SCWC-11-0000654

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI
Respondent/Plaintiff-Appellee,

vs.

ALFRED KALANI BEAVER, JR.,
Petitioner/Defendant-Appellant.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000654; FC-CR NO. 08-1-532)

DISSENT BY POLLACK, J.,
IN WHICH ACOBA, J., JOINS

I respectfully dissent from the denial of petitioner/defendant-appellant Alfred K. Beaver's (Petitioner) application for writ of certiorari. This case arises from the Family Court of the Third Circuit's (family court) revocation of deferral of Petitioner's no contest plea. I would accept the application due to the family court's plain error in ordering Petitioner to pay restitution as a condition of deferral: 1) without undertaking a colloquy with Petitioner regarding restitution at the change of plea hearing; 2) without determining

whether Petitioner could afford to pay the ordered monthly installment payments toward restitution; and 3) without entering findings and conclusions that the manner of payment was reasonable and one which Petitioner could afford. As a separate and additional basis for accepting the application, I believe that a remand to the family court is required to determine the court's basis for revoking the deferral and imposing the jail term against Petitioner. For these reasons, I would accept the application.

I.

On January 13, 2010, Petitioner entered a no contest plea to the charge of persistent nonsupport in violation of Hawai‘i Revised Statutes (HRS) § 709-903, pursuant to a plea agreement whereby he would be granted a one year deferral.[1] At the change of plea hearing, the prosecutor recited the terms of the plea agreement on the record, which included staying a fourteen-day jail term. Petitioner would also be required to pay restitution in the amount of $40,711, payable at a rate of $400 per month or a lesser amount if approved by the child support enforcement agency or the family court. The family court then engaged Petitioner in a colloquy regarding his deferred acceptance of no contest (DANC) plea, but did not specifically

[1] HRS Chapter 853 governs the court's deferred acceptance of guilty and no contest pleas.

question Petitioner about the amount of restitution or the manner of payment. The court also did not inquire with Petitioner regarding defense counsel's statement that Petitioner would "forgo" his "right to have some sort of contested restitution hearing." The court nevertheless granted the DANC plea setting forth the terms and conditions of deferral.[2]

On the same day as the plea hearing, the court executed an order granting the DANC plea, with the terms and conditions of deferral attached to the order. Neither the order nor the terms and conditions reflected the $40,711 restitution amount or the $400 monthly payment. Immediately after the plea hearing, Petitioner met with a probation officer and signed the terms and conditions form.

On May 24, 2010, Petitioner again signed the same terms and conditions form, just below his original signature.[3] The form was not otherwise altered and was filed on May 27, 2010 in the family court.

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[2] Upon accepting Petitioner's no contest plea and granting a one-year deferral, the family court recited the terms and conditions of the deferral, including the following:

> [THE COURT]: And, in this case, you are to make restitution, as noted, in the total amount of $40,711 at the rate of $400 a month, unless either the total amount or the monthly amount is adjusted to some other amount by the family court or the child support enforcement agency.

[3] It is unclear why Petitioner signed the form on this occasion.

On July 1, 2010, the court filed an amended DANC order, which provided that Petitioner was required to pay "RESTITUTION of $40,711.00 payable at $400/month," and attached a copy of the terms and conditions form that Petitioner had signed on January 13. In September 2010, Petitioner met with a second probation officer, who instructed him to sign the "amended order" in order to show that "he understood and [was] willing to abide with the conditions set forth" in the order.[4] Petitioner refused to sign and indicated that he wanted to return to court.

Subsequently, the State filed a motion to set aside the DANC plea, adjudicate guilt, and resentence Petitioner based on his failure to "comply with the reasonable instructions" of his probation officer as well as his failure to sign the terms and conditions of deferral on September 13, 2010. The attached declaration of counsel also alleged that Petitioner "willfully failed to pay the $400 per month toward restitution that he was orally ordered to pay at the time the Court orally announced the terms and conditions of his deferral."

At the hearing on the State's motion, the family court concluded that "the instructions of the probation officer were

[4] Petitioner's requested signature appeared to pertain only to the terms and conditions form, which was identical to the terms and conditions Petitioner had already signed. The signature portion of the terms and conditions form is titled "Acknowledgment" and provides: "The foregoing terms and conditions of probation and notice and warning have been fully explained to me; I fully understand them, agree to abide by them in every way and understand the consequences for not doing so. I have received a copy of these terms and conditions of probation."

eminently reasonable" and granted the State's motion. During the hearing, defense counsel disputed the allegation that Petitioner had failed in any payment obligations during the deferral period and asserted that the issue of payment obligations was not before the court. Defense counsel further indicated that Petitioner would agree to paying $50 per month towards restitution:

> [Defense counsel]: Um, yes. Initially, um, we're not in agreement that Mr. Beaver, uh, failed in any, uh, payment obligations under the -- the period of the deferral. Uh, that was a matter that, uh, might have been disputed but was not really put before the court, uh, at this hearing.
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> Mr. Beaver has been found noncompliant for not having signed a paper. Um, what Mr. Beaver has indicated to me is that he is unable, uh, to pay, um, any monthly amount, other than, uh, he -- he thought he might be able to pay fifty dollars a month, and he would agree to that. Um, but he has not worked for years. He does -- just doesn't have the financial means.
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> Uh, when this, uh, original agreement was made, he was confused by, um, a lot of things that were said. He's not sure, um, what happened or why that amount was set or -- or why he, uh, as he evidently did in the transcript, say -- acknowledged that he was -- had some kinda support obligation, but he, uh, doesn't have the money to pay.

(Emphases added).

After hearing from the State, defense counsel and Petitioner, the family court explained its decision to grant the State's motion for revocation:

> THE COURT: All right. Well, Mr. Beaver, it seems to me that you were essentially trying to take advantage of a mistake made by the court in failing to include the restitution requirement as part of your original judgment and terms and conditions of your probation. And have, since that time, been continuing to try and avoid that. Um, the court finds that, um, action reprehensible, and the court will not grant you another period of deferral, will not place you on probation . . . .

The court imposed a ninety-day jail term and ordered Petitioner to "pay restitution in the amount of $40,711."

II.

Hawai‘i Rules of Penal Procedure (HRPP) Rule 11(c) (2007) requires the trial court, in accepting a defendant's no contest plea, to address the defendant personally in open court and determine whether the defendant understands, among other things, "the nature of the charge to which the plea is offered," "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[.]" (Emphasis added).

In State v. Williams, 68 Haw. 498, 720 P.2d 1010 (1986), this court held that the trial court committed plain error in accepting the defendant's guilty plea to a charge of driving under the influence, where the trial court failed to inform the defendant of the penalties for a first offense DUI conviction and failed to inquire as to whether the defendant knew or understood the penalties. The court explained:

> A trial judge is *constitutionally* required to ensure that a guilty plea is voluntarily and knowingly entered. Although no specific dialogue is required, the court should make an affirmative showing by an on-the-record colloquy between the court and the defendant wherein the defendant is shown to have a full understanding of what the plea of guilty connotes and its consequences.
>
> The trial court accepted defendant's plea of guilty to the DUI charge without informing defendant of the penalties for a first offense DUI conviction or inquiring as to whether defendant knew or understood the penalties in violation of HRPP 11(c)(2) and the court's constitutional obligation to ensure that the guilty plea was voluntarily and knowingly entered. In view of the record of this case, we hold that the trial court committed plain error.

Id. at 499, 720 P.2d at 1012 (citations and quotation marks omitted) (underline emphases added). See also State v. Solomon, 107 Hawai‘i 117, 128, 111 P.3d 12, 23 (2005) ("Inasmuch as the record affirmatively demonstrates that Solomon did not have a full and complete understanding of what his guilty plea connoted and its consequences, the family court's acceptance of Solomon's guilty plea constituted an abuse of discretion amounting to plain error."); State v. Davia, 87 Hawai‘i 249, 254-55, 953 P.2d 1347, 1352-53 (1998) (trial court's "failure to inquire on the record whether [the defendant's] no contest plea was knowing and voluntary," in violation of HRPP Rule 11 (c) and (d), was an abuse of discretion and constituted plain error).

In this case, the family court recognized that it was "plainly apparent that what the state is concerned about in this case is that the child support that has been assessed against you get paid." Accordingly, the most significant requirement imposed as a result of the plea agreement was the amount of restitution and the required monthly installment amount. Nevertheless, the family court did not question Petitioner regarding the total amount of restitution ordered or the amount of the monthly installment during the court's plea colloquy. Rather, the court only generally inquired whether Petitioner understood that he would be subject to the standard terms of probation "plus the

special terms and conditions" that the prosecutor read into the record.

Under these circumstances, it cannot be said that there was an "affirmative showing . . . wherein [Petitioner was] shown to have a full understanding of what the plea of [no contest] connotes and its consequences." See Williams, 68 Haw. at 499, 720 P.2d at 1012 (quotation marks omitted). Thus, pursuant to Williams, the family court's failure to inform Petitioner of the required monthly installment payments and to inquire as to whether Petitioner had knowledge of and understood this penalty constituted plain error. See HRPP Rule 52(b) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

This error was magnified by the court's failure to consider Petitioner's financial ability to make restitution for the purpose of establishing the time and manner of restitution payments. HRS § 706-605 (Supp. 2010), entitled "Authorized disposition of convicted defendants," requires a court to consider the defendant's ability to pay in establishing the time and manner of restitution payment:

> (7) The court shall order the defendant to make restitution for losses as provided in section 706-646. In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment.

(Emphasis added). The importance of this provision is reflected by the fact that an identical provision is included in HRS § 706-646(3), which governs the defendant's payment of restitution to the victim.[5]

In State v. Gaylord, 78 Hawai'i 127, 152-53, 890 P.2d 1167, 1192-93 (1995), this court explained that the sentencing court's discretion in ordering restitution is not "boundless." The court held that because the sentencing court has the "exclusive responsibility and function of imposing a sentence[,] . . . requisite specificity should be provided by the sentencing court[.]" Id. (quotation marks and citations omitted). The court further held that "it is incumbent upon the sentencing court to enter into the record findings of fact and conclusions that the manner of payment is reasonable and one which the defendant can afford." Id. at 153, 890 P.2d at 1193 (quotation marks and brackets omitted) (emphasis added).

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[5] HRS § 706-646(3) (Supp. 2012) provides in relevant part:

> (3) In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses[.]

(Emphasis added).

When Gaylord was decided, HRS § 706-605 limited restitution orders to an amount the defendant could afford to pay. 78 Hawai‘i at 152, 890 P.2d at 1192. In 2006, HRS § 706-605 was modified to its current form, under which the court is not required to consider the defendant's ability to pay in determining the total amount of restitution. 2006 Haw. Sess. Laws Act 230, § 17 at 1008. However, the legislature specified the requirement that the court "shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment." Id. Likewise in 2006, HRS § 706-646 was amended to adopt the provision on victim restitution requiring the court to consider the defendant's financial ability to pay in establishing the time and manner of payment. 2006 Haw. Sess. Laws Act 230, § 22 at 1011.

In Gaylord, the court held that the sentencing court's restitution order failed to comply with HRS § 706-605 and was "illegally imposed," based in part on the court's failure "to prescribe the manner of payment."[6] 78 Hawai‘i at 155, 890 P.2d at 1195.

In this case, the family court erred by imposing monthly restitution payments of $400 without first inquiring as

[6] The court also held that the sentencing court failed to make any finding that the total amount of restitution ordered was an amount the defendant could afford to pay (pursuant to the relevant statute at the time), and that the court "expressly and improperly delegated the judicial function of determining the manner of payment" to the Hawai‘i Paroling Authority. Id.

to whether Petitioner had the ability to make such payments, in violation of HRS § 706-605(7), and by not entering into the record findings and conclusions that the manner of payment of $400 a month was reasonable and in an amount that Petitioner could afford to pay.

III.

Petitioner argues that the family court abused its discretion in revoking his DANC plea based on his refusal to follow his probation officer's instruction to sign the terms and conditions form after the court filed the amended DANC order.

At the plea revocation hearing, defense counsel represented that Petitioner was confused by the plea agreement and his obligation to pay a monthly installment towards his restitution. Defense counsel further informed the court that Petitioner had not worked in years and lacked the financial means to pay the ordered monthly installment, but would agree to pay fifty dollars a month towards restitution.

At the conclusion of the hearing, the family court explained that it was the court's view that Petitioner was "essentially trying to take advantage of a mistake made by the court in failing to include the restitution requirement as part of your original judgment and terms and conditions of your probation." The court further stated that Petitioner had, "since that time, been continuing to try and avoid that." Thereafter,

the court imposed a ninety-day jail term and ordered Petitioner to pay $40,711 in restitution but did not specify the manner of payment. The court did not indicate whether its revocation and imposition of the jail term was based specifically on Petitioner's refusal to follow his probation officer's instruction, or on Petitioner's failure to pay the installment amounts during the deferral period, or for both reasons.

Based on these statements, it appears that Petitioner may have refused to sign the terms and conditions due to his inability to pay the monthly installments. However, as noted, the monthly installments had been imposed without any inquiry as to whether Petitioner had the financial ability to make such payments. Accordingly, the court's lack of inquiry into Petitioner's ability to make the installment payments may have impacted the basis for the court's revocation.

In addition, based on the record it is unclear whether the family court ordered the revocation and the jail sentence due to Petitioner's asserted inability to pay the original monthly installment payments of $400 a month. An order to incarcerate Petitioner based upon an inability to pay the monthly installments would undermine the statutory directive to consider the defendant's financial ability for the purpose of establishing the time and manner of restitution payment, HRS § 706-605, and be lacking in constitutional validity. See State v. Huggett, 55

Haw. 632, 638, 525 P.2d 1119, 1124 (1974) ("The incarceration of the defendant solely on the basis of his inability to pay the fine [as a condition of probation] would be wholly lacking in constitutional validity."); State v. Tackett, 52 Haw. 601, 602, 483 P.2d 191, 192 (1971) ("Equal justice is clearly lacking where an indigent . . . suffers imprisonment solely because of a financial inability to pay for liberty while his more prosperous counterpart avoids confinement.").

Accordingly, even if plain error is not invoked with respect to the issues addressed in Part II herein, I believe that this court should accept the application to enable the case to be remanded to the family court for a determination of the court's basis for revoking Petitioner's DANC plea and for imposing the ninety-day jail term. See United States v. Taylor, 321 F.2d 339, 342 (4th Cir. 1963) (vacating order revoking probation for failure to pay fines and remanding for further proceedings "for clarification" to take evidence on defendant's plea of pauperism); Huggett, 55 Haw. at 638, 525 P.2d at 1124 (vacating order revoking probation for failure to pay fine and remanding for determination of whether defendant's failure to pay was "the result of contumacious attitude or conduct").

IV.

Based on the foregoing, I respectfully dissent from the court's denial of the application for writ of certiorari in this case.

DATED: Honolulu, Hawai'i, June 20, 2013.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack

Robert K. Allen
for petitioner

Jefferson R. Malate
for respondent