

NO. 23131

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

FREDERICK NUNEZ, Defendant-Appellant

APPEAL FROM THE THIRD CIRCUIT COURT
(CR. NO. 97-081)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama,
Ramil, and Acoba, JJ.)

Defendant-Appellant Frederick A. Nunez (Defendant) was granted a five-year deferred acceptance of nolo contendere (DANC) plea on August 12, 1998 by the Third Circuit Court (the court), after having pled pursuant to a plea bargain to terroristic threatening in the first degree. Plaintiff-Appellee State of Hawai'i (the prosecution) twice obtained modifications to the terms and conditions of the DANC plea supervision to include restrictions on travel and residency, which Defendant had opposed. On June 15, 1999, Defendant appealed the resulting amended DANC order. His appeal was dismissed by this court for lack of jurisdiction on August 31, 1999. This court ruled that a DANC order is not a sentence or judgment from which a criminal appeal can be taken. See State v. Oshiro, 69 Haw. 438, 442, 746 P.2d 568, 571 (1987).

On October 27, 1999, Defendant filed with the court a motion to withdraw his no contest plea on the ground that travel and residency conditions were not part of the plea bargain, or in the alternative, to enforce the terms of the plea agreement. On January 4, 2000, the court filed an order denying Defendant's withdrawal motion. On February 1, 2000, Defendant again appealed, this time from the January 4, 2000 order denying his motion to withdraw.

Pursuant to Hawai'i Revised Statutes (HRS) § 602-4 (1993), we maintain supervisory jurisdiction over inferior courts to "prevent and correct errors and abuses . . . where no other remedy is provided by law." State v. Ui, 66 Haw. 366, 663 P.2d 630 (1983). However, as in Ui, we decline to assert jurisdiction here because the trial court did not commit any errors for us to correct. See discussion, infra.

Defendant is correct in contending that a geographic restriction was not part of the original plea bargain but incorrect in contending that the restriction was inconsistent with the plea agreement. The plea agreement did not contain any prohibition on travel and residency restrictions but allowed the prosecution to recommend reasonable terms of probation. The court may impose as conditions to a deferral, conditions that may be imposed on a sentence of probation. HRS § 853-1 (1993); HRS § 706-624 (1993).

Restrictions on travel and residency are authorized under HRS § 706-624(2)(1) and (o). Evidence was adduced in support of the restrictions. Under the circumstances the conditions were reasonable. Additionally, we note that a trial court may revoke or modify the conditions of probation by reducing or enlarging the conditions of a sentence of probation. Because terms and conditions of supervision are derived from HRS § 706-625 (Supp. 1994), they, like probationary terms and conditions, would be amenable to modification.

The four-part test in State v. Gomes, 79 Hawai'i 32, 897 P.2d 959 (1995), governs Defendant's withdrawal of his pre-sentence nolo contendere plea. Under Hawai'i Rules of Penal Procedure Rule 32(d), the following matters, as set forth in Gomes, must be demonstrated by a defendant:

- (1) the defendant has never expressly admitted guilt;
- (2) the defendant advances a claim of new information or changed circumstances with factual support that, if believed by a reasonable juror, would exculpate the defendant;
- (3) there has been no undue delay in moving to withdraw the plea; and
- (4) the prosecution has not otherwise met its burden of establishing that it relied on the plea to its substantial prejudice.

79 Hawai'i at 39, 897 P.2d at 966 (emphasis added). The Gomes test is stated in the conjunctive. Defendant failed to produce new information or identify changed circumstances that could exculpate him and thus did not satisfy the second Gomes factor. Accordingly, the court did not err in denying the withdrawal motion. Therefore,

IT IS HEREBY ORDERED that Defendant's appeal is dismissed for lack of jurisdiction.

DATED: Honolulu, Hawai'i, April 26, 2001.

On the briefs:

Harry Eliason for
defendant-appellant.

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