

NO. 28849

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
DOUGLAS MILLER, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT  
(FC-CR. NO. 07-1-0309(4))

CLERK OF THE COURT  
STATE OF HAWAI'I

2008 SEP 15 AM 8:18

FILED

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Foley and Fujise, JJ.)

Defendant-Appellant Douglas Miller (Miller) appeals from the "Judgment Conviction and Probation Sentence" filed on October 15, 2007 in the Family Court of the Second Circuit (family court).<sup>1</sup>

On appeal, Miller raises two points of error: (1) the Deputy Prosecuting Attorney (Prosecutor) violated the terms of the plea agreement not to take any position with respect to Miller's oral motion for a deferred acceptance of no contest (DANC) plea (DANC Motion) by making statements to persuade the family court to deny the DANC plea, and (2) the family court abused its discretion in denying Miller's DANC Motion.

On August 6, 2007, the State of Hawai'i (State) charged Miller with Abuse of Family or Household Member, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2007).

On October 15, 2007, pursuant to an oral plea agreement, Miller pled no contest to Assault in the Third Degree, in violation of HRS § 707-712 (1993). The family court accepted the plea and sentenced Miller to, inter alia, forty-eight hours of imprisonment and one year of probation. The family court denied Miller's DANC Motion, which was made pursuant to HRS § 853-1 (1993 & Supp. 2007). The family court entered the judgment on October 15, 2007, and Miller timely appealed.

<sup>1</sup> The Honorable Richard T. Bissen, Jr., presided.

On appeal, Miller raises, for the first time, the issue of breach of the plea agreement by the State. Whether the State breached the terms of a plea agreement is a question we would normally review de novo under the right/wrong standard of review. State v. Abbott, 79 Hawai'i 317, 320, 901 P.2d 1296, 1299 (App. 1995). However, having failed to claim a breach of the plea agreement by the State at the sentencing hearing, Miller did not preserve this issue for appeal. State v. Miyazaki, 64 Haw. 611, 616, 645 P.2d 1340, 1344 (1982) ("Normally, an issue not preserved at trial is deemed to be waived.").

The State and Miller reached a plea agreement just prior to the start of trial. In exchange for a guilty or no contest plea, the State agreed to amend the original charge of Abuse of Family or Household Member to Assault in the Third Degree. The Prosecutor outlined the sentencing provisions that had been agreed on between the State and Miller. These included forty-eight hours of incarceration, one year of probation, substance abuse assessment, domestic violence intervention classes, and restitution and an apology to the victim. The Prosecutor also agreed that the State would "take no position" on Miller's DANC Motion. After the plea terms had been discussed in open court, the family court asked Miller, "Mr. Miller, is that your understanding of the plea agreement?" Miller replied, "Yes, Your Honor."

The family court then engaged Miller in a voluntariness-of-plea colloquy to assure that Miller understood what rights he was giving up and the consequences of his decision. After the colloquy, the family court found that Miller was "voluntarily, knowingly, and intelligently" entering his plea. The family court stated that it was reserving its "finding of guilt until I've heard the argument on the deferred acceptance" and asked to hear from the State on "sentencing." The Prosecutor responded as follows:

Your Honor, we would ask that you follow the agreement that's been reached. However, this case was borderline strangulation. [Miller] actually elbows her, kneed her in

the back, punched her, choked her, put his hand over her mouth, and told her to be quiet, and then also took a pillow after that because she wouldn't be quiet and put it over her face.

At that time, your Honor, the witness in this case, the victim, actually feared for her life. And, you know, she is 51 years old. So is [Miller]. [Miller] doesn't have a prior criminal record, but you know, at 51 years old, you shouldn't be doing that to a significant loved one. And this type of beating and brutality should not be accepted in our society.

Miller did not object to the Prosecutor's comments. Miller, instead, thanked the Prosecutor for agreeing to amend the charge and proceeded to argue his case. Miller did not at any time suggest that the State breached the plea agreement. The State contends its comments were limited to sentencing and at no time did it take a position on Miller's DANC Motion.

On this record, we cannot disagree with the State. Disputes over the meaning of plea agreements involve questions of fact to be addressed by the trial court. Abbott, 79 Hawai'i at 319, 901 P.2d at 1298. Miller should have raised the alleged breach before the family court at sentencing or subsequently by Hawai'i Rules of Penal Procedure Rule 35 motion and afforded the court the opportunity to hold a hearing on the alleged breach and make factual determinations as to whether a breach of the plea agreement occurred. This Miller failed to do, and thus he cannot raise the issue for the first time on direct appeal.

As to plain error review, we cannot, based on the record before us, conclude there was error which seriously affected "the fairness, integrity, or public reputation of judicial proceedings," subverted "the ends of justice," and prevented "the denial of fundamental rights." State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999).

This court's power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system--that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes.

Id. (quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 74-75 (1993)).

As to Miller's second point of error:

The grant or denial of a motion for a DANC plea is within the discretion of the [trial] court and will not be disturbed unless there has been manifest abuse of discretion. 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. Klie, 116 Hawai'i 519, 521-22, 174 P.3d 358, 360-61 (2007) (internal quotation marks and citations omitted).

We conclude that Miller has failed to show that the family court clearly exceeded the bounds of reason or disregarded the rules or principles of law or practice to Miller's substantial detriment in denying his motion for a DANC plea.

Therefore,

The "Judgment Conviction and Probation Sentence" filed on October 15, 2007 in the Family Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, September 15, 2008.

On the briefs:

Hayden Aluli  
for Defendant-Appellant.

Justine Hura,  
Deputy Prosecuting Attorney,  
County of Maui  
for Plaintiff-Appellee.



Chief Judge



Associate Judge



Associate Judge