NOT FOR PUBLICATION

NO. 25055

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
DANIEL ALAN JOHNSON aka STEVEN JAMES DAY, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 95-170)

SUMMARY DISPOSITION ORDER
(By: Burns, C. J., Watanabe and Lim, JJ.)

Daniel Alan Johnson, aka Steven James Day (Johnson), appeals the April 3, 2002 order of the circuit court of the third circuit[1] that granted the State's July 15, 1998 motion to revoke his probation, then re-sentenced him to a ten-year, indeterminate term of imprisonment for manslaughter.

Upon a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we resolve Johnson's points of error on appeal as follows:

1. Johnson first attacks, on several grounds, the court's April 18, 2002 order that denied his April 3, 2002 motion to withdraw his on-the-record admission that he had committed and been convicted of a crime in Minnesota while on probation, which was the reason the court granted the State's motion for

[1] Unless otherwise noted, infra, the Honorable Riki May Amano presided over all proceedings in this case.

revocation of his probation. We conclude the court did not abuse its discretion, cf. State v. Adams, 76 Hawai‘i 408, 411, 879 P.2d 513, 516 (1994) ("the trial court's denial of [a motion to withdraw plea] is reviewed for abuse of discretion" (citation omitted)), in denying Johnson's motion to withdraw admission, for the following reasons:

a. Johnson argues that (i) the affirmative, due process defense of entrapment by estoppel, which we recognized in State v. Guzman, 89 Hawai‘i 27, 37, 968 P.2d 194, 204 (App. 1998); and (ii) the affirmative defense of mistake of law, Hawaii Revised Statutes (HRS) § 702-220 (1993), both required withdrawal of his admission, because he reasonably relied in pleading guilty to the Minnesota crime on alleged assurances, made by the Minnesota probation officer exercising courtesy supervision over him, that his Hawai‘i probation would not be revoked for the resulting conviction. We disagree. Entrapment by estoppel and HRS § 702-220 apply only where an authorized government official or official pronouncement, respectively, assured a defendant that his conduct, otherwise criminal, was legal. Guzman, 89 Hawai‘i at 40-41, 968 P.2d at 207-208; HRS § 702-220. They do not apply to assurances about the consequences of a change of plea. Even if, *arguendo*, they did apply here, Johnson's reliance on the alleged assurances of the Minnesota probation officer was not objectively reasonable, an essential element of both affirmative defenses. Guzman, 89 Hawai‘i at 42, 968 P.2d at 209; HRS § 702-

220. Johnson was twice warned by the court below, and did twice acknowledge -- both times on the record and before he was placed on his Hawai‘i probation -- that a violation of the terms and conditions of his probation would surely result in revocation and likely end with a ten-year prison sentence. Indeed, Johnson was informed in the Minnesota court that took his guilty plea, and did acknowledge -- on the record and just before he tendered his plea -- that "you are on supervised probation to the . . . State of Hawaii[,]" and that "there are no specific guarantees here as to what effect [your guilty plea] may have on the Hawaii probation."

b. Johnson notes that HRS § 353-81 (1993) (the "Interstate Parole and Probation Compact") required Minnesota to apply "the same standards that prevail for its own probationers[,]" HRS § 353-81(2), to its courtesy supervision of him. Hence, Johnson asserts, HRS § 353-81(2) and the full faith and credit clause of the United States Constitution required that the State of Hawai‘i abide by the Minnesota probation officer's alleged assurances to and agreements with him *vis a` vis* revocation of his Hawai‘i probation. On the contrary, they do not.

c. Johnson contends the court deprived him of the right to a hearing on his motion to withdraw admission, a right guaranteed to him by HRS § 706-625(2) (Supp. 2003) and the due process clauses of the State and federal constitutions. The

court's April 18, 2002 order that denied the motion reflects, however, that "[o]n April 3, 2002, Defendant's Motion To Withdraw Admission to Plaintiff's Motion For Revocation of Probation and to Resentence came regularly for hearing before the Honorable Judge Riki May Amano[,]" with Johnson and his present counsel in attendance. We surmise the motion was heard and denied just before re-sentencing. That hearing did not cease to exist just because Johnson failed to order a transcript of the April 3, 2002 hearing and re-sentencing and designate it to the record on appeal.

2. Johnson next attacks, on numerous grounds, the court's[2] September 1, 1999 findings of fact, conclusions of law and order that denied his March 30, 1999 motion to withdraw his plea of no contest to manslaughter. We conclude the court did not abuse its discretion, Adams, 76 Hawai‘i at 411, 879 P.2d at 516, in denying Johnson's motion to withdraw plea, for the following reasons:

a. Johnson argues that the court should have allowed him to withdraw his no contest plea because the requirements of Hawai‘i Rules of Penal Procedure (HRPP) Rule 11 were not observed for what Johnson calls the second and third "plea agreements" in this case.[3] The fundamental problem with

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[2] The Honorable Greg K. Nakamura, judge presiding.

[3] Defendant-Appellant Daniel Alan Johnson, aka Steven James Day, concedes on appeal that his April 4, 1997 no contest plea to manslaughter, (continued...)

this argument is that the second and third agreements were not "plea agreements," as Johnson would have it, but agreements to amend the sentence originally agreed to by the parties. No further change of plea was contemplated or involved in the second and third agreements. Indeed, both Johnson and the State acknowledged in pleadings below that Johnson was to maintain his original plea of no contest under the second agreement. And Johnson testified, at the June 30, 1999 hearing on his motion to withdraw plea, that "[b]asically everything was changed [under the second agreement] except my no contest plea." As for the third agreement, the attorney who negotiated the agreement for Johnson testified at the same hearing, under questioning by Johnson's present counsel, as follows:

> Q. Now, Mr. De Lima, on the -- in the further, um, uh, settlement discussions between, uh, Mr. Johnson and the State of Hawaii that you were involved in, the subsequent sentencing or resentencing, uh, do you recall whether or not a written guilty plea or no contest form similar to Defendant's Exhibit F [Johnson's April 4, 1997 "Guilty Plea/No Contest" form] was used in those later proceedings?
>
> A. Uh, no, I don't believe there was any other because we didn't have a change a [sic] plea. The same plea was in effect; all that was occurring is that Mr. Johnson was provided probation. So there was no -- there was no plea change.
>
> Q. Okay. The terms and conditions of the -- of the sentence changed but not the plea itself; is that correct?
>
> A. Yes. He was provided release rather than sentenced to prison.

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[3](...continued)
under a plea agreement, was taken and accepted by the circuit court of the third circuit in substantial compliance with Hawai'i Rules of Penal Procedure (HRPP) Rule 11: "The first agreement occurred on April 4, 1997, where a hearing was held that substantially complied with HRPP Rule 11." Opening Brief at 17.

> Q. And were these discussions that you had with the Hawai'i Prosecutor's Office, the State of Hawaii?
>
> A. These are matters of record[.]

Because the second and third agreements did not contemplate nor involve a further change of plea, the requirements of HRPP Rule 11 simply did not apply to those later agreements.

b. Johnson also argues that the court should have permitted him to withdraw his plea because the State breached various terms of the three agreements, as he understood those terms to be. First, Johnson asserts that the original plea agreement provided for punishment after plea limited to "16 months in prison and 8 months on parole in the State of Minnesota." Opening Brief at 19. Whatever merit Johnson's interpretation of the original plea agreement might possess, it is of no moment because the subsequent agreements superseded the original plea agreement as to sentencing and waived any breach thereof. Second, Johnson complains that the second agreement was breached because he "was not placed on probation within a reasonable time after sentencing." Opening Brief at 22. Here again, the second agreement was superseded and any breach thereof was waived when Johnson entered into the third agreement. Third, Johnson avers that, when the court informed him that the subsequent agreements would "convert" his ten-year prison term to five years of probation, he understood that if his probation was revoked, his maximum exposure upon re-sentencing would be a five-year prison term. Johnson's understanding was clearly not a

legitimately reasonable one. Cf. State v. Abbott, 79 Hawai‘i 317, 320, 901 P.2d 1296, 1299 (App. 1995) (a defendant's interpretation of a plea agreement must have "reasonable grounds[,]" and his expectations derived therefrom must be "legitimate" (citations and internal quotation marks omitted)). As noted above, Johnson was twice warned by the court and did twice acknowledge -- both times on the record and before he ultimately agreed to be placed on probation -- that a violation of the terms and conditions of his probation would surely result in revocation and likely end with a ten-year prison term.

c. Johnson contends the court should have permitted him to withdraw his plea because psychological conditions and medications rendered him unable to knowingly and voluntarily enter into the three agreements. Johnson testified to that effect at the June 30, 1999 hearing on his motion to withdraw plea. Obviously, the court did not believe his testimony, because the court found that "Defendant has not shown that he was not able to make knowing, intelligent and voluntary decisions in regard to his change of plea and associated matters"; and concluded that "Defendant knowingly, intelligently and voluntarily entered into the plea agreement." We will not disturb the court's assessment of Johnson's credibility in this respect. See, e.g., Tachibana v. State, 79 Hawai‘i 226, 239, 900 P.2d 1293, 1306 (1995). Furthermore, our independent review of the record of Johnson's many colloquies with the court reveals

that he was at all times a most lucid, informed and assertive interlocutor.

d. Johnson avers that the court should have allowed him to withdraw his no contest plea because he did not "expressly consent to the second and third agreements." Opening Brief at 26. While it is true Johnson did not utter any magic words -- such as, "I consent to the agreement" -- at the June 24, 1997 and November 10, 1997 hearings in which the second and third agreements, respectively, were put on the record and implemented, it is obvious from the transcripts of the two hearings that Johnson was present when each agreement was put on the record by counsel, and that Johnson thereafter clearly communicated his assent to each. As to the second agreement, under which he was to be put on probation instead of imprisoned:

> THE COURT: Okay. Mr. Johnson, you have anything to say before this Court sentences you?
>
> THE DEFENDANT: Yes, your Honor.
>
> Um, I understand what I have to do on probation and I will abide by all the conditions of probation. And my intent completely is to go back to school and get a profession. Um, this has been kind of a tough time for me here and I believe at this time it's taught me something, your Honor. And, um, and I plan -- I plan to do well on probation without any problems. And I am sorry for what happened in this case.

As to the third agreement, under which probation was finally arranged:

> THE COURT: Mr. Johnson, you understand what's going on?
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> THE DEFENDANT: Yes, I do, Your Honor.
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> THE COURT: And are you clear thinking at this time?
>
> THE DEFENDANT: Yes, I am.

> THE COURT: And I know that you are able to understand English. I've seen you in court many times and reviewed many of your papers.
>
> You -- do you have any questions about what is happening?
>
> THE DEFENDANT: No, I don't, Your Honor.
>
> THE COURT: You understand that you will not be able to withdraw your plea to manslaughter?
>
> THE DEFENDANT: I realize that.

e. Citing Adams, supra, Johnson contends the court erred in not affording him his "choice of remedies"; in other words, withdrawal of his plea rather than re-sentencing. See Adams, 76 Hawai'i at 414-15, 879 P.2d at 519-20. Johnson forgets that the Adams choice of remedies is available only "where a defendant is denied due process because the prosecution violates a plea agreement[.]" Id. at 414, 879 P.2d at 519 (citations omitted). Here, Johnson waived any breach of an agreement by the State when he consented to the third agreement and the court thereupon gave him exactly what he had bargained for.

f. Johnson asserts that the court should have permitted him to withdraw his plea because of various violations of his right to due process under the State and federal constitutions. The one supporting argument Johnson raises that is not considered and rejected elsewhere herein is, that "the trial court denied him of his right to allocution prior to the resentencing on November 10, 1997." Opening Brief at 29. This argument, too, lacks merit. As quoted above, the court afforded

Johnson full allocution at the sentencing hearing on June 24, 1997. Further, at the November 10, 1997 hearing in which Johnson's sentence was amended, the court, as quoted above, afforded Johnson ample opportunity to be heard. We question, at any rate, what harm a lack of formal allocution might forebode where Johnson was sentenced exactly as he had asked. See State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995) (regarding harmless error).

g. Johnson asserts the court imposed an illegal sentence on June 24, 1997, and on November 10, 1997. In support of this assertion, Johnson rattles off about ten -- if we apprehend them correctly -- summary arguments. He includes numerous statutory and constitutional citations, some of which cannot be located. What Johnson does not do is explain why the court should have allowed him to withdraw his plea because of the purportedly illegal but now superseded sentences. If the sentences were indeed illegal, the remedy was not withdrawal of plea, but re-sentencing. See HRPP Rule 35. And that remedy is now moot in any event, in light of Johnson's current sentence, imposed on April 3, 2002, which he does not assail on appeal.

h. Finally, Johnson faults a number of the court's September 1, 1999 findings of fact and conclusions of law. However, the bases for his objections are, for the most part, arguments we have already considered and found wanting. The others are either inconsequential or incomprehensible, or both.

Therefore,

IT IS HEREBY ORDERED that the court's April 3, 2002 order of revocation of probation and re-sentencing; its April 18, 2002 order denying Johnson's motion to withdraw admission; and its September 1, 1999 findings of fact, conclusions of law and order denying Johnson's motion to withdraw plea, are affirmed.

DATED: Honolulu, Hawai‘i, February 6, 2004.

On the briefs:

Harry Eliason, for
defendant-appellant.

Michael J. Udovic,
Deputy Prosecuting Attorney,
County of Hawai‘i, for
plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge