

NOT FOR PUBLICATION

NO. 25148

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
OSOVALE ATAPUAI, Defendant-Appellant,
and FAIVAE TUPUIAVAO, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 96-0747)

MEMORANDUM OPINION

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

Defendant-Appellant Osovale Atapuai (Atapuai or Mr. Atapuai) appeals from the May 6, 2002 order entered by the Circuit Court of the First Circuit (the circuit court), Judge Wilfred K. Watanabe (Judge Watanabe) presiding, denying Atapuai's October 18, 2001 Motion to Withdraw Plea of No Contest and to Reset Case for Trial (motion to withdraw plea). We affirm.

BACKGROUND

Atapuai and his cousin, Faivae Tupuiavao (Mr. Tupuiavao), were arrested on the night of April 4, 1996, after they sold thirty dollars worth of rock cocaine to an undercover police officer. On April 5, 1996, Atapuai was charged with one count of Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(c) (1993).

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At a hearing on November 1, 1996, Atapuai pled no contest to the charge. Judge Watanabe conducted the following colloquy to determine whether Atapuai's plea was voluntary:

BY THE COURT:

Q. Your name is Osovale Atapuai?

A. Yes.

Q. This says you're 24 years old. You finished ten years of school?

A. Yes.

Q. You can read and write and understand English?

A. Yes.

Q. Are you under the influence of alcohol or any other drugs today?

A. No.

Q. Are you under treatment for any mental illness or emotional disability?

A. No.

Q. Your mind is clear this morning?

A. Yes.

Q. This plea form that your lawyer has handed in, on the second page dated today there's a signature Osovale Atapuai. That's your signature?

A. Yes.

Q. Now, before you signed the form, did your lawyer go over the form with you and explain all of the different terms and provisions to you?

A. Yes.

Q. Do you have any questions about anything that appears on the form?

A. No.

Q. And he explained the charge against you and what it involves?

A. Yes.

Q. He told you that there is a possibility of a ten-year prison term and 25,000 dollar fine?

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A. Yes.

Q. And he also explained that you have certain rights which include the right to have a jury trial of your case, the right to make [Plaintiff-Appellee State of Hawaii (the State)] prove the charge against you beyond a reasonable doubt, the right to put on any defenses you might have, and also the right to appeal any conviction that might result. You understand?

A. Yes.

Q. And you understand when you plead no contest, you give up all of those rights?

A. Yes.

Q. Now, are you pleading no contest because anyone is threatening you or forcing you to do so?

A. No.

Q. You are pleading no contest of your own free will?

A. Yes.

THE COURT: And there's no plea agreement in the case.

[DEPUTY PROSECUTING ATTORNEY]: No, Your Honor.

BY THE COURT:

Q. Are you satisfied with the help and advice that your lawyer has given you in this case?

A. Yes.

THE COURT: [Deputy Prosecuting Attorney], a brief factual basis for the plea.

[DEPUTY PROSECUTING ATTORNEY]: If the State had gone to trial, the State would have proven the following: That on or about April 4th, 1996, within the City and County of Honolulu, State of Hawaii, [Mr. Atapuai] was engaged, along with [Mr. Tupuiavao], in distributing rock cocaine.

The specific details are that at about 9:30 that evening, an undercover officer drove up to the area where they were at, Maunakea and Pauahi. And that the officer made a contract or offered 30 dollars for a piece of rock cocaine and that both [Mr. Atapuai] and [Mr. Tupuiavao] sold him a piece of rock cocaine.

BY THE COURT:

Q. Mr. Atapuai, what is your plea to Promoting a Dangerous Drug in the Second Degree, guilty, not guilty, or no contest?

A. No contest.

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THE COURT: I find [Mr. Atapuai] voluntarily enters his plea of no contest with an understanding of the nature of the charge against him and the consequences of his plea.

The written no-contest plea form that Atapuai signed on

November 1, 1996 included the following statement:

6. I know that I still have the right to plead not guilty and have a trial by jury or by the court in which the government will be required to prove me guilty beyond a reasonable doubt. I know that in a trial, I can see, hear and question the witnesses who may testify against me, I can call my own witnesses to testify for me, and I do not have to take the stand and testify if I do not wish to do so. I know that I have a right to a speedy and public trial. I know that by pleading in this matter, I am giving up my right to a trial and may be found guilty and sentenced without a trial of any kind.

Following a hearing on April 2, 1997 before Judge Watanabe, Atapuai was sentenced to five years' probation and one hundred hours of community service. More than four and a half years later, on October 18, 2001, Atapuai filed a motion to withdraw his no-contest plea, arguing that

although the colloquy between [Atapuai] and the [c]ourt was quite comprehensive, [Atapuai] was not informed specifically in open court that he had "the right to plead not guilty, or to persist in that plea if it has already been made," as required by [Hawai'i Rules of Penal Procedure] Rule 11. . . . As a result, the plea cannot be considered voluntary.

At a February 20, 2002 hearing on the motion before Judge Watanabe, Atapuai testified as to why his plea had been involuntary:

BY [NEW DEFENSE COUNSEL]:

Q Good morning, Mr. Atapuai. Would you state your full name for the record.

A Osovale Atapuai.

Q How old are you, sir?

A Twenty-nine.

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Q Do you recall entering a no contest plea to promoting a dangerous drug in the second degree on or about November 1st 1996?

A Yes.

Q Do you recall that day and entering a no contest plea?

A Well, yes.

Q Before entering your no contest plea how many times had you talked to your lawyer about the facts of your case?

A Not many.

Q Who was your lawyer at the time?

A Joe Mottl.

Q When you say "not many," what do you mean by that? To the best of your recollection?

A I only seen him court dates, like a couple minutes before I had court dates.

Q Did you ever go to his office and sit down and go over police reports or anything like that?

A No. Never.

Q So in discussing your case it was a couple minutes on one or two occasions?

A I had court appearances, like a couple minutes before.

Q So a total of how many minutes do you think you talked about your case with your lawyer?

A Maybe five or less.

Q Okay. Did you discuss going to trial in that matter before you entered your no contest plea with your attorney?

A Not that I know of, no.

Q What exactly did your attorney advise you to do as far as proceeding with that case? I'm talking about Mr. Mottl.

A Really, I don't remember. He just --

Q Do you recall discussions with him about the strength of your case at trial?

A No, nothing like that.

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Q And the proceedings and how the trial would play out, anything like that?

A No.

Q No. Okay. Why did you decide not to go to trial and enter a no contest plea.

A He just told me the best he can do, or something like that. He just told me to plea out.

Q And so he did talk to you about getting a deferral of your no contest plea and maybe getting it wiped off your record at some point.

A I don't remember.

Q You don't remember that. But as far as you know, discussions about going to trial, there really wasn't much discussion about that; is that correct?

A No.

Q Yes?

A I mean yes.

Q So you basically just kind of did what your lawyer told you after the couple of minutes that you talked with him outside of courtrooms?

A That was my first time. I didn't know what was going on.

Q First time?

A They didn't explain nothing.

Q First time that --

A -- in court.

Q In criminal proceedings like the one that you were in at that time?

A Yes.

[NEW DEFENSE COUNSEL]: I have nothing further from the witness, Your Honor.

THE COURT: [Deputy Prosecuting Attorney].

[DEPUTY PROSECUTING ATTORNEY]: I don't have any questions, Your Honor.

THE COURT: Thank you.

THE WITNESS: Thank you.

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By a written order dated May 6, 2002, Judge Watanabe denied Atapuai's motion to withdraw his plea. This timely appeal followed on June 4, 2002.

DISCUSSION

The denial of a defendant's motion to withdraw a no-contest plea after imposition of sentence is reviewed on appeal for abuse of discretion. State v. Adams, 76 Hawai'i 408, 411, 879 P.2d 513, 516 (1994). Moreover, after sentence has been imposed, "only a showing of manifest injustice will entitle the defendant to withdraw his or her plea." State v. Nguyen, 81 Hawai'i 279, 286, 916 P.2d 689, 696 (1996).

Atapuai contends that he should have been allowed to withdraw his guilty plea because he was never told by the circuit court that he had a right to plead not guilty. While it is true that the circuit court never explicitly informed Atapuai that he had "the right to plead not guilty," the transcript of the November 1, 1996 hearing indicates that the circuit court implicitly advised Atapuai of his right to plead not guilty and go to trial:

Q. And [your lawyer] also explained that you have certain rights which include the right to have a jury trial of your case, the right to make the State prove the charge against you beyond a reasonable doubt, the right to put on any defenses you might have, and also the right to appeal any conviction that might result. You understand?

A. Yes.

Q. And you understand when you plead no contest, you give up all of those rights?

A. Yes.

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Additionally, the circuit court specifically asked Atapuai, "[W]hat is your plea to Promoting a Dangerous Drug in the Second Degree, guilty, not guilty, or no contest?" (Emphasis added.) Atapuai was thus informed of his option to plead not guilty. Atapuai also signed a written form acknowledging that he had "the right to plead not guilty and have a trial by jury or by the court in which the government will be required to prove me guilty beyond a reasonable doubt."

In light of the record, we conclude that no "manifest injustice" will occur if Atapuai is not allowed to withdraw his no-contest plea. The circuit court thus did not abuse its discretion by denying Atapuai's motion to withdraw plea.

CONCLUSION

The Order Denying Motion to Withdraw Plea of No Contest and to Reset Case for Trial entered by the circuit court on May 6, 2002 is affirmed.

DATED: Honolulu, Hawai'i, August 14, 2003.

On the briefs:

Richard Naiwieha Wurdeman
for defendant-appellant.

James M. Anderson, Deputy
Prosecuting Attorney, City
and County of Honolulu for
plaintiff-appellee.