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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,  
Respondent/Plaintiff-Appellee,

vs.

KAOHULANI MEDEIROS,  
Petitioner/Defendant-Appellant.

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SCWC-17-0000829

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-17-0000829; 2CPC-17-0000158)

DECEMBER 20, 2019

CONCURRING OPINION BY NAKAYAMA, J.

Petitioner/Defendant-Appellant Kaohulani Medeiros (Medeiros) voluntarily entered pleas of no contest to two petty misdemeanors pursuant to a plea agreement.<sup>1</sup> Medeiros, a twenty-three-year-old with no prior criminal history, filed a motion for deferred acceptance of no contest (DANC) plea, pursuant to

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<sup>1</sup> The Honorable Rhonda I.L. Loo presided. Medeiros pled no contest to: (1) Hunting Hours, in violation of Hawai'i Administrative Rules (HAR) § 13-123-6 (effective 2015); and (2) Artificial Light Prohibited, in violation of HAR § 13-123-7 (effective 2015).

Hawaii Revised Statutes (HRS) Chapter 853.<sup>2</sup>

At sentencing, Medeiros apologized to the Circuit Court of the Second Circuit (circuit court) "for the mess that [he] got [him]self into" and "guarantee[d]" that he would not appear before the circuit court again.

Respondent/Plaintiff-Appellee the State of Hawaii (the State) did not oppose Medeiros's motion for DANC plea at the sentencing. The State noted that Medeiros was a youthful, first-time offender who had support from his family – his parents had accompanied him to every court appearance. The State expressed its belief that Medeiros was unlikely to reoffend and that he had learned from the experience. The State requested that the circuit court sentence Medeiros to the minimum fine of \$100.00 for each of the two petty misdemeanor counts.

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<sup>2</sup> HRS § 853-1 (2014) provides in relevant part:

**Deferred acceptance of guilty plea or nolo contendere plea; discharge and dismissal, expungement of records.**

(a) Upon proper motion as provided by this chapter:

- (1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor;
  - (2) It appears to the court that the defendant is not likely again to engage in a criminal course of conduct; and
  - (3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law,
- the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

The circuit court sentenced Medeiros to a term of probation of six months for each of the petty misdemeanors, to run concurrently, in addition to a \$100.00 fine for each count.<sup>3</sup> Medeiros's counsel pointed out that six months' probation was the maximum term permitted for petty misdemeanors, while the State remained silent.

Next, the circuit court considered the factors set forth in HRS § 853-1(a) in determining whether to grant Medeiros's motion for DANC plea. The circuit court cited the following as considerations for whether Medeiros was likely to commit a similar offense in the future: at the time of the offense, Medeiros was (1) wearing camouflage; (2) in an area known for night hunting between 8:30 p.m. and 9:00 p.m.; (3) using an artificial light to spotlight wild animals; and (4) in possession of an unloaded weapon and ammunition. In addition, the circuit court expressed concern that, when Medeiros was questioned by Department of Land and Natural Resources (DLNR) officers on the night of the offenses, he told the officers "half truths."<sup>4</sup> The circuit court found that Medeiros "is likely again

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<sup>3</sup> The record does not explain why the circuit court sentenced Medeiros prior to ruling on his motion for DANC plea.

<sup>4</sup> Specifically, the circuit court noted that Medeiros admitted that he was spotlighting, while also telling the DLNR officers that he was driving to his home in Hana when he was going in the opposite direction. Spotlighting  
(continued...)

to engage in such a criminal course of conduct[]" and denied Medeiros's motion for DANC plea.

Medeiros appealed to the ICA, arguing that the circuit court abused its discretion in denying his motion for DANC plea. In the State's answering brief, the State argued that Medeiros was ineligible for a DANC plea because the offenses to which he pled no contest were not probationable. I concur with the majority's determination that the circuit court erred in denying Medeiros's motion for DANC plea.

I write separately because I believe that the State waived the argument that Medeiros was ineligible for a DANC plea because the offenses to which he pled no contest were not probationable.

This court has discretion to recognize plain errors or defects affecting a defendant's substantial rights that were not brought to the attention of the trial court. Here, the State's waiver of its argument did not affect Medeiros's substantial rights, so plain error review is neither appropriate nor within this court's discretion. The majority's opinion unnecessarily expands plain error review by noticing an error raised by the

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<sup>4</sup>(...continued)  
is a night hunting term that refers to using a light to pan up and down and from side to side, searching for animals.

State.

Because the State did not raise the issue before the circuit court and waived the argument, we need not revisit State v. Hamili to resolve this case.

## I. DISCUSSION

### A. The State waived the argument that Medeiros is ineligible for a DANC plea when it did not raise it before the circuit court.

Issues not raised before the sentencing court are reviewed for plain error. State v. Jenkins, 93 Hawai'i 87, 114, 997 P.2d 13, 40 (2000). Hawai'i Rules of Penal Procedure (HRPP) Rule 52(b) (2016) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Conversely, "[a]ny error, defect, irregularity or variance which does not affect substantial rights" is a harmless error and must be disregarded. HRPP Rule 52(a). Thus, an error not raised before the trial court may only be noticed by an appellate court when the error affects substantial rights. Here, the State did not raise the issue that the offenses to which Medeiros pled were not probationable before the circuit court.<sup>5</sup> Accordingly, we review

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<sup>5</sup> With all respect, the majority is undeniably applying plain error review. "Plain errors by definition were not 'objected to' or 'brought to the attention of the court[.]'" State v. Miller, 122 Hawai'i 92, 108, 223 P.3d (continued...)

the decision of the sentencing court for plain error. See Jenkins, 93 Hawai'i at 114, 997 P.2d at 40.

As an initial matter, we have repeatedly stated:

An appellate court's "power to deal with plain error is one to be exercised sparingly and with caution because the plain error rule represents a departure from a presupposition of the adversary system—that a party must look to his or her counsel for protection and bear the cost of counsel's mistakes."

State v. Kong, 131 Hawai'i 94, 101, 315 P.3d 720, 727 (2013) (quoting State v. Nichols, 111 Hawai'i 327, 335, 141 P.3d 974, 982 (2006) (internal citation omitted) (emphasis added)). See also State v. Miller, 122 Hawai'i at 138 n.5, 223 P.3d at 203 n.5 (Nakayama, J., dissenting) ("[A]ppellate power to deal with plain error is one to be exercised sparingly.") (internal quotations and citations omitted). This court's previous decisions have interpreted "sparingly" to mean that the "'kind of error'" appropriate for plain error review is one that "'seriously affect[s] the fairness of the proceedings.'" Id. at 116, 223 P.3d at 181 (citing State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988)). We have also reasoned that, "where the error is of constitutional magnitude, . . . 'an invocation of the plain error rule would be the better part of discretion.'" Id. Thus, an

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<sup>5</sup>(...continued)  
157, 173 (2010) (citing Hawai'i Rules of Appellate Procedure Rule 28(b)(4)) (emphasis in original). Because neither the State nor Medeiros objected to the error or brought it to the attention of the circuit court, I fail to understand how this is not plain error review. See id.

appellate court is to exercise plain error review sparingly when "the error affects substantial rights." Id. at 117, 223 P.3d at 182.

Plain error review is available only when an error affects the defendant's substantial rights. "We may recognize plain error when the error committed affects substantial rights of the defendant." State v. Staley, 91 Hawai'i 275, 282, 982 P.2d 904, 911 (1999) (quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)) (emphasis added); accord In Interest of Doe, 77 Hawai'i 46, 50 n.5, 881 P.2d 533, 537 n.5 (1994). We have exercised plain error review to notice errors which resulted in the denial of a defendant's right to due process, such as a defendant's right to testify, right to counsel, right to a unanimous jury verdict, and voluntariness of a plea. See Miller, 122 Hawai'i at 122-24, 223 P.3d at 187-89 (internal citations omitted). We have also explained that the purpose of plain error review is to vindicate the appellant's substantial rights and "uphold the integrity of the judicial system[.]" Id. at 119, 223 P.3d at 184 (emphasis added).

Because plain error review is intended to vindicate a defendant's substantial rights, it is axiomatic that plain error review may not be used to notice an error affecting the State. See State v. Rapoza, 95 Hawai'i 321, 326, 22 P.3d 968, 973 (2001)

(equating a defendant's substantial rights to his constitutional rights); accord State v. Yamada, 99 Hawai'i 542, 549, 57 P.3d 467, 474 (2002). The State does not have substantial rights and the purpose of noticing plain error is to vindicate a defendant's rights. Yet here, the majority recognizes the State's error, when it does not affect Medeiros's substantial rights, is not of constitutional magnitude, and is unnecessary to resolve this case. Thus, the majority seems to disregard our previous rationales for applying plain error review, and instead decides that invocation of the plain error rule on behalf of the State "would be the better part of discretion" while providing no rationale at all.

Here, the circuit court sentenced Medeiros to probation. While a sentence of probation is a "variance" from the sentence provided by statute for the offenses to which Medeiros pled,<sup>6</sup> this variance did not affect Medeiros's substantial rights. "Any error, defect, irregularity or variance

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<sup>6</sup> Medeiros was sentenced pursuant to HRS § 183D-5 (2016), which provides in relevant part:

**Penalties.** (a) Any person violating . . . any rule adopted under this chapter shall be guilty of a petty misdemeanor, and upon conviction thereof, shall be punished as follows:

- (1) For a first conviction, by a mandatory fine of not less than \$100, or imprisonment or not more than thirty days, or both[.]



which does not affect substantial rights shall be disregarded.” HRPP Rule 52(a) (emphasis added). Thus, any error was harmless and must be disregarded, pursuant to HRPP Rule 52(a).

For this court to use plain error review to notice an error not raised at the trial court and not affecting the defendant’s substantial rights sharply departs from our previous plain error jurisprudence. The majority’s application of plain error review in this case ignores our previous admonitions that plain error review should be “exercised sparingly and with caution[.]” See State v. Kong, 131 Hawai‘i at 101, 315 P.3d at 727.

**B. The circuit court abused its discretion by denying Medeiros’s motion for DANC plea.**

Having sentenced Medeiros to probation, the circuit court was required to consider the factors set forth in HRS § 853-1(a) in deciding whether to grant Medeiros’s motion for DANC plea. Thus, the circuit court was required to consider: (1) whether Medeiros voluntarily pled no contest; (2) whether it appeared that Medeiros was likely to again engage in a criminal course of conduct; and (3) whether the ends of justice and the welfare of society did not require Medeiros to presently suffer the penalty imposed by law. See HRS § 853-1(a).

The circuit court acknowledged that because Medeiros

voluntarily pled no contest, the first factor was met.

The information before the circuit court when it considered Medeiros's motion for DANC plea was primarily the testimony of the DLNR officers, Medeiros's statement to the court apologizing "for the mess that [he] got [him]self into" and "guarantee[ing]" that he would not appear before the circuit court again, and the arguments of counsel, both of whom noted that Medeiros was twenty-three years old, with no prior arrests, and had the support of his family. Both Medeiros's counsel and the State expressed their belief that this was a "learning experience" for Medeiros and that he would not engage in criminal conduct in the future.

The circuit court denied Medeiros's motion for DANC plea because it found that Medeiros "is likely again to engage in such a criminal course of conduct." However, what the circuit court cited as reasons for this finding - Medeiros was wearing camouflage in an area known for night hunting, at night, using an artificial light to spotlight wild animals, and in possession of an unloaded weapon and ammunition - are merely elements of the offenses (Hunting Hours and Artificial Light Prohibited) to which Medeiros pled. The circuit court failed to articulate how any of the facts that were elements of Medeiros's prior offenses caused the circuit court to believe that Medeiros was "likely again to

engage in such a criminal course of conduct."

The circuit court also stated that it was "concerned" that, on the night of the offenses, Medeiros told the DLNR officers "half truths," in that Medeiros admitted that he was spotlighting, but told the officers that he was driving home, when he was driving in the opposite direction. Again, the circuit court failed to provide a rationale for how Medeiros's conduct on the night of the offenses supported its finding that Medeiros was likely to reoffend.

Other than the facts of the offenses to which Medeiros pled no contest, there was no evidence in the record to support the circuit court's conclusion that Medeiros was likely to engage in future criminal conduct. Instead, the record supports a contrary conclusion: Medeiros was twenty-three years old, yet had never before been arrested, had the support of his family, and had apologized to the circuit court. In view of the fact that there was no evidence before the circuit court that supported its conclusion that Medeiros was likely to again engage in criminal conduct but ample evidence to the contrary, the circuit court abused its discretion by denying Medeiros's motion for DANC plea.

## **II. CONCLUSION**

Because the State waived the argument that Medeiros was ineligible for a DANC plea and the error did not affect

Medeiros's substantial rights, I would not apply plain error review. I would vacate the ICA's February 28, 2019 Judgment on Appeal, which affirmed the circuit court's October 12, 2017 Judgment, Conviction, and Probation Sentence and remand for new proceedings because the circuit court abused its discretion by denying Medeiros's motion for DANC plea.

/s/ Paula A. Nakayama

