

NO. 22768

IN THE INTERMEDIATE COURT OF APPEALS

FOR THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
JOSEPH A. MANGLICMOT, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CASE NO. CAPA 30 of 5/19/99, HPD #99-170758)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Joseph A. Manglicmot (Defendant) appeals the July 15, 1999 judgment of the district court of the first circuit which convicted him, upon his pretrial plea of *nolo contendere*, of theft in the fourth degree, in violation of Hawai'i Revised Statutes (HRS) §§ 708-833,¹ and sentenced him to pay a \$25.00 fine. Defendant takes issue with the district court's denial of his motion for deferred acceptance of his plea of *nolo contendere*, or no contest (the DANC motion), brought pursuant to HRS chapter 853. Discerning no error, we affirm.

I. Standard of Review.

Whether a court grants or denies a motion for DAGP [deferred acceptance of

¹ Hawai'i Revised Statutes § 708-833 (1993) provides that "[a] person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of \$100. . . . Theft in the fourth degree is a petty misdemeanor."

guilty plea], when seasonably made, is properly within the discretionary powers of a trial judge and when properly exercised, the judge's discretionary action will not be disturbed on appeal unless there has been a plain and manifest abuse of such discretion. *State v. Martin*, 56 Haw. 292, 294 (1975).

Generally to constitute an abuse, it must appear that the court 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. Sacoco*, 45 Haw. 288, 292 (1961).

State v. Karwacki, 1 Haw. App. 157, 159-60, 616 P.2d 226, 228 (1980).

II. Relevant Statutes.

HRS § 853-1 (1993) provided that:

(a) Upon proper motion as provided by this chapter:

- (1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor;
- (2) It appears to the court that the defendant is not likely again to engage in a criminal course of conduct; and
- (3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law,

the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and

after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

(b) The proceedings may be deferred upon any of the conditions specified by section 706-624. The court may defer the proceedings for such period of time as the court shall direct but in no case to exceed the maximum sentence allowable unless the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, in which case the court may defer the proceedings for a period not to exceed one year. The defendant may be subject to bail or recognizance at the court's discretion during the period during which the proceedings are deferred.

(c) Upon the defendant's completion of the period designated by the court and in compliance with the terms and conditions established, the court shall discharge the defendant and dismiss the charge against the defendant.

(d) Discharge of the defendant and dismissal of the charge against the defendant under this section shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is not a conviction.

(e) Upon discharge of the defendant and dismissal of the charge against the defendant under this section, the defendant may apply for expungement not less than one year following discharge, pursuant to section 831-3.2.

HRS § 853-2 (1993) governs the district court's options with respect to disposition of a DANC motion:

Upon motion made before sentence by the defendant, the prosecutor, or on its own motion, the court will either proceed in accordance with section 853-1, or deny the motion and accept the defendant's plea of

guilty or nolo contendere, or allow the defendant to withdraw the defendant's plea of guilty or nolo contendere only for good cause.

If granted, a DANC motion carries with it the consequences of noncompliance with any condition of the grant:

Upon violation of a term or condition set by the court for a deferred acceptance of guilty plea or deferred acceptance of nolo contendere plea, the court may enter an adjudication of guilt and proceed as otherwise provided.

HRS §853-3 (1993).

III. Issue Presented.

Defendant contends that the district court erred in denying his DANC motion because it erroneously applied the disqualifying provision of HRS § 853-4(12) (1993):

This chapter shall not apply when . . . [t]he defendant has been charged with a misdemeanor offense and has been previously granted deferred acceptance of guilty plea status for a prior felony, misdemeanor, or petty misdemeanor for which the period of deferral has not yet expired[.]

Defendant points out that the theft in the fourth degree offense he was charged with in this case is a petty misdemeanor offense, not a misdemeanor offense, such that he was not disqualified from a deferred acceptance of his plea by HRS § 853-4(12).

IV. The Hearing.

The hearing on Defendant's DANC motion and sentencing proceeded as follows:

[DEFENSE COUNSEL]: Yes, Your Honor. For the record, we're gonna' be moving orally for a deferred acceptance of no contest plea. The reason is that my client, when he did what he did, he was under an extreme adverse situation. He had -- he's a painter by trade, and he'd been unemployed for four years. Correct?

[DEFENDANT]: Yes. Four years.

[DEFENSE COUNSEL]: And, he's -- he tried to support himself, and he could not find work. He, basically, fell upon extremely hard times. He -- he was, basically, penniless at the end. He applied for welfare, and this was something he did because he was basically starving at the time. So, we're saying this is not likely to reoccur. We realize he does have a -- a record from a -- either it was a prior DANC [DANC plea] granted him.

We're arguing that two things that distinguish that. One is that, when he did steal a wrench, I guess, back in 1990 (nineteen ninety), he was drunk at the time. Now, he -- he wasn't -- he wasn't drunk at this time. This was a desperation act.

And, the second thing is we will note that Section 583-4(12) talks about he -- he's not eligible for a deferred acceptance if he's charged with a misdemeanor. But, here, he's only charged with a petty misdemeanor. So, we believe that being the exception, or that -- that the statute wouldn't preclude him from applying to -- to the Court.

We'd also be asking that any fine that be given be more in the nature of \$15.00 (fifteen dollars) 'cause I believe the total amount of what he stole was \$2.91 (two dollars and ninety one cents). And, we'd ask that you waive the CICF fee because right now he's a -- he's in the process of applying for welfare and he continues to remain penniless.

THE COURT: All right. Okay. [Defendant], you want to say anything before I sentence you? Add to what your attorney has said on your behalf?

[DEFENDANT]: I'm just sorry. I'm -- it's too late. I'm sorry. But, I was -- I had no money and stuff at the time, and I haven't eaten -- I hadn't eaten for a few days and stuff. So, . . .

THE COURT: Okay. All right. Mr. Prosecutor.

[PROSECUTOR]: For the Court's information, [Defendant] did receive a prior deferral back in 1991. He also has two contempt of court convictions on his abstract, as well as a Driving Without a License conviction. Chapter 853-1 of the Hawaii Revised Statutes says that a deferral is granted to people when it appears to the Court that the defendant is not likely again to engage in a criminal course of conduct.

In this case, [Defendant] does have a criminal record and would not be eligible for a deferral. The State does oppose the motion.

THE COURT: Okay.

[PROSECUTOR]: And, also, with respect to the \$50.00 fine, that would just be the standard minimum fine that the State recommends.

THE COURT: All right. Anything else?

[DEFENSE COUNSEL]: One second, please, Your Honor.

THE COURT: Okay.

[DEFENSE COUNSEL]: Okay. Your Honor, we'd ask the Prosecutor to stip'. What was the -- the underlying charge on the contempts were what?

[PROSECUTOR]: It just says contempts.

[DEFENSE COUNSEL]: Okay. Your Honor, we -- we're just gonna' say that, basically, at this point the representations, we're absolutely not sure what the contempts were for, but we suspect that it's like now . . .

THE COURT: All right. Okay.

[DEFENSE COUNSEL]: It's not -- he's not -- this is not a career criminal, Your Honor.

THE COURT: Okay. All right. Because -- [Defendant], because you already received a DANCP in the past, I'm gonna' deny your request for another DANCP this afternoon. So -- and, I'm just gonna' fine you \$25.00 (twenty five dollars), and that's it. Waive the CICF. Okay.

[DEFENDANT]: Okay. Thank you.

THE COURT: All right. Thank you.

[DEFENSE COUNSEL]: And, Your honor, just for the record, we're gonna -- we're gonna' respectfully move to stay the implementation of ths sentence pending an appeal on this issue.

THE COURT: All right. Request denied. Thank you.

[DEFENSE COUNSEL]: Okay. Thank you.

V. Discussion.

The success of Defendant's appeal depends entirely upon his assertion that the district court based its denial of his DANC motion exclusively upon the disqualifying provision of HRS § 853-4(12). For the record contains ample justification in Defendant's background for the court to deny his DANC motion under the general eligibility factors set out in HRS §§ 853-1(a)(1)-(3).

Defendant seizes upon the comment the court made as it denied his DANC motion -- "because you already received a DANCP in the past, I'm gonna' deny your request for another DANCP" -- in arguing that the court's denial was based exclusively, and

therefore erroneously, upon HRS § 853-4(12). By the same token, Defendant rejects the State's argument that the court based its denial instead upon the general eligibility factors contained in HRS §§ 853-1(a)(1)-(3). In Defendant's words:

The State claims that the Lower Court denied Defendant's motion for a DANC because Defendant had already received a prior DANC. [Answering Brief at Page 2 (AB at 2)] This is absolutely correct; the Lower Court used these exact words. However, the State then goes on to characterize the Lower Court's reasoning, in these terms, as a manifestation of its application of H.R.S. Section 853-1. (AB at 3) There are no words in the literal language of the record to support this assertion.

. . . .

The record on appeal does not indicate that the Lower Court used any words which approximated this language. It did not say, for example, "[Defendant] because it does not appear to me that you are not likely again to engage in such criminal behavior, I'm gonna deny your request for another DANCP this afternoon". Instead, the Lower Court, as the State points out, used the following literal words:

"[Defendant], because you already received a DANCP in the past I'm gonna deny your request for another DANCP this afternoon"

AB at 10; Tr. at 6.

(Emphases, capitalization, punctuation and bracketing in the original.)

In the absence of a definitive statement by the court of the basis for its denial, we do not find it profitable to focus out of context on a single judicial comment.

The comment relied upon by Defendant may support his interpretation, as HRS § 853-4(12) disqualifies a defendant from its chapter's benefits only if the defendant "has been previously granted deferred acceptance of guilty plea status[.]" We search in vain, however, for mention by the court, or by anyone else at the hearing, of the additional requirement for disqualification, that "the period of deferral [for the previous DANCP] has not yet expired." HRS § 853-4(12). If the court were indeed basing its decision as Defendant argues it did, it would certainly have inquired into that additional element, for many pertinent questions arise about the expiration of the statutory deferral period for a 1991 DANCP that arose "when he did steal a wrench, I guess, back in 1990[.]" See HRS § 853-1(b).

The court's comment might just as well support the State's position. The prosecutor told the court at the hearing about Defendant's previous DANCP. He also informed the court about Defendant's two previous contempt-of-court convictions, and about Defendant's previous conviction for driving without a license. Thereupon, the prosecutor argued that

Chapter 853-1 of the Hawaii Revised Statutes says that a deferral is granted to people when it appears to the Court that the defendant is not likely again to engage in a criminal course of conduct.

In this case, the defendant does have a criminal record and would not be eligible for a deferral. The State does oppose the motion.

(Emphasis supplied.) Almost immediately thereafter, the court made its ruling. Hence, in context, the court's words reasonably support an interpretation that the court considered Defendant's general background, and especially his previous DANCP which, as it turns out, was improvidently granted, and thereupon could not conclude that he "is not likely again to engage in a criminal course of conduct[,]" a required element for deferral under HRS § 853-1(a)(2).

VI. Conclusion.

Defendant's argument does not amount to the positive showing necessary to overcome the assumption that no error has been committed. Au-Hoy v. Au-Hoy, 60 Haw. 354, 358, 590 P.2d 80, 83 (1979). As the court's decision on the DANC motion is well supported by the entire record of the proceeding, we discern no indication that the court "disregarded rules [or] principles of law or practice to the substantial detriment of a party litigant." Hence, the court did not commit "a plain and manifest abuse of [its] discretion" in denying Defendant's DANC motion,

and we affirm its July 15, 1999 judgment. Karwacki, 1 Haw. App
at 159-60, 616 P.2d at 228.

DATED: Honolulu, Hawaii, April 5, 2001.

On the briefs:

Brian Custer for
defendant-appellant.

Chief Judge

Loren J. Thomas,
Deputy Prosecuting Attorney,
for plaintiff-appellee.

Associate Judge

Associate Judge