NO. 22821

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
PAUL KENNETH GRUBB, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 86-0216)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Paul Kenneth Grubb (Grubb or defendant) appeals the circuit court's August 11, 1999 Findings of Fact, Conclusions of Law and Order Denying Motion to Reverse Conviction and Sentence for Lesser Included Offenses that denied Grubb's February 22, 1999 Motion for Rule 35 Relief from Illegal Sentence. We affirm.

BACKGROUND

A.

On August 11, 1986, pursuant to the statutes then existing, Grubb was indicted and charged with the following crimes involving the following female minors:

Female Minor A	Rape in the Second Degree (sexual intercourse with female less than 14 years old).
Female Minor A	Sodomy in the Second Degree (deviate sexual intercourse with female less than 14 years old).
Female Minor B	Sodomy in the Second Degree (deviate sexual intercourse with female less than 14 years old).

Female Minor B	Sexual Abuse in the First Degree (sexual contact with female less than 14 years old).
Female Minor C	Sodomy in the Second Degree (deviate sexual intercourse with female less than 14 years old).
Female Minor C	Rape in the Second Degree (sexual intercourse with female less than 14 years old).

After negotiations between Grubb's deputy public defender (DPD) and Plaintiff-Appellee State of Hawai‘i (the State), it was agreed that, in exchange for Grubb changing his guilty plea to a no contest plea, the State would recommend that Grubb be sentenced to ten-year prison terms on the five class B felonies and a five-year prison term for the Sexual Abuse in the First Degree, the one class C felony; all six prison terms be concurrent; and the State would not ask for any enhanced (extended term or mandatory minimum) sentencing.[1/]

1/ The April 29, 1987 letter from the prosecutor to the deputy public defender (DPD) for Defendant-Appellant Paul Kenneth Grubb (Grubb) stated in pertinent part:

> Pursuant to Rule 11 of the Hawaii [Hawai‘i] Rules of Criminal Procedure, and based upon your representation to me that your client desires to enter into the plea agreement set forth below, this is to advise you of the fact that the State of Hawaii [Hawai‘i] hereby accepts the following plea agreement in the above-referenced matter:
>
> > The defendant will enter "no contest" pleas to two (2) counts of Rape in the Second Degree, three (3) counts of Sodomy in the Second Degree and one (1) count of Sexual Abuse in the First Degree.
> >
> > A pre-sentence report will be prepared in this matter. The defendant and the State of Hawaii [Hawai‘i] will jointly recommend that the defendant be sentenced to a ten year prison term on the class B felony charges and a five year prison term on the class C felony charge. The State will recommend that all prison terms be serve[d] concurrent.

(continued...)

At the change of plea hearing, the judge ensured that Grubb knew of his rights and knowingly and voluntarily waived them.[2/]

1/(...continued)

> It is also agreed that the State of Hawaii [Hawai'i] will not move the Court for any enhanced sentencing. This includes the extended term, consecutive sentencing and mandatory minimum provisions of the Hawaii [Hawai'i] Revised Statutes.
>
> . . . .
>
> It is further understood that the sentence to be imposed upon the defendant is within the sole discretion of the sentencing judge, and that this department does not make any promise or representation as to what sentence the defendant will actually receive.

In a letter dated April 29, 1987, the DPD responded:

> I am writing to confirm our agreement in this case. [Grubb] will plead as charged. At sentencing we will jointly recommend the imposition of concurrent prison terms for all courts [sic], amounting to a ten year maximum term. The State will not file any motions seeking enhanced sentencing.

2/ At the May 15, 1987 change of plea hearing, the following colloquy took place between Grubb and the court:

> BY THE COURT:
> Q [Grubb], would you state your name for the record, please?
>
> A Paul K. Grubb.
>
> Q How old are you, sir?
>
> A 51.
>
> Q How much education have you had?
>
> A Sixth grade.
>
> Q Can you read and write English?
>
> A Yes, sir.
>
> Q Are you under the influence of alcohol or any other drugs?
>
> A No, sir.
>
> Q Are you under treatment for mental illness or emotional disability?

(continued...)

2/(...continued)

A Nothing other than the stomach medicine.

Q Is your mind clear this morning?

A Yes, sir.

Q Your lawyer tells me you will plead no contest to the charges, two counts of rape in the second degree, three of sodomy in the second degree and one count of sex abuse in the first degree; is that correct?

A Right.

Q Your lawyer has given me this written no contest plea which appears to have your signature on the second page. Is this your signature?

A Yes, sir.

Q Did you read this form and did your lawyer go over it fully and explain it to you before you signed it?

A Yes, sir.

Q The charges against you include two counts of rape in the second degree and three of sodomy in the second degree and one of sex abuse in the first degree. Has your lawyer explained those charges?

A Yes, sir.

Q Do you understand them?

A Yes, sir.

Q Do you have any questions about the charges?

A No, sir.

Q You understand that the maximum penalty provided by law for each count of rape in the second degree and each count of sodomy in the second degree is a ten year prison term with a $10,000 fine?

A Yes, sir.

Q That the maximum penalty provided by law for sex abuse in the first degree is a five year prison term and a $5,000 fine?

A Yes, sir.

Q Is there any possibility that this defendant may be eligible for extended term, repeat offender or other enhanced sentence?

[THE STATE]: Your Honor, as reflected in the plea form, those provisions do apply if the extended maximum indeterminate sentence provision would apply as indicated the maximum amount of incarceration would be 110 years.

(continued...)

2/(...continued)

THE COURT: The maximum fine would be $55,000?

[THE STATE]: Yes, your Honor.

BY THE COURT:
Q [Grubb], do you understand if extended consecutive terms were applied in your case you could be sentenced to a total of 110 years?

A Yes, sir.

Q And that the maximum fine would be $55,000?

A Yes, sir.

Q Knowing the penalty you face do you still wish to plead no contest to these charges?

A Yes.

Q You understand that you have the right to a speedy and public trial by jury, but by pleading no contest you are giving up your right to trial?

A Yes.

Q You understand you have the right to trial no matter how strong the evidence against you?

A Yes.

Q You understand if you demand a trial the State must prove you guilty beyond a reasonable doubt?

A Yes.

Q You understand that if you demand a trial your lawyer can cross-examine the witnesses against you?

A Yes, sir.

Q You understand that if you demand a trial you have the right to testify or to remain silent?

A Yes, sir.

Q You understand if you demand a trial you have the right to call and present your own witnesses?

A Yes.

Q You understand by pleading no contest you are giving up all these rights?

A Yes.

Q You understand if you plead no contest there will be no trial

(continued...)

2/(...continued)
at all?

A Yes.

Q Do you understand if I accept your no contest plea I will find you guilty and sentence you without a trial?

A Yes.

Q You understand after you are sentenced you will not be allowed to change your mind and go to trial if, for example, you do not like the kind of sentence you receive?

A Yes.

Q You understand if you wish you can maintain your plea of not guilty and have a full trial on the charges against you?

A I understand that.

Q Are you pleading no contest because someone is threatening you or forcing you to do so.

A No.

Q Has anyone put any pressure on you?

A No, sir.

Q Are you pleading no contest of your own free will?

A Yes, sir.

THE COURT: Is there a plea agreement in the case?

[THE STATE]: There is, your Honor. As noted in the plea form the defense as well as the State will recommend to the Court that the defendant serve a ten year prison term on the class B felonies, five years on the Class C felonies and that the terms run concurrent.

The State will not seek the enhanced sentencing under the extended term provision of the Hawaii [Hawai‘i] Revised Statutes consecutive sentencing or mandatory minimum under Hawaii [Hawai‘i] Revised Statutes.

THE COURT: [DPD], is that an accurate statement of the plea agreement?

[DPD]: Your Honor, that is the plea agreement essentially written as in paragraph nine and I would agree with the recitation of it.

BY THE COURT:
Q Has this been explained to you?

A Yes, sir.

(continued...)

Notwithstanding the plea agreement between the State and Grubb, the court, in its July 10, 1987 Judgment, sentenced Grubb to consecutive prison sentences totaling 55 years (5 times 10 plus 5). The transcript of the July 10, 1987 sentencing hearing states in relevant part as follows:

> [DPD]: Mr. Grubb's situation is somewhat exacerbated by what's waiting for him in Texas, as the Court is aware from the

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2/(...continued)

Q Do you understand it?

A Yes, sir.

Q Do you understand that this agreement under the law is not binding on the Court?

A Yes, sir.

Q Do you understand that the Court makes no promises?

A Yes.

Q Do you understand that regardless of the State's recommendation or the plea agreement the Court might decide to sentence you to the full 11- years that I mentioned?

A Yes, sir.

Q Apart from the plea agreement has any promise of any kind been made to you in exchange for your no contest plea?

A No, sir.

Q Have you completely understood this proceeding?

A Yes, sir.

Q Is there any part of it you would like to have explained?

A No, sir.

Q Have you discussed the no contest plea fully with [DPD], your attorney?

A Yes, sir.

Q Are you satisfied with his advice?

A Yes, sir.

presentence report. He was parolled [sic] in 1983 from a 20 year term -- discharged on good time for 20 year term there. He's in a situation where he remains with an outstanding charge in Texas. We expect that Texas would take action on the charge he was arrested on in 1983 as a result of this conviction.

Also what's happened is he has a case seeking extradition and that case is a first degree felony and it carries a maximum possible sentence of 25 years to life. Mr. Grubb is desirous of getting back to Texas and taking care of that.

. . . .

THE COURT: The crimes with which this case is concerned are the most serious sexual offenses this court has seen. They involve not only the normal psychological injury to the children involved, but also serious physical injury.

In the court's view they evidence callousness and lack of control which are simply not understandable. The Court having read the neurological report finds nothing to indicate that [Grubb] has any significant mental impairment.

Equally important this is not the first time that [Grubb] has been convicted of similar offenses. As early as 1960 he was convicted of carnal knowledge of a female juvenile who was in Connecticut and in 1975 in Huntsville, Texas was convicted of rape of a child and sentenced to 20 years and served eight years.

He was released on December 9th, 1983 and just a year later was indicted for the aggravated assault of a child in [sic] an outstanding warrant remains pending in that matter. Further there are other serious offenses of which the defendant has been convicted including grand larceny, robbery.

He has spent much of his adult life in prison. It is plain to this Court that despite [Grubb's] current age, which is 51, he remains a plain danger to the community and particularly to young children and the Court believes that his institutionalization is essentially [sic] for the protection of the public.

In many cases the best way to protect the public is with therapy, but in a few unfortunate cases the best alternative is long term incarceration. This in the Court's view is one of those cases and I think it is best demonstrated by the fact that despite the long periods in prison [Grubb] has immediately reoffended.

On November 16, 1987, the circuit court entered its Order Denying Motion for Resentencing and Specific Performance of Plea Agreement or in the Alternative Withdrawal of No Contest Plea.

Grubb did not appeal the July 10, 1987 Judgment.

B.

On February 6, 1996, Grubb filed his first Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 Petition to Vacate, Set Aside, or Correct Judgment or Release Petitioner From Custody (Petition One). In Petition One, Grubb asserted the following three grounds: (1) his conviction was obtained by use of a coerced confession because he was told that he would be given 110 years if he did not plead guilty or no contest, but if he did plead guilty or no contest then he would be given a ten-year sentence and all charges would run concurrently; (2) he was denied effective assistance of counsel because his lawyer never appealed the conviction or sentence; and (3) he was denied effective assistance of counsel because all the "charges were committed in the commission of one felony and therefore his sentences should have been run concurrently instead of consecutively."

On March 27, 1996, Petition One was denied. Grubb did not appeal this denial.

C.

On May 9, 1996, Grubb filed a petition under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody with the United Stated District Court for the District of Hawai‘i. On August 16, 1996, the federal magistrate recommended dismissing the petition with prejudice. This recommendation was

adopted and entered into as an order by the federal district court on September 16, 1996.

D.

On October 8, 1996, Grubb filed his second HRPP Rule 40 Petition to Vacate, Set Aside, or Correct Judgment or Release Petitioner From Custody (Petition Two). In Petition Two, Grubb asserted the following grounds: (1) denial of a right to appeal because his trial attorney did not appeal the conviction or sentence; (2) ineffective assistance of counsel because his trial counsel failed to appeal the conviction and sentence; (3) violation of the protection against double jeopardy because he was forced to plead guilty to charges that he did not commit, and his past prison record and convictions were used against him at sentencing, and (4) his conviction was obtained by use of coerced confession by using his past criminal record and falsely promising a shorter sentence.

On March 17, 1997, the circuit court denied Petition Two, without a hearing, on the grounds that Grubb was barred from raising the issues in Petition Two because such issues (a) were previously raised in or with respect to Petition One or (b) if not raised, could have then been raised and were waived or (c) were patently frivolous and without any trace of support in the record. Grubb appealed.

The issue on appeal was whether the circuit court

properly denied Grubb's Rule 40 petition without a hearing. Grubb argued he was entitled to a hearing because he presented colorable claims for post-judgment relief. On June 1, 1998, this court's Summary Disposition Order denied Grubb's appeal.

On February 22, 1999, Grubb filed a Motion for Rule 35 Relief from Illegal Sentence. In his motion, Grubb argued that "[a]ny and all of these offenses were committed at the same time, and therefore are considered one offense." He further argued that the solution of having "these multiple charges and sentences overturned, and reduced to one offense" "is fair to [Grubb] because it remedies the HRS § 701-109[3/] violation, and it is fair to the prosecution and the public because it sustains the conviction of the offense of the highest class and grade of which the defendant was convicted." (Footnote added.)

In its August 11, 1999 Findings of Fact, Conclusions of Law and Order, the circuit court denied Grubb's motion, noting that Grubb "fails to explain how Section 701-109, for example, can convert separate acts against different individuals into included offenses[,]" and that Grubb failed to "define any manner of irregularity let alone illegitimacy, regarding his sentence."

In his opening brief, Grubb initially contends that "Counts Two-Six should be remanded, and Grubb should be sentenced

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3/ The title of HRS § 701-109 (1993) is "**Method of prosecution when conduct establishes an element of more than one offense**."

on Count One (1) only." Grubb subsequently contends, however, that the following action should be taken: "[T]he convictions of Counts One (1) through Three (3), and Counts Five (5) and Six (6) remanded, and convict Grubb of the charges in Count Four (4), and sentence him to the Five (5) years imposed by the Court."

Grubb argues that five of the six offenses are included offenses and HRS § 701-109(a)(4) prohibits convictions "of more than one offense if one offense is included in the other." Grubb cites the rule that

> [t]he test for determining the singleness of a criminal episode be [sic] based on whether the alleged conduct was so closely related in time, plan and circumstances, that a complete account of one charge cannot be related without referring to details of the other charge. State v. Serventes, 72 Haw. 35, 804 P.2d 1347 (1991).
>
> A conviction for a lesser offense **bars any subsequent prosecution or concurrent punishment** for either that offense again or a greater offense of which it is a part. [emphasis added] . . . . One offense is included in the other if it is established by proof of the same or less than all facts required to establish the commission of the other offense.

(Citations omitted; emphasis in the original.)

The State responds that

> [o]n August 8, 1986, [Grubb] was indicted by the Grand Jury of the Second Circuit on six counts of rape, sodomy, and sexual abuse of [three] female children less than fourteen (14) years old. Counts One (Rape in the Second Degree in violation of Hawaii Revised Statutes ["HRS"] § 707-731(1)(b) (1985), and Two (Sodomy in the Second Degree in violation of HRS § 707-734(1)(b) (1985) alleged sexual intercourse and deviate sexual intercourse with [Female A]. Counts Three (Sodomy in the Second Degree in violation of HRS § 707-734(1)(b) (1985) and Four (Sexual Abuse in the First Degree in violation of HRS § 707-736(1)(b) (1985) alleged deviate sexual intercourse and sexual contact with [Female B]. Counts Five (Sodomy in the Second Degree in violation of HRS § 707-734(1)(b) (1985) and Six (Rape in the Second Degree in violation of HRS § 707-731(1)(b) (1985) alleged deviate sexual intercourse and sexual intercourse with [Female C]. The acts alleged were different instances of conduct that occurred over the same period of time, January 1, 1986, through April 30, 1986. With the exception of Count Four, which was a class C felony, the counts were class B felonies.

(Record citations omitted.)

Grubb responds that

> [p]ursuant to Territory v. Silva, 27 Haw. 270, a conviction of the offense of rape **necessarily** includes a finding that he committed an assault and battery. **WITHOUT THE ASSAULT AND BATTERY THERE CAN BE NO RAPE.** In the instant case, [Grubb] was sentenced and convicted of multiple offenses in the commission of the same act. This multiple conviction is illegal, and the sentence has to be vacated or corrected pursuant to [HRS §] 701-109 and prevailing State as well as Federal case law.

(Emphases in original.)

CONCLUSION

We conclude that Grubb was charged and convicted for having committed six separate and distinct culpable acts constituting six separate and distinct crimes. None of the six crimes was included in any other.

Accordingly, we affirm the circuit court's August 11, 1999 Findings of Fact, Conclusions of Law and Order Denying Motion to Reverse Conviction and Sentence for Lesser Included Offenses.

DATED: Honolulu, Hawai‘i, November 9, 2000.

On the briefs:

Paul Kenneth Grubb,
Defendant-Appellant, *pro se*. Chief Judge

Richard K. Minatoya,
Deputy Prosecuting Attorney,
County of Maui, Associate Judge
for Plaintiff-Appellee.

Associate Judge