

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27876

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
GAUTIER TIENNI FANG, Defendant-Appellant

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 01-1-2082)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Gautier Tienni Fang (Fang) appeals from the Amended Judgment of Conviction and Probation Sentence [sic] filed on May 11, 2006 in the Circuit Court of the First Circuit (circuit court).^{1/} Fang pled guilty to nine counts of Theft in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 708-831(1)(b) (Supp. 2006) (Counts 1-9), and no contest to one count of Money Laundering, in violation of HRS §§ 708A-3(1)(a)(ii)(A) (Supp. 2006) and 708A-3(5)(b) (Supp. 2006)^{2/} (Count 10).

On appeal, Fang argues:

(1) The circuit court erred in its Finding of Fact (FOF) 6 and wrongly entered Conclusions of Law (COLs) 10 and 11 in its January 20, 2006 Findings of Fact, Conclusions of Law and Order Denying Defendant's Motion to Withdraw Plea. Fang contends the circuit court erred by denying his September 26, 2005 Motion

^{1/} The Honorable Michael A. Town presided.

^{2/} The State of Hawaii (State) charged Defendant-Appellant Gautier Tienni Fang (Fang) and the circuit court sentenced Fang under Hawaii Revised Statutes (HRS) §708A-3(5)(b) (Supp. 2006). However, in 1998, when Fang allegedly committed the crimes, subsection (5) did not have a part (a) or a part (b). The sentencing language in the 1998 subsection (5) became part of (5)(b) as of July 2, 1999.

to Withdraw Plea^{3/} because he did not realize when he entered his pleas that he was knowingly and voluntarily waiving his right to appeal a statute of limitations issue.

(2) The circuit court erred in its FOF 8 and wrongly entered COLs 6, 7, and 8 in its June 1, 2005 Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Dismiss Indictment. Fang contends the circuit court erred in denying his March 28, 2005 Motion to Dismiss Indictment (Motion to Dismiss) based on the statute of limitations because:

(a) the theft offenses, based on the dates of the misappropriation or taking of funds, occurred more than three years before the State of Hawai'i (the State) filed the Indictment, and theft, even from multiple victims, is not a continuing offense; and

(b) the money laundering, which allegedly happened immediately after each payment had been accepted by Fang, occurred more than three years before indictment.

(3) The circuit court erred in failing to dismiss the Indictment for the three-year delay in extradition and/or failure to timely serve the grand jury bench warrant.

Fang maintains that the circuit court's errors constituted a violation of his due process rights, as guaranteed by Amendments V and XIV to the United States Constitution and Article 1, §§ 5 and 14 of the Hawai'i Constitution.

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 resolve Fang's points of error as follows:

^{3/} In its memorandum in opposition to Fang's Motion to Withdraw Plea, the State notes that Fang filed his motion to withdraw his pleas on September 26, 2005; however, this motion is not in the record before this court.

(1) At the hearing on Fang's Motion to Withdraw Plea, Fang did not argue that his pleas were not knowingly and voluntarily entered because he had not knowingly and voluntarily waived his right to appeal a statute of limitations issue. Points not presented in accordance with Hawaii Rules of Appellate Procedure (HRAP) Rule 28(b) are deemed waived. HRAP Rule 28(b)(4); Kemp v. State of Hawai'i Child Support Enforcement Agency, 111 Hawai'i 367, 391, 141 P.3d 1014, 1038 (2006).

(2) Nevertheless, in denying the Motion to Withdraw Plea, the circuit court did not err for the following reasons:

(a) Fang knowingly and voluntarily pled guilty to Counts 1-9 and no contest to Count 10 of the Indictment and failed to demonstrate a "fair and just reason" for withdrawing his pleas. State v. Topasna, 94 Hawai'i 444, 452, 16 P.3d 849, 857 (App. 2000); Hawai'i Rules of Penal Procedure (HRPP) Rule 11.

(b) At the hearing on Fang's entry of his guilty/no contest pleas, the circuit court did not advise Fang specifically that he was giving up the right to appeal the case by pleading guilty, so the portion of FOF 6 that read "[t]he Court reiterated [to Fang] that by pleading guilty and no contest [Fang] was giving up the right . . . to appeal the case" was erroneous. However, the error was harmless because

(i) the guilty/no contest plea form set forth the consequences of Fang's decision to enter his pleas, including that Fang was giving up his "right to appeal anything that has happened in this case to date," and

(ii) the "Certificate of Counsel" part of the plea form indicated that Fang's counsel believed that Fang was pleading voluntarily and with an intelligent understanding of the nature of the charges and possible consequences.

(c) HRPP Rule 11 did not require the circuit court to specifically inform Fang that he was giving up his right to appeal the case by pleading guilty.

(3) By knowingly, intelligently, and voluntarily pleading guilty and no contest to the charges against him, Fang waived his right to appeal the circuit court's denial of his Motion to Dismiss and the timeliness of the State's extradition of him. State v. Morin, 71 Haw. 159, 160-62, 785 P.2d 1316, 1317-19 (1990); State v. Domingo, 82 Hawai'i 265, 266 & 268-69, 921 P.2d 1166, 1167 & 1169-70 (1996).

Therefore,

The Amended Judgment of Conviction and Probation Sentence [sic] filed on May 11, 2006 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, October 25, 2007.

On the briefs:

Stuart N. Fujioka
(Nishioka & Fujioka)
for Defendant-Appellant.

Donn Fudo,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.


Presiding Judge


Associate Judge


Associate Judge