

NO. 29766

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ROBERT JOHNSON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIFTH CIRCUIT
LIHUE DIVISION
(CASE NO. 5DTC-08-002197)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding J., Reifurth and Ginoza, JJ.)

Defendant-Appellant Robert Johnson (Johnson) appeals from the Judgment filed on March 12, 2009 in the District Court of the Fifth Circuit, Lihue Division¹ (district court).

Johnson pled no contest to Driving Motor Vehicle Without Valid Driver's License, in violation of Hawaii Revised Statutes (HRS) § 286-102 (2007 Repl.).

On appeal, Johnson contends (1) the district court erred by denying his motion to dismiss; (2) he did not knowingly, intelligently, and voluntarily enter his no contest plea because his trial counsel and the district court failed to inform him that pleading no contest would "cut off his right to appeal the adverse ruling in his motion to dismiss"; and (3) he received ineffective assistance of trial counsel because of errors

¹ The Honorable Laurel Loo presided.

committed by his trial counsel at the motion to dismiss hearing and because his trial counsel did not inform him that by pleading no contest to the charge, he would be unable to appeal the denial of his motion to dismiss.

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 resolve Johnson's points of error as follows:

(1) Johnson's contention that the district court erred by denying his Motion to Dismiss is without merit. Johnson pled no contest and therefore waived all non-jurisdictional defects in the proceeding, including whether the district court erred by denying his Motion to Dismiss. State v. Morin, 71 Haw. 159, 162, 785 P.2d 1316, 1318-19 (1990); see also State v. Domingo, 82 Hawai'i 265, 267-68, 921 P.2d 1166, 1168-69 (1996).

(2) Johnson contends his no contest plea was not made knowingly, intelligently, and voluntarily. Johnson requests this court to "vacate the plea and judgment entered on March 12, 2009." Johnson is essentially requesting this court to allow him to withdraw his plea. Johnson did not move to withdraw his plea in the district court within 10 days after his sentencing, as required under Rule 32(d) of the Hawai'i Rules of Penal Procedure (HRPP). Therefore, under Rule 32(d), Johnson must move to withdraw his no contest plea pursuant to HRPP Rule 40, not in a direct appeal. Johnson's claim that his plea was not knowing, intelligent, and voluntary is denied without prejudice to his raising this issue in a petition pursuant to HRPP Rule 40.

(3) Johnson contends he was provided ineffective assistance of trial counsel because of errors committed by his trial counsel at the hearing on his Motion to Dismiss and because his trial counsel failed to inform him that he could reserve his right to appeal the denial of his Motion to Dismiss. The record is not clear as to the reason why Johnson's trial counsel did not

propose a conditional plea or why he took the actions alleged at the motion to dismiss hearing, or the reason Johnson's trial counsel stated that Johnson would plead no contest immediately after the district court denied his Motion to Dismiss. "If the record is unclear or void as to the basis for counsel's action, counsel shall be given the opportunity to explain his or her actions in an appropriate proceeding before the trial court judge." Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993). Therefore, Johnson's claim of ineffective assistance of trial counsel is denied without prejudice to his raising this issue in a petition pursuant to HRPP Rule 40.

Therefore,

IT IS HEREBY ORDERED that the Judgment filed on March 12, 2009 in the District Court of the Fifth Circuit, Lihue Division, is affirmed without prejudice to Johnson's filing a petition pursuant to HRPP Rule 40 to withdraw his plea and to allege ineffective assistance of trial counsel.

DATED: Honolulu, Hawai'i, March 16, 2011.

On the briefs:

Charles A. Foster
for Defendant-Appellant.

Tracy Murakami,
Deputy Prosecuting Attorney,
County of Kauai
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge