

NOT FOR PUBLICATION

NO. 26600

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

STATE OF HAWAI'I, Plaintiff-Appellant, v.
ROBERT H. HENNEMAN, JR., Defendant-Appellee

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 91-0223(3))

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant State of Hawai'i (State) appeals from the Order Granting Motion to Withdraw No Contest Plea (Order) filed on May 26, 2004 in the Circuit Court of the Second Circuit^{1/} (circuit court). The Order (1) granted Defendant-Appellee Robert H. Henneman, Jr.'s (Henneman) motion to withdraw his prior no contest plea to Murder in the Second Degree; (2) vacated the April 30, 1992 Judgment; (3) reinstated Henneman's not guilty pleas; (4) set Henneman's bail at \$150,000; and (5) ordered Henneman to return to court to set the case for trial.

On August 19, 1991, the State charged Henneman with Count One, Murder in the Second Degree in violation of Hawaii Revised Statutes (HRS) § 707-701.5 (1993); and Count II, Possession or Use of Firearm in the Commission of a Felony in violation of HRS § 134-6(a) (Supp. 1992). Henneman's attorney negotiated a plea agreement with the State under which Henneman

^{1/} The Honorable Joseph E. Cardoza presided.

pled no contest to Murder in the Second Degree.^{2/} Under the plea agreement, the State agreed to (1) dismiss Count Two, Use or Possession of a Firearm in the Commission of a Felony; (2) refrain from seeking a mandatory minimum sentence; and (3) refrain from making recommendations to the Hawai'i Paroling Authority (HPA).

On March 5, 1992, Henneman entered a plea of no contest to Murder in the Second Degree. The circuit court sentenced Henneman on April 30, 1992 to life imprisonment with the possibility of parole, with credit for time served, and the Judgment was filed on that date. On May 4, 1992, the State filed a Motion to Dismiss with Prejudice Count Two, which was granted by the circuit court. Henneman did not appeal from the Judgment.

On April 30, 1993, Henneman filed, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40, a Petition for Post-Conviction Relief (Rule 40 Petition), in which he argued that (1) he had not understood the consequences of his plea, (2) his counsel was ineffective at the time of his plea, (3) the State breached the plea agreement, (4) the presentence report contained false information, and (5) the circuit court denied him his constitutional right to a speedy trial. On November 3, 1993, without holding an evidentiary hearing, the circuit court denied

^{2/} The Honorable Boyd P. Mossman presided over the plea agreement proceeding.

the Rule 40 Petition as being patently frivolous and without a trace of support in the record. Henneman did not appeal from the denial of the Rule 40 Petition.

On September 5, 2003, Henneman filed his Motion to Withdraw No Contest Plea pursuant to HRPP Rule 32(d) (Rule 32(d) Motion). He argued that (1) his counsel was ineffective prior to his tendering his plea; (2) the circuit court's colloquy at Henneman's change-of-plea hearing did not comply with HRPP Rule 11(c) (advice to defendant); (3) the State violated the terms of the plea agreement by asking the HPA for a high minimum term; and (4) the plea was obtained in violation of Article I, §§ 5, 10, and 14 of the Hawai'i Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Following hearings on November 18, 2003 and February 5, 2004, the circuit court agreed that Henneman's conviction was the result of the ineffective assistance of his counsel.

The State appealed the Order pursuant to HRS § 641-13(3) (1993).

On appeal, the State contends the circuit court erred in granting Henneman's Rule 32(d) Motion because:

(1) The doctrines of res judicata and collateral estoppel barred Henneman from asserting that his conviction was the result of the ineffective assistance of his counsel because he had raised the issue of ineffective assistance of counsel in

his Rule 40 Petition and the circuit court had already ruled on the issue.

(2) Henneman waived the issue of ineffective assistance of counsel because, after the circuit court had rejected his claim of ineffective assistance of counsel when it denied his Rule 40 Petition, Henneman failed to appeal from the order denying his Rule 40 Petition.

(3) Henneman failed to meet his burden of proving that the ineffective assistance of his counsel resulted in his no contest plea and manifest injustice.

Upon careful review of the record and briefs submitted by the parties and having given due consideration to the arguments advanced and issues raised by the parties, we conclude:

(1) The circuit court did not err in concluding that the issues presented and addressed in Henneman's Rule 40 Petition were not the same issues presented in Hanneman's Rule 32(d) Motion, and therefore State v. Oughterson, 99 Hawai'i 244, 54 P.3d 415 (2002), was inapplicable. Furthermore, the "comity" rule addressed in Oughterson "is not an absolute rule that prevents one judge from changing an earlier ruling once the facts are more fully developed, thus making obvious the prejudice that would result from enforcing the earlier ruling." Id. at 254, 54 P.3d at 425 (quoting State v. Mabuti, 72 Haw. 106, 114, 807 P.2d 1264, 1269 (1991)). The circuit court gave "cogent reasons" in

support of the Order and therefore did not abuse its discretion in granting the Order. Oughterson, 99 Hawai'i at 253, 54 P.3d at 424.

(2) Henneman did not waive the ineffectiveness of counsel claim in his Rule 32(d) Motion by not appealing the circuit court's denial of his earlier Rule 40 Petition because, as the circuit court concluded, the grounds raised for the ineffective assistance of counsel claims in his Rule 32(d) Motion were not the same as those presented in his Rule 40 Petition.

(3) The circuit court did not abuse its discretion in determining there was manifest injustice entitling Henneman to withdraw his no contest plea. State v. Aeto, 105 Hawai'i 257, 260, 96 P.3d 586, 589 (App. 2004), cert. denied, 105 Hawai'i 360, 97 P.3d 1012 (2004); State v. Nguyen, 81 Hawai'i 279, 286, 916 P.2d 689, 696 (1996). Henneman's no contest plea was based on his counsel's erroneous representation as to the mandatory minimum sentence Henneman would face if convicted as charged. State v. Ambrosio, 72 Haw. 496, 824 P.2d 107 (1992); State v. Coelho, 107 Hawai'i 273, 112 P.3d 759 (App. 2005); State v. Feliciano, 107 Hawai'i 469, 483-86, 115 P.3d 648, 662-65 (2005); State v. Kimsel, 109 Hawai'i 50, 57-58, 122 P.3d 1148, 1155-56 (App. 2005). "Manifest injustice occurs when a defendant makes a plea involuntarily or without knowledge of the direct consequence of the plea." Barnett v. State, 91 Hawai'i 20, 28, 979 P.2d

1046, 1054 (1999). The on-the-record exchange among Henneman, Henneman's counsel, and the circuit court when Henneman entered his plea of no contest is clear. Henneman was misled as to the sentence that could be imposed if he were convicted of the crimes for which he was charged. Henneman therefore did not have knowledge of the direct consequences of his plea. Id.

Therefore,

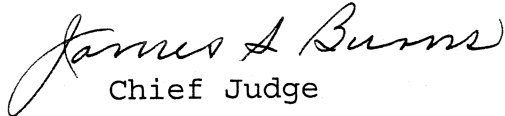
The Order Granting Motion to Withdraw No Contest Plea filed on May 26, 2004 in the Circuit Court of the Second Circuit is affirmed.


DATED: Honolulu, Hawai'i, February 17, 2006.

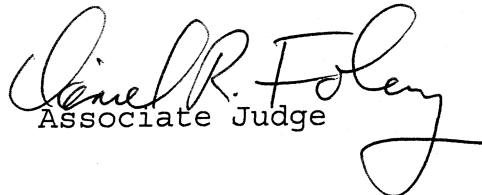
On the briefs:

Artemio C. Baxa,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellant.

Peter Van Neme Esser and
Howard K.K. Luke
for Defendant-Appellee.


Chief Judge


Associate Judge


Associate Judge