

**Electronically Filed
Intermediate Court of Appeals
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NO. 30150

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
DAMIEN FERREIRA, JR., Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(Criminal Case Nos. 1P109-03191, 1P109-03192,
1P109-03193, 1P109-03194)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding J., Leonard, J., and
Circuit Judge Chang in place of Nakamura, C.J.,
Fujise, Reifurth, and Ginoza, JJ., all recused)

Defendant-Appellant Damien Ferreira Jr. (Ferreira) appeals from the Judgments filed in Case Nos. 1P109-03191, 1P109-03192, 1P109-03193, and 1P109-03194 on September 30, 2009 in the District Court of the First Circuit, Honolulu Division¹ (district court).

On March 23, 2009, Plaintiff-Appellee State of Hawaii (State) charged Ferreira with four counts of Wilful Failure to File Return, in violation of Hawaii Revised Statutes (HRS) § 231-35 (2001 Repl.). On July 31, 2009, Ferreira pled no contest to all four counts and moved for deferred acceptances of his no contest pleas. The district court accepted Ferreira's pleas, but

¹ Per diem District Court Judge Clyde E. Sumida presided.

denied his requests for deferred acceptances. The district court sentenced him to, inter alia:

On Count I (Case No. 1P109-03191): one year of probation and 50 hours of community service and ordered him to pay a fine of \$2,000 and restitution in the amount of \$30,252;

On Count II (Case No. 1P109-03192): one year of concurrent probation and 50 hours of community service and ordered him to pay a fine of \$2,000 and restitution in the amount of \$26,642;

On Count III (Case No. 1P109-03193): one year of concurrent probation and 50 hours of community service and ordered him to pay a fine of \$2,000 and restitution in the amount of \$17,843; and

On Count IV (Case No. 1P109-03194): one year of probation and 50 hours of community service and ordered him to pay a fine of \$2,000 and restitution in the amount of \$4,811.

On September 30, 2009, the district court entered a "Judgment and Order for Restitution Pursuant to Sections 706-605, 706-644, and 706-647, H.R.S."

On October 29, 2009, Ferreira filed an appeal from the four Judgments.

On appeal, Ferriera contends the restitution and fine portions of his sentences were excessive and the district court erred in denying his motions for deferred acceptance of his no contest pleas.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we vacate and remand.

The district court did not abuse its discretion in denying Ferreira's motions for deferred acceptance of his no contest pleas. State v. Tom, 69 Haw. 602, 603, 752 P.2d 597 (1988). However, the district court erred in setting the amount of restitution Ferreira could afford to pay. State v. Gaylord,

78 Hawai'i 127, 890 P.2d 1167 (1995). The district court mistakenly set restitution pursuant to HRS §§ 706-605 and 706-624 as amended in 2006. 2006 Haw. Sess. Laws Act 230, § 17 at 1007 & § 20 at 1009. Act 230 took effect on June 22, 2006, 2006 Haw. Sess. Laws Act 230, § 54 at 1025, and by its own terms did not "affect rights and duties that matured, penalties that were incurred, or proceedings that were begun, before its effective date." 2006 Haw. Sess. Laws Act 230, § 51 at 1024. Ferreria was charged with failure to file tax returns in 2003, 2004, 2005, and 2006.

Therefore,

IT IS HEREBY ORDERED that the Judgments filed in Case Nos. 1P109-03191, 1P109-03192, 1P109-03193, and 1P109-03194 on September 30, 2009 in the District Court of the First Circuit, Honolulu Division, are vacated and this case is remanded for further proceedings as to the amount of restitution Ferreira can afford to pay.

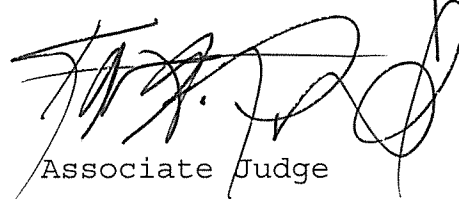
DATED: Honolulu, Hawai'i, November 30, 2010.

On the briefs:

Damien Ferreira, Jr.
Defendant-Appellant pro se.

Janine R. Udui,
Deputy Attorney General,
for Plaintiff-Appellee.


Charles R. Foley
Presiding Judge


Associate Judge


Gary WBC
Acting Associate Judge