

NOS. 28170 & 28171

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
WILLIAM K. KALILIKANE, JR. aka WILLIE K. KALILIKANE, ak
WILLIAM KAMANU, Defendant-Appellant

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 OCT 25 AM 09 19

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NOS. 03-1-1229 and 06-1-0554)

MEMORANDUM OPINION

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

In this consolidated appeal, Defendant-Appellant William K. Kalilikane, Jr. (Kalilikane) appeals the August 31, 2006 order of the Circuit Court of the First Circuit (circuit court) in Criminal No. 06-1-0554, denying his pre-sentence motion to withdraw his guilty plea.¹ Kalilikane contends that the circuit court erred in denying his motion to withdraw his guilty plea because he presented "fair and just reasons for withdrawal[.]" Kalilikane also appeals the circuit court's August 28, 2006 Order of Resentencing [and] Revocation of Probation in Criminal No. 03-1-1229.² Upon careful review of the record and the briefs submitted by the parties, we affirm.

I. BACKGROUND

On May 1, 2006, Kalilikane pleaded guilty to one count of Unauthorized Control of a Propelled Vehicle in violation of Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2006),³ and one

¹ The Honorable Steven S. Alm presided.

² As part of a plea agreement with the State, Defendant-Appellant William K. Kalilikane, Jr. (Kalilikane) agreed to, among other things, plead guilty to Unauthorized Control of a Propelled Vehicle in Criminal No. 06-1-0554, and to stipulate that "he inexcusably failed to comply with substantial terms and conditions of his probation and be resentenced to an open term of ten years of incarceration in Criminal No. 03-1-1229[.]" for the offense of Robbery in the Second Degree.

³ Hawaii Revised Statutes (HRS) § 708-836 (Supp. 2006) states:
Unauthorized control of propelled vehicle. (1) A person

count of failure to stop at a stop sign in violation of HRS § 291C-63(b) (1993).⁴ On May 1, 2006 the circuit court held a hearing on Kalilikane's motion to enter a guilty plea. At the hearing, Kalilikane submitted a signed, two page, written guilty plea form (plea form). When Kalilikane submitted the plea form, the circuit court asked him to state his name, age, and years of education. The court also asked Kalilikane if he had taken any

commits the offense of unauthorized control of a propelled vehicle if the person intentionally or knowingly exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's consent or by changing the identity of the vehicle without the owner's consent.

(2) "Propelled vehicle" means an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle.

(3) It is an affirmative defense to a prosecution under this section that the defendant:

(a) Received authorization to use the vehicle from an agent of the owner where the agent had actual or apparent authority to authorize such use; or

(b) Is a lien holder or legal owner of the propelled vehicle, or an authorized agent of the lien holder or legal owner, engaged in the lawful repossession of the propelled vehicle.

(4) For the purposes of this section, "owner" means the registered owner of the propelled vehicle or the unrecorded owner of the vehicle pending transfer of ownership; provided that if there is no registered owner of the propelled vehicle or unrecorded owner of the vehicle pending transfer of ownership, "owner" means the legal owner.

(5) Unauthorized control of a propelled vehicle is a class C felony.

⁴ HRS § 291C-63 (1993), entitled, "Vehicle entering stop or yield intersection" provides in pertinent part:

(a) Preferential right of way at an intersection may be indicated by stop signs or yield signs.

(b) Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on the other highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

alcohol, drugs, or medications in the last forty-eight hours, to which he responded "No, sir." Additionally, when asked if he had signed the guilty plea form after going over the "whole thing" with his attorney, Kalilikane stated "Yes."

The circuit court then "personally addressed" Kalilikane as required by Hawai'i Rules of Penal Procedure (HRPP) Rule 11(c):⁵

⁵ Hawai'i Rules of Penal Procedure (HRPP) Rule 11 provides in pertinent part:

(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.

(e) Plea Agreement.

(1) **IN GENERAL.** The prosecutor and counsel for the defendant, or the defendant when acting pro se, may enter into plea agreements that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to an included or related offense, the prosecutor will take certain actions or adopt certain positions, including the dismissal of other charges and the recommending or not opposing of specific sentences or dispositions on the charge to which a plea was entered. The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.

[The Court] Q. Okay. And you understand you're in court today pleading guilty to one count of Unauthorized Control of Propelled Vehicle and that you are admitting to a right of way traffic violation?

[Kalilikane] A. Yes.

Q. Okay. Now, do you understand that the unauthorized control charge is a Class C felony, so you're subject to five years in prison and a \$10,000 fine?

A. Yes.

Q. And the way the system works is, based on your record and what you're pleading to, it's even possible you would get ten years in prison, do you understand that?

A. Yes.

Q. And also, because of your priors, you're looking at a one-year, eight-month mandatory minimum based on that count, you understand that?

A. Yes.

Q. Okay. Now, do you understand what those charges are all about?

A. Yes.

(2) NOTICE OF PLEA AGREEMENT. Any plea agreement shall be disclosed by the parties to the court at the time the defendant tenders the defendant's plea. Failure by the prosecutor to comply with such agreement shall be grounds for withdrawal of the plea.

(3) WARNING TO DEFENDANT. Upon disclosure of any plea agreement, the court shall not accept the tendered plea unless the defendant is informed that the court is not bound by such agreement, unless the court agreed otherwise.

(4) INADMISSIBILITY OF PLEA DISCUSSIONS. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or of a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the offense charged or any other offense, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or penal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the offense charged or any other offense is admissible in a penal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(Emphasis added.)

Q. And do you also understand that any time somebody's going to enter a plea, it means they're choosing to do that and giving up the right to have a trial on it?

If there were a trial, the prosecutors would bring in witnesses and other evidence and try to prove the case against you beyond a reasonable doubt.

Your attorney would be able to cross-examine or ask questions of all the state's witnesses, [and] challenge all their evidence.

You folks could bring witnesses on your behalf, you could testify, if you wanted to.

If it was a jury trial and you decide you didn't want to testify, I would tell the jurors they couldn't hold your silence against you.

You'd also be able to assist your attorney in selecting a jury.

Any time somebody's going to enter a plea, it means they're choosing to do that and giving up the right to have a trial, you understand that?

A. Yes.

Q. That's what you're choosing to do?

A. Yes.

Q. And is anyone or anything forcing you or pressuring you to plead guilty today?

A. No.

The circuit court further followed Rule 11 procedure and advised Kalilikane on the consequence of his plea if he was not a citizen of the United States. After Kalilikane responded that he understood, the circuit court examined the plea agreement between the State and Kalilikane and confirmed that he understood the agreement's terms.

The court then stated:

Q. Okay. All right. And as far as the factual basis for this matter, next to number 7 on page 2 of the [guilty plea] form, it says, "On or about March 9, 2006, on the island of Oahu, I intentionally or knowingly operated Duane Balisbisana's motor vehicle without his consent and recklessly failed to stop at a stop sign." Is that all true?

A. (Pause.)

[Kalilikane's attorney]: Oh, if I may supplement.

The Court: Okay.

[Kalilikane's attorney]: Mr. Kalilikane wants the Court to know he didn't actually steal the vehicle. He did get permission from the person who had control of the vehicle, but apparently the vehicle had been reported stolen. He understands that, under the law, specifically under State versus Palisbo, which is a case the supreme court has stated, you have a duty to get permission from the registered owner, and in this particular case, Mr. Kalilikane did not have permission from Duane Balisbisana, and he does agree that he did not get permission from the registered owner to operate this vehicle.

Q. (By the Court) Okay. You agree with all that, Mr. Kalilikane?

[Kalilikane] A. Yes.

Kalilikane then pleaded guilty to both the unauthorized control of a propelled vehicle charge, and to failing to stop at a stop sign. He then signed the plea form for a second time, acknowledging that the circuit court had explained the form and questioned him regarding his decision to plead guilty. The circuit court found that Kalilikane had "entered his plea intelligently, knowingly, and voluntarily, with an understanding of the nature of the charges against him and the consequences of his plea."

On July 12, 2006 Kalilikane filed his Motion to Withdraw Guilty Plea and Re-set Case For Trial because he felt that he had been "cheated," and he was "dissatisfied with the plea agreement[.]"

On August 28, 2006 the circuit court held a hearing on Kalilikane's motion. During the hearing Kalilikane stated "I honestly didn't know that the car was stolen. I borrowed it from a friend. And I just feel like I wasn't doing anything wrong on this case." Kalilikane also said that he "didn't intentionally, knowingly attempt -- and knowingly driving the car that was stolen."⁶ After reading the transcript from the May 1, 2006 hearing, and applying the applicable case law for a HRPP Rule 32

⁶ Kalilikane also wrote to the circuit court, stating "I borrowed the car from James Haggerty not knowing the car was stolen. He told me to be back with the car in one hour from job hunting. He had the car for two weeks and I naturally I assumed it belonged to him."

Withdrawal of Plea,⁷ the circuit court denied Kalilikane's motion. On August 31, 2006 the circuit court filed its written Order to that effect.

Pursuant to Kalilikane's plea agreement with the State, discussed in footnote 2, supra, during the August 28, 2006 hearing, the circuit court revoked Kalilikane's probation in Criminal No. 03-1-1229. As a result, Kalilikane was resentenced to an indeterminate ten-year term of incarceration to run concurrently with the sentence in Criminal No. 06-1-0554.

II. POINTS ON APPEAL

Kalilikane contends that the circuit court "was wrong in denying [his] pre-sentence motion to withdraw his plea, where he presented fair and just reasons for withdrawal, i.e. that he had never expressly admitted guilt and that there was no strong factual basis for the plea." Kalilikane further contends that the revocation of his probation and resentencing in Criminal No. 03-1-1229 should accordingly be vacated.

III. STANDARD OF REVIEW

"The trial court's denial of the request [to withdraw a plea] is reviewed for abuse of discretion." State v. Smith, 61 Haw. 522, 523, 606 P.2d 10, 26 (1980).

"An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Adams, 76 Hawai'i 408, 411, 879 P.2d 513, 516 (1994) (internal quotation marks and citations omitted).

However, in State v. Topasna, 94 Hawai'i 444, 452, 16

⁷ HRPP Rule 32 provides in pertinent part:

(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.

P.3d 849, 857 (App. 2000) (quoting State v. Merino, 81 Hawai'i 198, 225, 915 P.2d 672, 699 (1996)), this court noted that when "[o]ur evaluation of the court's exercise of its discretion hinges solely upon the constitutional inquiry whether [the defendant] knowing[ly], intelligently and voluntarily entered his pleas of guilty, . . . [then] the underlying and determining mode of review . . . is *de novo*, i.e., according to the right/wrong standard, based upon an examination of the entire record."

III. DISCUSSION

A. The Circuit Court Correctly Denied Kalilikane's HRPP Rule 32 Motion to Withdraw His Plea

Kalilikane contends that the circuit court incorrectly denied his motion to withdraw his guilty plea because there was no factual basis for the plea. Specifically, Kalilikane asserts that because of his "contemporaneous denial that he had committed the charged offense, the lower court was obligated to conduct a searching inquiry addressed to the defendant personally, to ensure the defendant's complete understanding of the finality of his guilty plea if accepted" (citations and internal quotation marks omitted). However, the record shows that when accepting Kalilikane's guilty plea the circuit court properly followed HRPP Rule 11 (Rule 11) requirements. Therefore, the circuit court did not abuse its discretion in denying Kalilikane's HRPP Rule 32 (Rule 32) motion to withdraw his plea.

Rule 11 sets forth the requirements a court must follow to accept a plea of guilty or *nolo contendere*. Rule 11(c) requires that the circuit court address the "defendant personally in open court and determine that he [or she] understands" the nature of the charge, the maximum penalty possible, the defendant's right to plead not guilty, that a guilty or *nolo contendere* plea means that there will be no trial and the defendant waives his or her right have one, and that if the defendant is not a United States citizen it may have consequences on his or her ability to enter or stay in the country. Foo v. State, 106 Hawai'i 102, 111-12, 102 P.3d 346, 355-56 (2004).

Rule 11(d) requires the court to openly engage the defendant in a colloquy to make sure that the plea is entered into voluntarily. State v. Topasna, 94 Hawai'i 444, 453, 16 P.3d 849, 858 (App. 2000). Rule 11(f) requires that the court "shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

As this court stated in Topasna, 94 Hawai'i at 453, 16 P.3d at 858 (quoting Merino, 81 Hawai'i at 217, 915 P.2d at 691):

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. HRPP 11(e) also relates on its face to guilty and nolo contendere pleas and prescribes the steps to be followed in disclosing to the court and memorializing for the record the terms of plea agreements between a defendant and the prosecution, as well as insuring, as appropriate, that the defendant understands that the court is not bound by the agreement. Pursuant to HRPP 11(f), . . . the court is prohibited from entering judgment upon a guilty plea if it is not subjectively satisfied that there is a factual basis for the plea. The court must satisfy itself that the conduct which the defendant admits constitutes the offense charged in the indictment[, complaint,] or information or an offense included therein to which the defendant has pleaded guilty. While the factual basis may come from various sources, it must appear on the record.

Id. (emphasis and citation omitted; brackets in the original).

Under Rule 32(d), a defendant can request to withdraw his or her plea. However, once the trial court has accepted the guilty plea "the defendant does not have an absolute right to withdraw his [or her] plea of guilty." State v. Smith, 61 Haw. 522, 523, 606 P.2d 86, 88 (1980) (citation omitted). "[W]here the motion is presented to the trial court before the imposition of sentence, . . . the motion should be granted if the defendant has presented a fair and just reason for his [or her] request and the State has not relied upon the guilty plea to its substantial detriment." Id. (citation and internal quotation marks omitted). However, if the defendant cannot carry the burden of showing "fair and just reason" for withdrawal, there is no need to address the issue of the State's detrimental reliance on the

plea. Topasna, 94 Hawai'i at 451, 16 P.3d at 856 (citing Merino, 81 Hawai'i at 223, 915 P.2d at 697).

"The two fundamental bases for showing 'fair and just reason' for withdrawing a guilty plea are (1) that the defendant did not knowingly, intelligently and voluntarily waive the rights relinquished upon pleading guilty, or (2) that changed circumstances or new information justify withdrawal of the plea." Topasna, 94 Hawai'i at 452, 16 P.3d at 857 (citation omitted). Where, as in this case, the first of these bases is at issue, the defendant is entitled to withdrawal of his or her guilty plea if: "(1) the defendant has not entered the plea knowingly, intelligently, and voluntarily; (2) there has been no undue delay in moving to withdraw the plea; and (3) the prosecution has not otherwise met its burden of establishing that it relied on the plea to its substantial prejudice." Id. (citation and italics omitted).

Here, Kalilikane asserts that all three factors were present. We agree with Kalilikane that factors (2) and (3) have been satisfied because Kalilikane's motion to withdraw his plea was filed without undue delay, and the State does not assert that it relied on the plea to its substantial detriment. Thus, the only issue is whether Kalilikane entered his guilty plea knowingly, intelligently, and voluntarily.

HRPP Rule 11(c) and (d) "implements the constitutional requirement that a trial judge ensure that a [defendant's] plea be voluntarily and knowingly entered." Id. (citation, brackets, ellipsis, and internal quotation marks omitted). Thus, if the trial court fulfills Rule 11(c) and (d) requirements, the defendant will be deemed to have knowingly and voluntarily entered into the plea agreement. Foo, 106 Hawai'i at 112, 102 P.3d at 356 (stating that Rule 11 ensures that a plea was voluntarily and knowingly entered into).

Here, the record shows that not only did Kalilikane state to the circuit court that he understood the guilty plea form (which incorporates Rule 11's requirements) and had reviewed

it with his attorney, but that the circuit court openly addressed Kalilikane as to each aspect of Rule 11. As discussed above, the circuit court addressed the nature of the charge, the maximum penalty, Kalilikane's right to plead not guilty, the rights he waived by pleading guilty, the effects of the plea if he was not a United States citizen, that he was of clear mind, and that he entered into the plea voluntarily without any coercion. Thus, the circuit court fulfilled its obligations under HRPP Rule 11. Therefore, when Kalilikane both orally and in writing pleaded guilty he did so knowingly, intelligently, and voluntarily.

In conclusion, the circuit court was correct in determining that Kalilikane knowingly, voluntarily, and intelligently pleaded guilty to the charges of unauthorized control of a propelled vehicle, and failure to stop at a stop sign.

B. The Circuit Court Did Not Abuse Its Discretion In Determining That There Was a Factual Basis For Kalilikane's Guilty Plea

Kalilikane contends that the circuit court was wrong in accepting his guilty plea because there was not a "factual basis" for the plea after Kalilikane's "contemporaneous denial" of the charge of unauthorized control of a propelled vehicle. However, the record clearly shows that Kalilikane specifically admitted to conduct which constituted the offense of unauthorized control of a propelled vehicle, on his plea form, during the change of plea hearing, and then during the hearing on his motion to withdraw his plea.

Under HRS § 708-836, "unauthorized control of a propelled vehicle, criminal liability attaches if the defendant failed to obtain consent to operate the vehicle from the vehicle's owner." State v. Palisbo, 93 Hawai'i 344, 347, 3 P.3d 510, 513 (App. 2000). At the change of plea proceeding, Kalilikane admitted to conduct that constituted the offense:

[Kalilikane's attorney]: Mr. Kalilikane wants the Court to know he didn't actually steal the vehicle. He did

get permission from the person who had control of the vehicle, but apparently the vehicle had been reported stolen. He understands that, under the law, specifically under *State versus Palisbo*, which is a case the supreme court has stated, you have a duty to get permission from the registered owner, and in this particular case, Mr. Kalilikane did not have permission from Duane Balisbisana, and he does agree that he did not get permission from the registered owner to operate this vehicle.

Q. (By the Court) Okay. You agree with all that, Mr. Kalilikane?

A. Yes.

Furthermore, HRS § 708-836 "does not require proof that the accused knew the vehicle involved was stolen." *Id.* at 353, 3 P.3d at 519. In fact, the only proof required is that "the defendant's intentional conduct was to . . . operate the vehicle . . . without having obtained the owner's consent[.]" *Id.* Kalilikane's observation that "he didn't actually steal the vehicle" is irrelevant to his guilt or innocence under section 708-836, which imposes criminal liability regardless of whether the defendant was the person who "stole" the vehicle in the first instance. *Id.* Therefore, Kalilikane admitted to conduct which constituted the unauthorized control of a propelled vehicle when he admitted that "he does agree that he did not get permission from the registered owner to operate this vehicle."

Kalilikane also asserts that the circuit court's failure to conduct a "searching inquiry" after his "denial" of the factual basis for the plea constituted "fair and just reasons" for withdrawal of his plea.⁸ Specifically, he contends that the circuit court "absolutely failed to do [a searching inquiry] and instead only asked a single question ('Okay. You agree with all that, Mr. Kalilikane?') before proceeding to accept his pleas." However, that single question was all that was necessary under the circumstances in this case. When

⁸ Kalilikane cites *State v. Smith*, 61 Haw. 522, 524-25, 606 P.2d 86, 88-89 (1980), for this proposition. However, *Smith* requires a searching inquiry when "a tendered plea of guilty is accompanied by a contemporaneous denial of the acts constituting the crime charged[.]" *Id.* As discussed above, Kalilikane specifically admitted to conduct which constituted the crime charged, and accordingly *Smith* is distinguishable.

Kalilikane answered "yes," the proper factual basis for his plea was established because Kalilikane admitted to conduct that constituted the unauthorized control of a propelled vehicle, and pleaded guilty to that offense. See Topasna, 94 Hawai'i at 453, 16 P.3d at 858 (citing Merino, 81 Hawai'i at 217, 915 P.2d at 691). Therefore, the record shows that the circuit court was subjectively satisfied that there was a factual basis for Kalilikane's plea because "the conduct which the defendant admit[ted] constitut[ed] the offense charged[.]" Id. (emphasis in the original) (citing Merino, 81 Hawai'i at 217, 915 P.2d at 691).

Additionally, Kalilikane asserts that the circuit court's inquiry was inadequate because the court failed to engage Kalilikane regarding possible defenses to the charged offense. However, paragraph "2." of the plea form, which Kalilikane signed twice, states in pertinent part: "My lawyer explained the government's evidence against me, my possible defense(s), and the facts which the government must prove in order to convict me." Thus, the circuit court fulfilled its "obligation to ensure that [the defendant] was 'informed of the defenses which were available to him[,]'" Topasna, 94 Hawai'i at 458, 16 P.3d at 863 (quoting Carvalho v. Olim, 55 Haw. 336, 344-45, 519 P.2d 892, 898 (1974)), when Kalilikane responded that he had gone over the plea form with his attorney before he signed it. Foo, 106 Hawai'i at 113, 102 P.3d at 356 ("Inasmuch as the court found trial defense counsel had discussed possible defenses with Defendant prior to his plea, it cannot be said that Defendant made a plea involuntarily or without knowledge of the direct consequences of the plea.") (citation and internal quotation marks omitted). As the United States Court of Appeals for the Second Circuit succinctly stated:

Due process does not require that a defendant be advised of every basis on which he might escape or receive a lesser punishment for an offense that he has committed. The distinction is particularly strong where, as is the case here, the burden of persuasion with respect to the appropriate defense rests on the defendant.

Panuccio v. Kelly, 927 F.2d 106, 111 (2nd Cir. 1991) (brackets omitted).

Like the defendant in the Panuccio case, Kalilikane has the burden of proving that the affirmative defenses of HRS § 708-836(3) apply. HRS § 701-115(2)(b) (1993). Moreover, the observations expressed by Kalilikane, through his counsel, at the change of plea proceeding did not provide any basis for concluding that the affirmative defenses might be applicable.

Therefore, it cannot be said that the circuit court abused its discretion in determining that there was a factual basis for Kalilikane's plea, and denying his motion to withdraw his guilty plea.

As a result of this disposition, we further conclude that the circuit court did not err in revoking Kalilikane's probation and resentencing him in Criminal No. 03-1-1229.

IV. CONCLUSION

Accordingly, the August 31, 2006 Order Denying Motion to Withdraw Guilty Plea and Re-Set Case For Trial, and August 28, 2006 Order of Resentencing [and] Revocation of Probation, filed by the Circuit Court of the First Circuit, are hereby affirmed.

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

On the briefs:

Jon N. Ikenaga,
Deputy Public Defender,
for Defendant-Appellant.

Brian R. Vincent,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellee.

Mrs. E. Redman

Chief Judge

Corinne K. Watanabe

Associate Judge