

NO. 28799

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

STATE OF HAWAI'I, Plaintiff-Appellee,
v.
MING YUNG CHANG, Defendant-Appellant

SEN. LEONARDO
CIBENGA APPELLATE COURTS
STATE OF HAWAII

2009 MAY 29 AM 8:39

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 06-1-2213)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Ming Yung Chang (Chang) appeals from the "Order Denying Defendant's Motion to Withdraw Plea" filed on October 24, 2007, by the Family Court of the First Circuit (family court). We affirm.

I.

On November 2, 2006, Chang was charged with harassment of his wife, Xu Huarong Chang (Huarong), in violation of Hawaii Revised Statutes (HRS) § 711-1106(1)(a) (Supp. 2008). Chang initially pleaded not guilty.

On December 13, 2006, the day scheduled for trial to begin, Chang pleaded guilty pursuant to a plea agreement. Chang agreed to plead guilty to the harassment charge and stipulate to the revocation of his probation in a prior case. In return, Plaintiff-Appellee State of Hawai'i (State) agreed to request that Chang be sentenced to a one-year term of probation on the harassment charge and resentenced to a one-year term of probation for the probation revocation, both terms to be served concurrently. In the prior case, Chang had been convicted of committing third-degree assault and second-degree terroristic threatening against Huraong based on a guilty plea entered after Chang had initially pleaded not guilty.

After a change-of-plea colloquy with Chang, the family court found that Chang's plea of guilty to the harassment charge

was knowing, voluntary, and intelligent. The family court then sentenced Chang to concurrent one-year terms of probation for the harassment charge and the probation revocation, which was consistent with the parties' plea agreement.

On March 7, 2007, the family court granted Chang's motion for withdrawal and substitution of counsel, and new counsel was appointed. On March 15, 2007, more than three months after he had been sentenced, Chang filed a motion to withdraw his guilty plea pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 32(d).^{1/} Chang's motion was based on the claim that "[Chang] did not make the correct decision in giving up his right to fight [the harassment charge] because the accusation lodged against him is false." Chang's counsel later filed a second supplementary declaration in which counsel asserted that the guilty plea colloquy had been "insufficient, resulting in a plea that was not knowingly and intelligently made, as the trial court never advised Mr. Chang of his right to maintain his plea of not guilty, as is required by [HRPP] Rule 11"

On September 26, 2007, the family court held a hearing on Chang's motion to withdraw his guilty plea and orally denied the motion. The family court entered its written order denying Chang's motion on October 24, 2007.

II.

On appeal, Chang argues that the family court erred in denying his motion to withdraw his guilty plea because in accepting his plea, the family court failed to advise Chang of

^{1/} HRPP Rule 32(d) provides:

(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.

his right to "maintain his plea of not guilty."^{2/} We hold that the family court did not err in denying Chang's motion.

Chang claims that he was entitled to withdraw his plea because he demonstrated "fair and just reasons" for the requested withdrawal. However, the "fair and just reason" standard is only applicable when a defendant moves to withdraw his plea before sentencing. See State v. Gomes, 79 Hawai'i 32, 36, 897 P.2d 959, 963 (1995); State v. Jim, 58 Haw. 574, 576, 574 P.2d 521, 522-23 (1978). When a defendant seeks to withdraw a guilty plea after sentencing, the defendant must demonstrate that the withdrawal of the plea is necessary to correct manifest injustice. HRPP Rule 32(d); State v. Kido, 109 Hawai'i 458, 461, 128 P.3d 340, 343 (2006).

Here, Chang did not move to withdraw his plea until three months after his sentence was imposed. Thus, he was required to demonstrate that granting his motion was necessary to correct manifest injustice. We review the family court's decision to deny Chang's motion for abuse of discretion.

When a defendant moves to withdraw a plea of [guilty] under HRPP 32(d) after imposition of sentence, only a showing of manifest injustice will entitle the defendant to withdraw his or her plea. When a trial court denies a motion to withdraw a plea, the trial court's determination will not be disturbed on appeal unless abuse of discretion is clearly shown. The burden of establishing abuse of discretion is on appellant and a strong showing is required to establish it. An abuse of discretion occurs only 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.

Kido, 109 Hawai'i at 461, 128 P.3d at 343 (citation and internal block quote format omitted).^{3/}

^{2/} The Honorable Russel S. Nagata presided over Chang's guilty plea and sentencing on the harassment charge. The Honorable Wilson M.N. Loo presided over Chang's motion to withdraw his guilty plea.

^{3/} Chang filed his motion to withdraw his guilty plea pursuant to HRPP Rule 32(d) which is only applicable to motions to withdraw filed within ten days of sentencing. Motions to withdraw pleas filed after ten days must be pursued pursuant to HRPP Rule 40. However, because the manifest injustice standard applies to requests to withdraw pleas under both HRPP Rule 32(d) and HRPP Rule 40, and because the family court ruled on the merits, we treat Chang's HRPP Rule 32(d) motion as a HRPP Rule 40 petition.

Chang contends that the family court violated HRPP Rule 11^{4/} by failing to advise him that he had the right to persist in a plea of not guilty, which he entered at the outset of the case. Chang claims that this alleged deficiency in the family court's change-of-plea colloquy established that the granting of his motion to withdraw was necessary to correct manifest injustice. We disagree.

A trial court's failure to comply with all the requirements of Rule 11 does not per se establish manifest injustice. In State v. Aeto, 105 Hawai'i 257, 96 P.3d 586 (App. 2004), this court held that "[t]he mere fact that the [trial] court did not comply with all of the requirements of HRPP Rule 11 when [it] accepted Aeto's plea is not proof of a 'manifest injustice.'" Id. at 261, 96 P.3d at 590; see also State v. Cornelio, 68 Haw. 644, 646-47, 727 P.2d 1125, 1127 (1986).

Here, the family court's change-of-plea colloquy implicitly advised Chang that he could persist in his plea of not

^{4/} At the time that Chang pleaded guilty to the harassment charge, HRPP Rule 11(c) (2006) provided as follows:

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

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

(5) that if he is not a citizen of the United States, a conviction of the offense for which he 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.

(Emphasis added.)

guilty. The relevant portion of the colloquy is as follows:

THE COURT: Do you understand [defense counsel's] advice?

[CHANG]: (Through the interpreter) Yes.

THE COURT: Now, has she explained to you possible legal defenses you might have if you wanted to contest this and have a trial?

[CHANG]: (Through the interpreter) I don't want to go to trial.

THE COURT: Okay, but do you understand what possible legal defenses you might have if you wanted to go to trial? That's only if you wanted to go to trial.

[CHANG]: (Through the interpreter) Yes, my -- my lawyer told me all about it.

THE COURT: Okay, and knowing -- knowing all this, you wish to change your plea to guilty today?

[CHANG]: (Through the interpreter) Yes.

THE COURT: Do you understand that once you plead guilty, you cannot change your mind?

[CHANG]: (Through the interpreter) Yes, I know.

THE COURT: Okay, and that there -- there will be no trial on this?

[CHANG]: (Through the interpreter) Okay.

It would obviously be nonsensical for the family court to inquire about whether defense counsel had explained the possible legal defenses available to Chang "if [Chang] wanted to contest this and have a trial" unless Chang had the right to persist in his not-guilty plea and go to trial. The same is true of the family court's explanation that once Chang pleaded guilty, there would be no trial. Through its colloquy, the family court clearly conveyed the message that Chang could persist in his not-guilty plea and proceed to trial if that was what he wanted.

Moreover, Chang did not directly allege that prior to pleading guilty in this case, he was unaware of his right to persist in a plea of not guilty. Chang also did not demonstrate that he would have declined to plead guilty and would have insisted on a trial had the family court specifically advised him that he had the right to persist in a plea of not guilty. Thus,

Chang did not show that he was prejudiced by the alleged deficiency in the family court's change-of-plea colloquy.

Under the circumstances of this case, we conclude that Chang did not meet his burden of demonstrating that permitting him to withdraw his guilty plea was necessary to correct manifest injustice. The family court did not abuse its discretion in denying Chang's motion to withdraw his guilty plea.

III.

We affirm the "Order Denying Defendant's Motion to Withdraw Plea" entered by the family court on October 24, 2007.

DATED: Honolulu, Hawai'i, May 29, 2009.

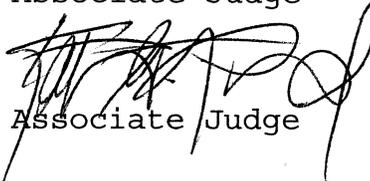
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Presiding Judge


Associate Judge


Associate Judge