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\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 25477

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

vs.

SAMUEL C. GIESE, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT  
(HPD Criminal Nos. 93374554; 93374562)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The defendant-appellant Samuel Giese appeals from the order of the district court of the first circuit, the Honorable Clarence Pacarro presiding, denying his motion to withdraw a no contest plea, originally entered on September 24, 1993, to one count of terroristic threatening in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 707-717 (1985).

On appeal, Giese alleges: (1) that the district court abused its discretion on October 17, 2002 when it denied his motion to withdraw his plea of no contest; (2) that he was denied effective assistance of counsel at his September 24, 1993 hearing; and (3) that the district court committed plain error on September 24, 1993 when it failed to conduct a proper colloquy to establish whether Giese's change of plea to no contest was knowing and voluntary.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve Giese's appeal as follows:

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(1) The district court did not abuse its discretion in denying Giese's motion to withdraw his no contest plea. Given that the liberal pre-sentence standard for granting such motions incorporates consideration of the danger of substantial prejudice to the prosecution, it follows that the more stringent "manifest injustice" post-sentence standard properly contains such consideration. See State v. Jim, 58 Haw. 574, 575-76, 574 P.2d 521, 522 (1978). Therefore, the district court legitimately balanced Giese's claim of harm resulting from reliance on misrepresentations of counsel as to a collateral effect of conviction<sup>1</sup> against the substantial prejudice faced by the prosecution in prosecuting charges arising from an incident nine years in the past.

(2) Giese failed to expressly raise the issue of ineffective assistance of counsel either in his September 24, 2002 motion to withdraw plea or at the October 17, 2002 hearing. He therefore failed to preserve the issue for appeal. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4), cited in Sprague v. California Pac. Bankers & Ins. Ltd., 102 Hawai'i 189, 195, 74 P.3d 12, 18 (2003); O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363 (1994).

(3) Giese raises his allegation of insufficient colloquy for the first time on appeal to this court. As such, it

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<sup>1</sup> The district court, in relying on established precedent, did not abuse its discretion in finding that a collateral effect of conviction, loss of access to firearms, was not converted into a direct effect of conviction merely through a defendant's inquiry on the issue to counsel. See Foo v. State, 106 Hawai'i 102, 113, 102 P.3d 346, 357 (2004); State v. Nguyen, 81 Hawai'i 279, 288, 916 P.2d 689, 698 (1996).

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is only reachable through plain error analysis. However, this court has previously held that because Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b)(1) requires that "in a criminal case, the notice of appeal shall be filed in the . . . district . . . court within 30 days after the entry of the judgment or order appealed from," an attempt years later to raise issues of plain error based on that judgment is untimely. See State v. Nguyen 81 Hawai'i 279, 293, 916 P.2d 689, 703 (1996). Giese, like Nguyen, is attempting to challenge the sufficiency of the plea colloquy in order to withdraw his no contest plea. Like Nguyen, however, Giese can only do so at this juncture if he demonstrates that either "defense counsel has inexcusably or ineffectively failed to pursue [his] appeal, or [] the lower court's decision was unannounced and no notice of the entry of judgment was ever provided." Id. Giese is not alleging either of those exceptions, and therefore, pursuant to Nguyen, we decline to notice plain error on this issue.



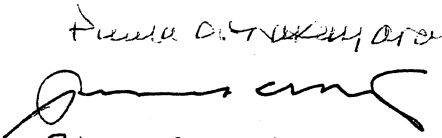
Therefore, IT IS HEREBY ORDERED that the order from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, March 21, 2006.

On the briefs:

Dwight C. Lum, for  
defendant-appellant  
Samuel C. Giese

Marvin Rampey, deputy  
prosecuting attorney, for  
the plaintiff-appellee  
State of Hawai'i

  
  
  
Kamoa E. Duffy, Jr.