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NO. CAAP-15-0000310

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
KAWIKA K. AKUI, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 13-1-1094)

SUMMARY DISPOSITION ORDER

(By: Leonard, Presiding Judge, and Reifurth and Ginoza, JJ.)

Defendant-Appellant Kawika K. Akui ("Akui") appeals from the Judgment of Conviction and Sentence ("Judgment"), which the Circuit Court of the First Circuit ("Circuit Court") entered on March 4, 2015.^{1/} Akui was charged with one count of Assault in the Second Degree, in violation of Hawaii Revised Statutes ("HRS") § 707-711(1)(b) (Supp. 2012).^{2/} Akui initially entered a plea of not-guilty. On January 31, 2014, however, Akui changed his plea to guilty ("Change of Plea").

^{1/} The Honorable Glenn J. Kim presided.

^{2/} That statute states in relevant part:

(1) A person commits the offense of assault in the second degree if:

. . . .

(b) The person recklessly causes serious or substantial bodily injury to another[.]

On November 14, 2014, Akui filed a motion to withdraw his guilty plea ("Motion to Withdraw"). In it, Akui contended that his former counsel had not discussed with him the possibility of raising the defense of self-defense. On March 4, 2015, the Circuit Court denied Akui's Motion to Withdraw and sentenced him, among other things, to an open, five-year term of imprisonment, with credit for time already served. Akui timely appealed from the Judgment and alleges on appeal that the Circuit Court abused its discretion (1) in not allowing him to withdraw his guilty plea prior to sentencing, and (2) in sentencing him to an "open" five-year term of imprisonment.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments they advance and the issues they raise, we resolve Akui's points of error as follows, and affirm.

(1) Akui asserts that the Circuit Court abused its discretion when it denied his Motion to Withdraw because he is able to establish a plausible and legitimate grounds to withdraw his guilty plea. Specifically, Akui claims that "the record does not support that the specific defense of self-defense was discussed with [Akui] prior to his change of plea[,] and that "only a lesser charge was discussed with him prior to his change of plea[.]" Akui's first point of error is without merit.

A defendant does not have an absolute right to withdraw his guilty plea. *State v. Topasna*, 94 Hawai'i 444, 451, 16 P.3d 849, 856 (App. 2000) (citing *State v. Merino*, 81 Hawai'i 198, 223, 915 P.2d 672, 697 (1996)). Rather, pursuant to Hawai'i Rules of Penal Procedure ("HRPP") Rule 32(d),

[a] motion to withdraw a plea of guilty or of nolo contendere may be made before sentence is imposed or imposition of sentence is suspended; provided that, to correct manifest injustice the court, upon a party's motion submitted no later than ten (10) days after imposition of sentence, shall set aside the judgment of conviction and permit the defendant to withdraw the plea.

Haw. R. Penal P. 32(d). "Where the record pertaining to the motion to withdraw guilty plea is complete, . . . '[t]he defendant has the burden of establishing plausible and legitimate grounds for the withdrawal[,]'" by a preponderance of evidence. *Topasna*, 94 Hawai'i at 451, 16 P.3d at 856 (quoting *Merino*, 81

Hawai'i at 223, 915 P.2d at 697) (explaining that the State's reliance upon the plea is no longer applicable if the defendant fails to meet this initial burden). Moreover, when a defendant makes his or her motion to withdraw a plea before sentencing, as in this case, "the motion should be granted if the defendant has presented a fair and just reason for his request and the [prosecution] has not relied upon the guilty plea to its substantial prejudice." *Id.* (quoting *Merino*, 81 Hawai'i at 223, 915 P.2d at 697) (internal quotation marks omitted).

There are two "fair and just" reasons for withdrawing a guilty plea: "(1) that the defendant did not knowingly, intelligently and voluntarily waive the rights relinquished upon pleading guilty, or (2) that changed circumstances or new information justify withdrawal of the plea." *Id.* at 452, 16 P.3d at 857 (citing *Merino*, 81 Hawai'i at 223-24, 915 P.2d at 697-98). Under the first reason, which Akui asserts applies here, the defendant is entitled to withdraw his guilty plea if, "(1) the defendant has not entered the plea knowingly, intelligently, and voluntarily; (2) there has been no undue delay in moving to withdraw the plea; and (3) the prosecution has not otherwise met its burden of establishing that it relied on the plea to its substantial prejudice." *Id.* (quoting *Merino*, 81 Hawai'i at 224, 915 P.2d at 698).

This court reviews the circuit court's denial of a motion to withdraw a guilty plea for abuse of discretion. See *State v. Gomes*, 79 Hawai'i 32, 36, 897 P.2d 959, 963 (1995). However, since this case requires us to consider a constitutional inquiry as to whether Akui knowingly, intelligently and voluntarily entered his Change of Plea, we review this specific underlying issue de novo. *Topasna*, 94 Hawai'i at 452, 16 P.3d at 857 (quoting *Merino*, 81 Hawai'i at 225, 915 P.2d at 699).

Akui argues that the Memorandum of Pretrial ("Pretrial Memorandum"), on which "Defense of Self/Other/Property" is indicated under the heading "DEFENSE/ISSUES," and the Notice of Intent to Rely Upon Other Crimes, Wrongs, Acts ("Notice of Intent"), which declared that evidence of prior wrongs "may be offered to prove that the [alleged victim] was the initial

aggressor in this case[,] " should not be used to determine whether or not he was apprised of self-defense because the Pretrial Memorandum did not have his signature.^{3/} Nevertheless, the Circuit Court found that Akui unequivocally acknowledged the available defenses during the change of plea colloquy, and that former defense counsel's testimony was more credible than Akui's.

Similar to *Topasna*, the Circuit Court addressed Akui personally in open court in accordance with HRPP Rule 11(c). That is, the Circuit Court established Akui's name; corrected his age, level of education, and language competency on the change-of-plea form; and confirmed that at the time of his hearing, Akui had a clear mind. Pursuant to HRPP Rule 11(c)(1), the Circuit Court questioned Akui as follows:

Q. Have you and your attorney discussed the nature of this charge and what the State would have to prove before you could be found guilty of this charge?

A. Yes

Q. You understand the nature of this charge?

A. Yes, I do.

Q. Has your attorney also explained to you possible defenses you could raise to this charge if you wanted to go to trial?

A. Yes, she did.

Q. You understand those defenses?

A. Yes.

In conformity with HRPP Rule 11(c)(2), the Circuit Court discussed the maximum penalty provided by law for one count of Assault in the Second Degree, and asked Akui if, after knowing the penalty, he still wanted to plead guilty. The Circuit Court then stated that there was no possibility of an extended term, after which Akui expressed his understanding, and said that he still wished to plead guilty.

Pursuant to HRPP Rule 11(c)(3), the Circuit Court also confirmed that Akui understood that he had the right to plead not guilty, a right to a trial, and that at trial, "the prosecutors

^{3/} The Pretrial Memorandum was signed by Akui's counsel, the State and the Circuit Court. Both the Pretrial Memorandum and Notice of Intent were signed by another public defender.

have to present evidence to prove you're guilty beyond a reasonable doubt[.]" Then the Circuit Court, in accordance with HRPP Rule 11(c)(4) stressed to Akui that if he pled guilty, he waived the right to a trial, as well as the right to file pretrial motions and appeal to the appellate court for anything in his case up until his Change of Plea. Akui answered each question in the affirmative. The Circuit Court then read Akui the required advisement concerning alien status. After all of this, the Circuit Court found that Akui had "voluntarily, knowingly, and intelligently entered his plea of guilty with a complete understanding of the nature of the charge against him and the consequences of the plea."

The Circuit Court also found a sufficient factual basis for Akui's guilty plea. See *State v. Tachibana*, 67 Haw. 573, 575-76, 698 P.2d 287, 290 (1985) (determining that after considering all of the information available to the court, there was a sufficient factual basis for the guilty plea). Moreover, Akui signed the form to change his plea on two separate occasions: first, after he and his defense counsel had discussed the entire form; and, second, while appearing before the Circuit Court following the change-of-plea colloquy described above.

Insofar as this Circuit Court's decision here rests on its determination that defense counsel's testimony was more credible than Akui's, this court will not disturb the court's judgment as to the credibility of testimony. See *Topasna*, 94 Hawai'i at 461, 16 P.3d at 866 (citing *State v. Balberdi*, 90 Hawai'i 16, 21, 975 P.2d 773, 778 (App. 1999)). In light of the above-summarized evidence, Akui did not meet his burden of presenting a fair and just reason for withdrawal of his guilty plea. As such, the Circuit Court did not err when it found that Akui entered his change of plea knowingly, intelligently, and voluntarily. Since Akui failed to meet this initial burden, the State's reliance upon the plea is not an issue. *Id.* at 451, 16 P.3d at 856 (citing *Merino*, 81 Hawai'i at 223, 915 P.2d at 697). Therefore, the Circuit Court did not abuse its discretion when it denied Akui's Motion to Withdraw.

(2) Akui contends that the Circuit Court abused its discretion in sentencing him to an open five-year term of imprisonment because he pled guilty rather than insisting on a trial and, thus, saved the State time and expense by "alleviat[ing] an already burdened court calendar[.]" Akui contends that a probation sentence would have been more appropriate because there was no applicable mandatory minimum or extended terms. We disagree.

The Hawai'i Supreme Court has stated that:

[A] sentencing judge generally has broad discretion in imposing a sentence. The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. '[F]actors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions.' And, '[g]enerally, 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. Kong, 131 Hawai'i 94, 101, 315 P.3d 720, 727 (2013) (quoting *State v. Rivera*, 106 Hawai'i 146, 154-55, 103 P.3d 1044, 1052-53 (2004) (format altered) (citations omitted), *overruled on other grounds by State v. Maugaotega*, 115 Hawai'i 432, 442-43, 168 P.3d 562, 572-73 (2007)). "The weight to be given the factors set forth in HRS § 706-606 in imposing sentence is a matter generally left to the discretion of the sentencing court, taking into consideration the circumstances of each case." *Id.* (quoting *State v. Akana*, 10 Haw. App. 381, 386, 876 P.2d 1331, 1334 (1994)).

Here, the record demonstrates that the Circuit Court weighed many factors before determining Akui's sentence. For example, the court allowed Akui to address the court and explain why he felt probation would be the appropriate sentence for the offense. Akui apologized to the court, gave various reasons why he pled guilty, and explained that he had two jobs at the time of the incident, and would like to have the opportunity to become a productive citizen in society. The record also shows that the Circuit Court considered Akui's Pre-Sentence Diagnosis and Report detailing Akui's criminal record. The Circuit Court found that Akui is "clearly a danger to the public." Akui has not

demonstrated that the Circuit Court abused its discretion in weighing the factors as it did or in sentencing him to an open five-year term of imprisonment.

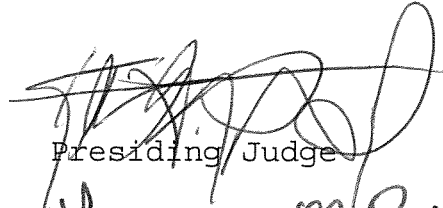
Therefore, the March 4, 2015 Judgment of Conviction and Sentence entered by the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, June 14, 2016.

On the briefs:

Shawn A. Luiz
for Defendant-Appellant.


Loren J. Thomas,
Deputy Prosecuting Attorney,
City & County of Honolulu,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge