

* * * NOT FOR PUBLICATION * * *
in West's Hawai'i Reports and the Pacific Reporter

NO. 27384

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FELIX BUENAVENTURA, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 05-1-0030)
(CR. NO. 03-1-2780)

CLARENDO
COURT APPELLATE
STATE OF HAWAI'I

2006 OCT 16 PM 9:13

FILED

SUMMARY DISPOSITION ORDER

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

Defendant-appellant Felix Buenaventura appeals from the findings of fact (FOFs), conclusions of law (COLs), and order of the Circuit Court of the First Circuit, the Honorable Michael D. Wilson presiding, filed on June 3, 2005, denying Buenaventura's petition for post-conviction relief pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 32 (2005)¹ and Rule 40 (2005), quoted infra [hereinafter, Rule 40 petition]. In his Rule 40 petition,

¹ HRPP Rule 32(d) provides in pertinent part that:

A motion to withdraw a plea of . . . [no contest] 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. At any later time, a defendant seeking to withdraw a plea of . . . [no contest] may do so only by [a petition for post-conviction relief] pursuant to Rule 40 of these rules and the court shall not set aside such a plea unless doing so is necessary to correct manifest injustice.

*** NOT FOR PUBLICATION ***
in West's Hawai'i Reports and the Pacific Reporter

Buenaventura sought to withdraw his no contest plea to the offense of theft in the fourth degree, a violation of Hawai'i Revised Statutes (HRS) § 708-833 (1993).² In so doing, Buenaventura essentially argued that, at the time of his change of plea: (1) he did not understand the nature of the charge or the consequences of his plea and that, therefore, his plea was not knowingly or voluntarily made and (2) he was denied effective assistance of counsel. On appeal, Buenaventura contends that the circuit court erred as a matter of law in denying his Rule 40 petition without affording him a hearing inasmuch as he had stated a colorable claim for relief.³ Buenaventura, therefore, maintains that manifest injustice would result unless the circuit court's order is vacated.

² HRS § 708-833 provides in pertinent part that:

- (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of \$100.
- (2) Theft in the fourth degree is a petty misdemeanor.

³ HRPP Rule 40(f) provides in relevant part:

If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner.

This court has noted that a hearing should be held "on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that[,] if taken as true[,] the facts alleged would change the verdict, however, a petitioner's conclusions need not be regarded as true." Dan, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (citation omitted). Thus, the burden is on Buenaventura to allege a colorable claim.

* * * **NOT FOR PUBLICATION** * * *
in West's Hawai'i Reports and the Pacific Reporter

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the parties' contentions as follows.

(1) With respect to Buenaventura's contention that his no contest plea was not voluntarily or knowingly made, we hold that the circuit court fulfilled the express requirements of ensuring a knowing and voluntary plea, pursuant to HRPP Rule 11.⁴

⁴ HRPP Rule 11 provides in relevant part:

(c) **Advice to Defendant.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that he understands the following:

(1) the nature of the charge to which the plea is offered; and

(2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and

(3) that he has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he is not a citizen of the United States, a conviction of the offense for which he has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(d) **Insuring That the Plea Is Voluntary.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from any plea agreement.

(f) **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(Bold emphasis in original.)

* * * NOT FOR PUBLICATION * * *
in West's Hawai'i Reports and the Pacific Reporter

See State v. Cornelio, 68 Haw. 644, 646, 727 P.2d 1125, 1127 (1986) (holding that there is no manifest injustice when the trial court has made an affirmative showing through an on-the-record colloquy between the court and the defendant that the defendant's plea is being voluntarily entered with a full understanding of the nature of the charge and the consequences of that plea); State v. Williams, 68 Haw. 498, 720 P.2d 1010 (1986) (same); State v. Nguyen, 81 Hawai'i 279, 916 P.2d 689 (1996) (same).

Here, Buenaventura does not dispute that the circuit court fulfilled the express requirements of HRPP Rule 11. Moreover, Buenaventura fails to allege any facts that, if accepted as true, would bring into dispute the circuit court's compliance with these requirements. The on-the-record and unchallenged colloquy between the circuit court and Buenaventura demonstrates that Buenaventura voluntarily entered his no contest plea with a full understanding of the nature of the charge and the consequences of his plea. Accordingly we hold that Buenaventura failed to establish a colorable claim of an unknowing and involuntary plea.

(2) With respect to Buenaventura's contention that he was denied effective assistance of counsel because his trial attorney erroneously advised him that a dismissal of the charge against him through the deferred acceptance of no contest (DANC) plea process would insulate him from immigration consequences, we

* * * NOT FOR PUBLICATION * * *
in West's Hawai'i Reports and the Pacific Reporter

hold that Buenaventura has failed to state a colorable claim of ineffective assistance of counsel.

This court has stated that,

[t]he defendant has the burden of establishing ineffective assistance of counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. This court will not judge the assistance provided the defendant ineffective solely by hindsight. A defendant who meets the two-prong test has proven the denial of assistance within the range of competence demanded of attorneys in criminal cases.

State v. Silva, 75 Haw. 419, 440, 864 P.2d 583, 593 (1993)

(citations omitted) (internal quotation marks omitted).

By accepting Buenaventura's allegations as true, as we must, see supra note 3, we presume his attorney incorrectly advised him regarding the immigration consequences of a no contest plea. Such an error or omission arguably reflects counsel's lack of skill, judgment, or diligence; thus, the first part of the two-part test is satisfied.

With respect to part two of the test, Buenaventura concludes that his change of plea effectively resulted in the withdrawal of all defenses, negating a trial, in favor of the no contest plea. The circuit court reached a different conclusion, stating specifically:

Even assuming, arguendo, that defense counsel committed specific errors by informing [Buenaventura] the [no contest] plea would not affect [his] immigration status, this error was cured by the court's colloquy with [Buenaventura] in which the court informed [him] that his plea could have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

* * * NOT FOR PUBLICATION * * *
in West's Hawai'i Reports and the Pacific Reporter

We agree with the circuit court. The extensive and unchallenged on-the-record colloquy, coupled with Buenaventura's acknowledgment on the change of plea form, demonstrates that he was aware of the possible immigration consequences of a no contest plea. His assertion to the contrary is "without a trace of support" in the record and, therefore, without merit. See HRAP 40(f).⁵

Based on the foregoing, we conclude that the circuit court did not err in denying Buenaventura's Rule 40 petition without a hearing. Therefore,

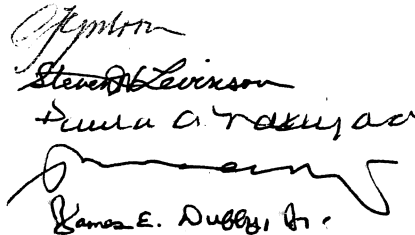
IT IS HEREBY ORDERED that the circuit court's June 3, 2005 order denying Buenaventura's Rule 40 petition is affirmed.

DATED: Honolulu, Hawai'i, October 16, 2006.

On the briefs:

Harrison L. Kiehm,
for petitioner-appellant

Daniel H. Shimizu,
Deputy Prosecuting Attorney,
for respondent-appellee


Steven Levinson
Kiana A. Takayama
Kamae E. Duggan, Jr.

⁵ HRPP Rule 40(f) provides in relevant part:

If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

(Emphasis added.)