case goes, after you go through your change of plea, then I'm going to set a date for sentencing.

MR. HOWE: Sure.

THE COURT: Then after I sentence you to incarceration for life without the possibility of parole, then I don't have any further jurisdiction over this case.

MR. HOWE: Sure, okay.

THE COURT: You have any other question?

MR. HOWE: No.

THE COURT: Have you -- do you have any questions?

MR. HOWE: No, sir.

THE COURT: Have you fully discussed your plea with [Counsel]?

MR. HOWE: Yes.

THE COURT: And you understand that [Counsel] does not agree with your decision?

MR. HOWE: Yes.

THE COURT: And you discussed with [Counsel] the reasons he feels that you're making the wrong decision?

MR. HOWE: Yes.

THE COURT: Did you also go over with [Counsel] all the possible defenses to these crimes?

MR. HOWE: Yes.

THE COURT: And are you satisfied with [Counsel's] advice?

MR. HOWE: Yes.

The circuit court then explained to Howe what the right to a jury trial entailed: that Counsel would participate in the selection of the twelve citizens who would serve as jurors and decide whether Howe was guilty or not guilty; that Counsel could excuse up to twelve prospective jurors without giving any reason; and that all twelve jurors must agree unanimously before they could find him guilty or decide that Nakaji's murder was "specially heinous, atrocious, or cruel[,] manifestating [sic] exceptional depravity."

Ultimately, the circuit court concluded that Howe's decision to plead no contest was voluntary and accepted Howe's change of plea.

In early February 2006, Howe contacted Counsel and denied killing Nakaji. Howe told Counsel that he entered the no-contest plea "because the same culprit that murdered [Nakaji] would harm, hurt or murder [Howe's] family . . . [if] all the facts concerning [Nakaji's] death aired in the media." Howe also informed Counsel that "after pleading no contest, he communicated with his family and they reassured him that they could protect themselves and that he should contest the charge against him." On March 1, 2006, Howe filed a motion to withdraw his no-contest plea.

A hearing on the motion was held on March 8, 2006. Howe testified that Nakaji was dealing drugs at Malabey's house. In April 2004, he moved in with Malabey because

[Malabey] and [Nakaji] got in one confrontation over stuffs that was missing from [Malabey's] house, and [Nakaji] threatened our family. [Nakaji] threatened [Malabey], my nephew and my family that she was going to have guys come over and hurt [Malabey's] family and us. So I stayed with [Malabey].

Howe stated that on the morning of April 22, 2004, he left his house in Waipahu and caught the bus to Malabey's house, arriving at "about 9:30, 10:00." Malabey was getting ready to go to their mother's house to take care of their mother, who suffered from Alzheimer's disease. Malabey related to Howe that she was expecting Nakaji to arrive at 11:00 a.m. However, when 11:00 a.m. passed with no sign of Nakaji, Malabey left, and Howe was alone in the house.

According to Howe, at "[a]bout 11:15, 11:30, [Nakaji] and these -- her two friends came in . . . [a]nd they asked to use [Malabey's] room." When asked to describe Nakaji's friends, Howe stated:

Mm, one was kind of Japanese Portuguese. One of them, she said his name was Boy, . . . .

. . . . And the other guy, she didn't mention his name. The other guy, they didn't really talk to me, but he was like, Hawaiian Polynesian.

Howe related that Nakaji and her friends went to Malabey's bedroom to weigh methamphetamine and he went to take a shower. When he got out of the shower and opened the bathroom door, he saw Nakaji on the hallway floor and "these guys was just beating her. One of the guys pulled one gun on me. I stopped, and they asked for [Malabey]."

Howe testified that when he told them that Malabey was not home, one of the men said that Malabey and Nakaji were working undercover for police who were setting them up. Howe

claimed that because he thought he would be shot, he did what the men wanted him to do. He helped them tie and bind Nakaji, who was dead, and "cleaned up the house as much as [he] could before [Malabey] could come home." Howe stated that he was with the men when they dropped Nakaji at the goat farm.

Howe was questioned extensively about why he had previously pleaded no contest. He stated that when he entered the plea, "I did whatever I had to do to save my family. I never like these guys come back. If they could do that to [Nakaji], they could do that to my family." Howe also testified that he pleaded no contest because he "just wanted to get this over with because until the day that [his] trial was supposed to start, [he] had no contact with [his] family, [Malabey] or anybody." Howe related that Malabey was present in the courtroom when he pleaded no contest. He told her to give his wife his phone number so he could find out "how she [was] doing and what's going on." He stated that after talking to Malabey after the hearing, he "found out that everything was -- that it wasn't a problem where she was in any danger or anything like that[.]"

Howe was then asked why he thought Malabey was in danger:

Q. Why did you think [Malabey] was in danger?

A. Because [Malabey] was out there by herself, and what happened to [Nakaji] would have happened to [Malabey] if she wasn't -- if she was there at the time.

Q. What led you to believe that?

A. Because I was there when I seen it happen. And I -- they said, you know, what I mean, even right now, whatever I just, you know, like right this minute, just knowing what I'm doing now, I can put her in jeopardy all over again. What if tomorrow they find her rolled up in one bag, or my wife or Jonah?

Q. Did they explain to you why they were going to do that?

A. If I said anything, or if I mentioned anything, I don't know who these guys was.



Q. If you said anything about what?

A. About what happened, the murder.

Q. Or if you said anything about who?

A. Them, who they are.

Q. What happened?

A. Or whatever, implicating them, or letting anybody know what happened.

Q. What would happen if you did that?

A. My family would get hurt, or they would be killed.

The following colloquy then ensued between Howe and Counsel:

Q. Do you recall being in this courtroom on Friday, October 28, 2005, the week before your trial was to begin?

A. Yes, sir.

Q. You knew that as your attorney, I had negotiated with the prosecutor?

A. Yes.

Q. You knew that if you had the -- well, you knew that if you pled guilty on Friday, October 28th, you would have received some benefit?

A. Yes, sir.

[DEPUTY PROSECUTOR]: Objection, Your Honor. That's not what happened that day. There had been no prior approval as to that. That was just a consideration, and that's a misstatement of the occurrence.

THE COURT: I'll allow him to make his record. Overruled.

[DEPUTY PUBLIC DEFENDER]:

Q. When the business week -- when Friday -- excuse me, when October 28th closed, and the day ended, what did you want to do that weekend?

A. I wanted to get in touch with my family and talk to them and let them know what I was facing, and what would -- what would be the circumstances if I did what I had to do.

I just, you know, wanted to make sure that they was okay, and that if I did, you know, take the plea agreement,

that I wouldn't be able to see them anymore, and let them know what the consequence was.

Howe then testified that he was able to speak with his wife over the weekend, but was unable to speak with Malabey until after he pleaded no contest. Howe said that after changing his plea, he called Malabey and

explained to her why I did what I did, because in that -- the day that she was in the courtroom, she was telling me not to do it, you know, just say whatever I had to say.

She wanted me to go to trial. I never knew this. She said that her and Jonah was fine. Selina was fine, that's [Malabey's] daughter, that she was staying with them.

And that whatever I got to do to get out of the situation I'm in, just tell them the truth, because if anything happens to her, then, they're going to know that whatever I said was the reason why she would get hurt.

So she told me to say just what happened, and if anything happens to her because of what I said, then, it's going to prove that what I said was true.

Howe also testified that although he was still concerned about Malabey, he had decided to fight the charges against him because "I didn't kill [Nakaji]. I said what I had to say to protect my family. I never killed [Nakaji]." He also stated that he no longer had "any hesitation about telling everybody who the true culprits are[.]"

On cross-examination, Howe agreed that he had been interrogated three times in April 2004 and that the testimony he had just given was consistent with the answers he had given during the third interrogation. He also admitted that "[a]ll the things [he] allege[d] that happened, happened before [he] pled to the murder charge in this case[.]" He further agreed that when he pleaded no contest, he "told the Judge that there were no threats . . . [and] no pressure put on [him] to plead to the murder charge[.]" Finally, he admitted that by filing the motion to withdraw his no-contest plea, he was putting his family, specifically Malabey, in jeopardy. However, "[k]nowing where

she's at," he was "now willing to put [Malabey's] life in jeopardy to prove what [he's] saying is true[.]"

On redirect-examination, Howe asserted that when he pleaded no contest, he was never asked whether anybody was threatening his family members.

On recross-examination, Howe agreed that on the day he pleaded no contest, he saw Malabey in the courtroom and asked her if she was "all right, [and] she told [him] she was all right." He also acknowledged that despite being assured by Malabey that "she was fine that day," he did not seek to withdraw his plea for three months.

The circuit court denied Howe's motion and sentenced Howe to life imprisonment without the possibility of parole. In the Order, the circuit court concluded that Howe's plea was voluntary and "no threat, force, promise or other inducement was used to obtain that plea. Nor was [Howe] taking the blame for anyone else or protecting anyone else by pleading." Conclusion of Law No. 3. The circuit court also concluded that Howe had "failed to establish 'plausible and legitimate grounds' to withdraw his no contest plea, and also failed to establish 'fair and just reasons' for his request, [and therefore,] the State was not required to establish that it had relied upon [Howe's] plea to its' [sic] substantial prejudice." Conclusion of Law No. 6 (citations omitted).

#### DISCUSSION

##### A. Whether Howe Entered His No-Contest Plea Voluntarily

"The trial court is vested with wide discretion to accept or refuse a nolo contendere plea," *State v. Medeiros*, 8 Haw. App. 39, 43, 791 P.2d 730, 733, cert. denied, 71 Haw. 669, 833 P.2d 901 (1990) (emphasis deleted), and the acceptance or refusal of a no contest plea is therefore reviewed for abuse of that discretion. The denial of a [Hawai'i Rules of Penal Procedure (HRPP) Rule] 32(d) motion to withdraw a plea of nolo contendere, or "no contest," prior to the imposition of sentence is likewise reviewed for abuse of discretion. *State v. Gomes*, 79 Hawai'i 32, 36, 897

P.2d 959, 963 (1995) (quoting *State v. Adams*, 76 Hawai'i 408, 411, 879 P.2d 513, 516 (1994) (citation omitted)); see also *State v. Costa*, 64 Haw. 564, 565, 644 P.2d 1329, 1331 (1982); *State v. Smith*, 61 Haw. 522, 523, 606 P.2d 86, 88 (1980); *State v. Jim*, 58 Haw. 574, 577, 574 P.2d 521, 523 (1978). "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."

*State v. Merino*, 81 Hawai'i 198, 211, 915 P.2d 672, 685 (1996) (brackets and footnote omitted).

Based on our examination of the entire record, we conclude that the circuit court did not abuse its discretion in accepting Howe's no-contest plea.

HRPP Rule 11 (2006) provides, in relevant part:

**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 the defendant 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 the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if the defendant pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the right to a trial is waived; and

(5) that if the defendant is not a citizen of the United States, entry of a plea to an offense for which the defendant 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.

(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.

The Hawai'i Supreme Court has explained that

it is incumbent on all trial judges to strictly conform to the guidelines provided in HRPP Rule 11. This does not mean that trial judges must resort to a ritualistic litany in determining the voluntariness of a nolo contendere plea. However, we cannot emphasize enough that all procedural components of HRPP Rule 11 should actually be complied with by the trial judges.

State v. Davia, 87 Hawai'i 249, 255, 953 P.2d 1347, 1353 (1998) (quoting State v. Cornelio, 68 Haw. 644, 647, 727 P.2d 1125, 1127 (1986) (citations omitted)).

Moreover, HRPP Rule 11(c) and (d)

implement the "constitutional requirement that a trial judge ensure that a . . . plea be voluntarily and knowingly entered." *State v. Dicks*, 57 Haw. 46, 49, 549 P.2d 727, 730 (1976) (citations omitted); see also *State v. Vaitogi*, 59 Haw. 592, 597-98, 585 P.2d 1259, 1262-63 (1978); *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1711-12, 23 L. Ed. 2d 274 (1969). In particular, HRPP 11(c), by its terms, is designed to insure that a defendant's guilty or nolo contendere plea is entered with knowledge and understanding of its consequences, while HRPP 11(d), by its terms, is similarly designed to ensure that a defendant's guilty or nolo contendere plea is entered voluntarily.

State v. Merino, 81 Hawai'i at 217, 915 P.2d at 691.

The record indicates that, in compliance with HRPP Rule 11(c) and (d), the circuit court engaged Howe in an extensive colloquy to assure that his change of plea was done knowingly, intelligently, and voluntarily and that Howe understood the consequences of his no-contest plea. The circuit court specifically asked Howe if he was pleading no contest because someone was threatening or forcing him to do so, putting any pressure on him, or had made promises to him in exchange for the change of plea. Howe answered "no" to all three questions.

Howe points out that during the colloquy conducted by the circuit court before his no-contest plea was accepted, the following exchange occurred:

MR. HOWE: I just like know this going end everything as far as trial or harassment towards my family or anything like that. That's all I like know, you know, if it stops here, not this kind later on they going bring up something. It's not going to be right, you know. That's all I wanted to know.

THE COURT: Mr. Howe, I can only talk about the trial because I don't know anything about harassment of your family, but as far as this case goes, after you go through your change of plea, then I'm going to set a date for sentencing.

MR. HOWE: Sure.

THE COURT: Then after I sentence you to incarceration for life without the possibility of parole, then I don't have any further jurisdiction over this case.

MR. HOWE: Sure, okay.

THE COURT: You have any other question?

MR. HOWE: No.

Howe argues that the circuit court erred "by not immediately addressing [his] statement concerning his family." However, the context of the colloquy suggests that Howe wished to be assured that if he pleaded no contest, there would be no trial and the State would no longer "harass" his family and later bring up new charges against them. In addressing the circuit court, Howe said that his concern was "this going end everything as far as trial or harassment" of his family was concerned. (Emphasis added.) Howe then went on to note that he wanted to know that "it stops here, not this kind later on they going bring up something." (Emphasis added.) Particularly when viewed in context of Howe's previously stated concerns about whether Malabey would be charged, it is clear that Howe was asking the circuit court whether Malabey would be charged even after his no-contest pleas--and not, as Howe suggests, expressing a concern that the persons he now suggests committed the crime would somehow harm his family. The circuit court's response to Howe--that the court had no power to give assurances with regard to

charges against his family--was both accurate and appropriate, and Howe did not ask for any further explanation.

Under the circumstances, we cannot conclude that the circuit court abused its discretion in accepting Howe's plea.

B. The Denial of Howe's Motion to Withdraw His No-Contest Plea

HRPP Rule 32(d) provides now as it did when Howe sought to withdraw his no-contest plea, in relevant part, as follows:

**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.

The Hawai'i Supreme Court has stated that "where the motion [to withdraw] is presented to the trial court before the imposition of sentence, a more liberal approach is to be taken, and the 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." State v. Marino, 81 Hawai'i at 223, 915 P.2d at 697 (quoting State v. Jim, 58 Haw. 574, 575-76, 574 P.2d 521, 522-23 (1978) (brackets omitted)).

The question of prejudice to the State is not considered unless it is first determined that a fair and just reason for the withdrawal of the plea has been demonstrated because "the absence of substantial prejudice would not support or resurrect a defendant's pre-sentence motion to withdraw a guilty or no contest plea where no fair and just reason for withdrawal had been presented." Id. at 40, 897 P.2d at 967.

"[F]air and just reasons" for granting a withdrawal of a no-contest plea arise when: (1) the defendant did not knowingly, intelligently, or voluntarily waive his or her rights;

or (2) changed circumstances or new information justified the withdrawal of the plea. Id. at 37, 897 P.2d at 964.

We have already concluded that the circuit court did not abuse its discretion in determining that Howe entered his plea voluntarily and need not address the first basis. As to the second basis, the supreme court has stated:

[A] defendant is entitled to withdraw his or her nolo contendere before imposition of sentence where: (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.

State v. Merino, 81 Hawai'i at 224, 915 P.2d at 698 (quoting State v. Gomes, 79 Hawai'i 32, 39, 897 P.2d 959, 966 (1995)).

In his motion to withdraw his no-contest plea, Howe claimed that "[c]ertainly, the fact that [Howe] withdrew his plea of not guilty, and entered a plea of no contest, out of concern for his family and out of concern for their safety, constitutes a fair and just reason for withdrawing his plea of no contest." The circuit court, however, concluded as follows:

4. [Howe] failed to carry his burden to present "fair and just reasons" to withdraw his no contest plea. State v. Gomes, 79 Hawaii 32, 897 P.2d 959 (1995). [Howe's] claim that he did not murder [Nakaji], that he pled because he feared that any reference at trial to the true culprit would place his family in danger, that prior to his plea he did not know if his family could protect themselves but subsequently learned that they could, is not credible and even if believed, is not a changed circumstance or new information that justifies withdrawal of his plea. The original trial week of July 12, 2004, was continued to February 14, 2005 and then to October 31, 2005. When [Howe] entered his plea on October 31, 2005, prospective jurors had appeared and been screened for their exposure to pretrial publicity and were waiting outside the courtroom for jury selection to begin. If [Howe's] concern for the safety of his family was truly credible and critical, he had ample opportunity to discuss the matter with them.

5. [Howe] failed to establish a claim of new information or changed circumstances with factual support



that, if believed by a reasonable juror, would exculpate him. State v. Merino, 81 Hawaii 198, 915 P.2d 672 (1996). His claim that he pled because he feared for his family's safety does not exculpate him. His allegation that others murdered [Nakaji] is not credible nor is it new information as he told police that in his third statement on April 30, 2004.

6. Because [Howe] failed to establish "plausible and legitimate grounds" to withdraw his no contest plea, State v. Costa, 64 Hawaii 564, 644 P.2d 1329 (1982), and also failed to establish "fair and just reasons" for his request, State v. Gomes, supra, the State was not required to establish that it had relied upon [Howe's] plea to its' [sic] substantial prejudice. State v. Merino, supra.

The evidence in the record supports the circuit court's conclusions as to the second basis. For example, there is evidence that Howe was already aware that his family was safe before he pleaded no contest. Indeed, at the hearing on the motion to withdraw, Howe admitted that when he entered his no-contest plea, he asked Malabey if she was "all right" and she told him that she was fine. Additionally, although Howe claimed he was willing to identify the true "culprits" responsible for Nakaji's death, he failed to identify the "culprits" who could exculpate him. Therefore, this information cannot be considered a changed circumstance or new information.

CONCLUSION

In light of the foregoing discussion, we affirm the Judgment and the Order.

DATED: Honolulu, Hawai'i, July 19, 2007.

On the briefs:

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