IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

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

vs.

THEO PEDRO,
Petitioner/Defendant-Appellant.

SCWC-19-0000439

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000439; CASE NO. 2FFC-18-0000252(4))

JUNE 4, 2021

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING IN PART, IN WHICH NAKAYAMA, J., JOINS

I. INTRODUCTION

I agree with the majority that the test for withdrawing a plea set forth in State v. Gomes, 79 Hawai'i 32, 37, 897 P.2d 959, 964 (1995), should be clarified, and I further concur with the majority's reformulation of the test.

However, I respectfully disagree with the majority's analysis of the prejudice caused to the State by allowing defendant Theo Pedro to withdraw his plea. The teenage complaining witness (CW) faced significant pressure from her family to recant after Pedro pleaded no contest to four counts of Sexual Assault in the Second Degree in violation of Hawaiʻi Revised Statutes (HRS) § 707-731(1)(a). Indeed, the State attested that the CW would not cooperate with the prosecution or testify at trial if Pedro were allowed to withdraw his pleas. In my view, these circumstances constitute substantial prejudice to the State caused by the withdrawal of Pedro's plea that must be balanced against the reasons supporting withdrawal. I therefore respectfully dissent on that basis, and I would remand to the Family Court of the Second Circuit (family court) to apply the correct test to the circumstances of this case.

II. BACKGROUND

The allegations against Pedro are as follows.[1] On June 24, 2018, Pedro came home intoxicated, where the CW, a 17-year-old family member, was babysitting his children. Pedro sexually assaulted her. Pedro's partner returned home and heard the CW screaming. When the police arrived, they found the CW curled up under the passenger dashboard of a car, hysterical.

[1] The description of the allegations comes from the court's statements at sentencing on May 14, 2019.

Pedro claimed that the encounter was consensual, and that he acted to get revenge on Pedro's partner, who had cheated on him.

When Pedro was arraigned on July 2, 2018 in family court, the court ordered that Pedro have "no contact, directly or indirectly through third parties" with the CW. Pedro pleaded no contest to four counts of Sexual Assault in the Second Degree on January 7, 2019. His counsel thereafter moved to withdraw, and the court granted the motion; at that hearing, on April 4, 2019, Pedro suggested to the court that he wished for new counsel to assist him in withdrawing his plea. At the end of the hearing, the State moved for the court to institute a no contact order prohibiting Pedro's family and friends from contacting the CW. The Deputy Prosecuting Attorney (DPA) stated:

> I understand that the . . . defendant is . . . looking to withdraw his plea. And I would like to put on the record that from what I have been told . . . it is very obvious that the defendant knows exactly what is going on and what he pled to by what he wrote in his motions.
>
> What the State believes is going on is the family has gotten to the young victim in this case. They are pressuring her severely. Um, that she is responsible and causing shame to the family and she needs to not cooperate with the State. Um, that is why I believe this defendant would like to start all over.

The court again ordered Pedro not to have any contact with the CW and to advise his "family or friends who may have any contact with [the CW]" not to do so either.

On May 3, 2019, with the assistance of new counsel,

Pedro moved to withdraw his plea. The motion alleged that Pedro "did not fully understand his options at trial," that his prior counsel failed to "fully explain [Pedro's] options in regard to a trial and pressured him into changing his plea," and that Pedro "is adamant that he is not guilty[.]"

The State opposed the motion, claiming, among other things, that it would be prejudiced by the withdrawal of the motion because since the plea, the CW had faced intense pressure from her and Pedro's family to recant and take the blame herself for the events of June 24, 2018. The State's memorandum in opposition to Pedro's motion to withdraw (to which the DPA attested in a declaration) stated:

> The State has spoken with the victim and the victim's Aunt and Uncle and has learned there has been significant familial and cultural pressure put on her and her family to not cooperate with this prosecution and blame her for the Defendant's actions during the time between Defendant's change of plea date and the March 29, 2019, sentencing date, when these claims began. Defendant's request to withdraw his plea appears to have arisen after the change of plea date, and is the State's position, [sic] prompted by the fact that the victim would not cooperate or testify at trial should Defendant be allowed to withdraw his plea of no contest and proceed to trial.

The family court held a hearing on the motion in which the DPA argued that:

> [the CW's willingness to testify] absolutely changed from the time . . . I spoke with . . . the victim and her aunt, who are . . . the only two that I was able to speak to because the rest of the family was on his side in this . . . .
>
> Family members that did not know had found out. There was an extreme . . . amount of pressure. Yes, there's always a cultural influence, but she had been willing to go a certain way.
>
> Now, it is completely . . . different. . . . And it

> is the State's position that this defendant absolutely knows that and doesn't just want to go to trial. He knows that, and is trying to withdraw this plea for the pure fact that he knows I do not have the victim at this time.

The family court denied the motion to withdraw, acknowledging that "someone has pressured the complaining witness to not cooperate[.]" As relevant here, the court "believe[d] the State's argument [that there] is an uncooperating family pressure situation on the complaining witness. And the defendant sees that as his opportunity." It concluded that "there will be substantial prejudice to the State if the defendant is allowed to withdraw his plea, if their witness is no longer available." Its findings of facts and conclusions of law (which also discussed the testimony about the alleged recantation adduced at sentencing) reflected that "[t]he State has relied upon the no contest plea to its substantial prejudice."

III. DISCUSSION

Initially, I agree with the majority that revisiting our test for withdrawal of a guilty or no contest plea is appropriate. Our precedent can reasonably be misunderstood to allow for the withdrawal of a plea only in the narrow circumstances addressed in Gomes. The majority appropriately clarifies that any "fair and just reason" can warrant the withdrawal of a plea. State v. Jim, 58 Haw. 574, 576, 574 P.2d 521, 523 (1978). The family court's order, therefore, rested on

an inaccurate formulation of the law, and I would vacate it for that reason.

But in this case, the State attested that the CW faced intense pressure from her family to recant after Pedro's plea. I do not doubt that uncooperative witnesses are "unexceptional" in criminal cases, Majority at 51, but there is wide consensus in other jurisdictions that when a witness becomes reluctant or uncooperative following the plea, the prosecution is prejudiced, and that prejudice weighs against granting a motion to withdraw the plea. For instance, in Griffin v. Commonwealth, 780 S.E.2d 909 (Va. Ct. App. 2016), the three key Commonwealth witnesses "were no longer available or were uncooperative" at the time the defendant moved for withdrawal – the witnesses had been convicted, fled, or (as particularly relevant here) were "dissatisfied with the consideration the Commonwealth offered in exchange for [the] testimony." Id. at 911, 911 n.4. The Court of Appeals of Virginia concluded that, separate and apart from the defendant's stipulation that the Commonwealth would be prejudiced, "the record show[ed] that the Commonwealth would have suffered actual prejudice if forced to try the case. The three primary witnesses against [the defendant] were all unable or unwilling to testify by the time the trial court heard [the defendant's] motion to withdraw his pleas." Id. at 912. As another example, in Commonwealth v. Carr, 543 A.2d 1232 (Pa.

Super. Ct. 1988), the defendant pleaded nolo contendere to a crime involving sexual abuse of his young grandson, and the trial court denied his motion to withdraw his plea. Id. at 1233. The court concluded that the prosecution "would have been substantially prejudice[d]" because, in addition to the likelihood that the child's memory would have been "dulled,"

> [w]hether intentional or not, the delays occasioned by the plea and subsequent motions for continuances by appellant resulted in a shift in family sympathies from the child victim to appellant. Though undoubtedly available in a technical sense, the reluctance of family members to testify in a way which would cause the incarceration of appellant is evident, and would have significantly impaired the prosecution of this case.

Id. at 1234; see also Commonwealth v. Davis, 191 A.3d 883, 891 (Pa. Super. Ct. 2018) (affirming the trial court's denial of a motion to withdraw plea where "[the now-convicted and sentenced co-defendant's] lack of motivation to cooperate with the prosecution would severely prejudice the Commonwealth if it sought to try Appellant"); United States v. Yazzie, 998 F. Supp. 2d 1044, 1119 (D.N.M. 2014) (holding that the United States would be prejudiced by the withdrawal of the defendant's guilty plea for sexual abuse of his two minor stepdaughters when, in the intervening time, the children had grown "more concerned about losing a member of their household and are rethinking their desire to testify against [the defendant]"); United States v. Bryant, 640 F.2d 170, 172 (8th Cir. 1981) (holding that the government would be prejudiced by the withdrawal of the plea

when witnesses were incarcerated or were otherwise reluctant to testify because a witness had been shot during another defendant's trial for the same crime); United States v. Morrison, 967 F.2d 264, 269 (8th Cir. 1992) ("[Defendant] had waited until the eve of trial before pleading guilty, when it was obvious that [the CW] would carry through on her criminal complaint. The prosecutor's affidavit in opposition to the first motion to withdraw explained in great detail the trauma of preparing for trial for [the CW] and her family, and the difficulty of gathering witnesses for a trial of this sort. Withdrawal of the plea would obviously require the prosecution and its witnesses to endure this emotional process again.").

These cases are consistent with the broader principle that, in the context of withdrawing a plea, prejudice can stem from "the potential difficulty to the Government in securing evidence against the defendant that would have been easier to secure at an earlier moment in time." United States v. Lopez, 385 F.3d 245, 254 (2d Cir. 2004). In addition to situations in which witnesses become reluctant or uncooperative, courts have recognized that the prosecution would be substantially prejudiced when the memories of child witnesses would fade due to the delay, State v. Bollig, 605 N.W.2d 199, 208 (Wis. 2000), a witness has died, State v. Rozell, 111 N.E.3d 861, 869 (Ohio Ct. App. 2018), or physical evidence has been discarded, United

States v. Jerry, 487 F.2d 600, 611 (3d Cir. 1973). Indeed, "the term 'prejudice' means that, due to events occurring after the entry of the plea, the . . . prosecution . . . is in a worse position tha[n] it would have been had the trial taken place as originally scheduled." Commonwealth v. Gordy, 73 A.3d 620, 624 (Pa. Super. Ct. 2013) (citation omitted). A key State witness becoming reluctant or uncooperative due to intensifying familial pressure to recant after the defendant pleads no doubt places the State "in a worse position" to prosecute the case.

The majority concludes that the prejudice to the State in this case was "minimal" because it was speculative, lacked evidentiary support, and not caused by Pedro's plea. Majority at 51-52. I respectfully disagree.

First, the prejudice here was not speculative. The Majority points to Gomes, but that case presented markedly different circumstances. For one, the circuit court in Gomes ruled on the motion before the State submitted the affidavit referenced by the majority; the circuit court

> had denied [the defendant's] . . . motion [to withdraw the plea] notwithstanding an acknowledgement that "the prosecution never argued or demonstrated any prejudice rising to a substantial level" as a result of its reliance on Gomes's plea. In fact, the prosecutor stated during the hearing on Gomes's Motion that "I'm not even asserting that it's substantial prejudice; I'm simply stating that it's an inconvenience. The prosecution is basically hanging its hat on the other two grounds specified in State v. Jim."

Gomes, 79 Hawai'i at 39-40, 897 P.2d at 966-67 (brackets and ellipses omitted).

To the extent the prosecution's affidavit "express[ing] [the principal witness's] desire to move to an undetermined location" bore on our analysis, we noted that the affidavit "d[id] not affirmatively attest to his unavailability." Id. at 40, 897 P.2d at 967. Not only was the State's explanation of the CW's reluctance more specific in this case than an amorphous desire to move to an "undetermined location," the State did "affirmatively attest to [the CW's] unavailability." Id.; cf. Gordy, 73 A.3d at 627 ("There [were] no facts of record supporting the court's suggestion that the complainants will not cooperate with the Commonwealth upon withdrawal of Appellant's guilty pleas. In fact, the record contain[ed] at least some evidence to the contrary."). The State attested, "[T]he victim would not cooperate or testify at trial should Defendant be allowed to withdraw his plea of no contest and proceed to trial."

Second, evidence supported the State's argument for prejudice, and likewise, third, the record belies the majority's argument that the CW's reluctance to testify was not caused by the plea. Here, the State attested that the CW faced external pressure to change her story after Pedro pleaded guilty, and that she would likely become uncooperative if the defendant were permitted to withdraw his plea:

> The State has spoken with the victim and the victim's Aunt and Uncle and has learned there has been significant familial and cultural pressure put on her and her family to not cooperate with this prosecution and blame her for the Defendant's actions during the time between Defendant's change of plea date and the March 29, 2019, sentencing date, when these claims began. Defendant's request to withdraw his plea appears to have arisen after the change of plea date, and is . . . prompted by the fact that the victim would not cooperate or testify at trial should Defendant be allowed to withdraw his plea of no contest and proceed to trial.[2]

And at the hearing on the motion, the State explained that:

---

[2] The majority contends that the DPA's statements at sentencing contradicted the memorandum in opposition to the motion to withdraw. Majority at 53. This argument is puzzling; the statements are entirely consistent. At sentencing, the DPA said that she last spoke to the CW on April 8, 2019. In the memorandum in opposition, on May 9, 2019, the DPA said that the CW faced pressure "during the time between Defendant's change of plea date and the March 29, 2019, sentencing date, when these claims began." And the DPA consistently stated that the CW, despite mounting pressure from family causing her reluctance to cooperate post-plea, never in fact recanted.

Indeed, at sentencing, the State provided more information about the CW's circumstances. The DPA asserted that:

> between . . . the change of plea date and the sentencing, things changed drastically for [the CW]. Her parents found out. And the family, both sides of the family, started putting immense pressure on both her and her aunt and her uncle who she was with.
>
> They blamed her for what happened. They told her she was bringing shame on the family by involving others and going forward with this. They basically told her that it was all her fault.
>
> . . . .
>
> [Her family] were trying to tell me . . . they were claiming that at least if [the CW] . . . wasn't seen as responsible for his prison term, that maybe they could save her. They . . . were threatening her . . . with [] being [] disowned.
>
> [The CW] does not know what she is going to do if she is disowned. . . . [S]he needs her family. She was crying desperately about the possibility of being disowned.
>
> . . . .
>
> Not once did [the CW] ever claim that it didn't happen. Neither did her uncle or her aunt. They just thought, enough. This is her fault. And she's the one bringing shame on the family.

> it absolutely changed from the time . . . I spoke with . . . the victim and her aunt, who are . . . the only two that I was able to speak to because the rest of the family was on his side in this . . . .
>
> Family members that did not know had found out. There was an extreme . . . amount of pressure. Yes, there's always a cultural influence, but she had been willing to go a certain way.
>
> Now, it is completely . . . different. . . . And it is the State's position that this defendant absolutely knows that and doesn't just want to go to trial. He knows that, and is trying to withdraw this plea for the pure fact that he knows I do not have the victim at this time.

It is not at all clear what, exactly, the majority would have the State show beyond what it did in this case – that the witness became uncooperative following the plea, due to circumstances precipitated by the plea. I would conclude that the State showed it would be substantially prejudiced by the withdrawal of Pedro's plea in this case. As in Carr, the plea "resulted in a shift in family sympathies" that rendered the witness reluctant to testify against Pedro and would have "significantly impaired the prosecution of this case." 543 A.2d at 1234. Unlike in Gomes, this prejudice was not merely speculative; the record before the court supported the conclusion that since Pedro's plea, the CW's cooperation had waned in light of growing pressure – pressure that intensified because of Pedro's plea – for her to recant. In my view, the family court did not err by concluding that the State would be substantially prejudiced by the withdrawal of Pedro's plea, and I therefore respectfully dissent on those grounds.

Of course, substantial prejudice must be weighed

against the reasons Pedro presents to support withdrawing his plea. Based on Gomes, the family court only addressed whether Pedro's plea was knowing, intelligent, and voluntary, and whether there had been a recantation. In so doing, the family court considered some, but not all, of the factors the majority sets forth – it did not consider, for instance, whether Pedro maintained his innocence, the circumstances underlying the plea, Pedro's education and familiarity with the legal system, or whether the undue delay was in fact caused by a conflict with his first attorney. See Majority at 34 n.20, 35, 44, 48. I would not consider those matters in the first instance. In light of the fact that we are crafting a new test, application of which will generally fall within the trial court's discretion, I would vacate the order denying the motion to withdraw Pedro's plea and remand this case to the family court to weigh the factors set forth in the majority opinion. See State v. Choy Foo, 142 Hawai'i 65, 77, 414 P.3d 117, 129 (2018) (remanding for application of a multi-factor test when the family court did not apply the factors in the first instance); State v. Sasai, 143 Hawai'i 285, 299-300, 429 P.3d 1214, 1228-29 (2018) (adopting a new multi-factor test and remanding "for application of the appropriate factors"); State v. Visintin, 143 Hawai'i 143, 159, 426 P.3d 367, 383 (2018) (setting forth "principles applicable to the circuit court's determination

should the [challenged] motion be further considered on remand"); Peer News LLC v. City & Cty. of Honolulu, 138 Hawai'i 53, 75, 376 P.3d 1, 23 (2016) (remanding for the trial court to apply the test set forth in the opinion when the factual record was insufficient); Gordon v. Gordon, 135 Hawai'i 340, 356, 350 P.3d 1008, 1024 (2015) (instructing the court on remand to consider the circumstances discussed in the opinion).[3]

The majority's treatment of the "defendant's nature and background" factor illustrates why the trial court is best suited to apply this new test in the first instance. I agree that "[a] youthful defendant, or a defendant with limited mental faculties, education, or English-language proficiency may be poorly equipped to thoughtfully consider a plea's implications." Majority at 48. But we know very little about whether Pedro's

[3] The Majority cites two cases to refute the principle that "the trial court is best positioned to apply our newly-introduced five-factor test to the facts of Pedro's case." Majority at 35. Respectfully, neither case is relevant. While both Nishimura v. Gentry Homes, Ltd., 134 Hawai'i 143, 338 P.3d 524 (2014), and State v. Ontai, 84 Hawai'i 56, 929 P.2d 69 (1996), involved a new statement of the law, in neither case did the court apply a newly-created, discretionary test based on facts not found by the trial court.

First, in Nishimura, the court applied the "fundamental fairness" standard it adopted to the terms of an arbitration agreement. 134 Hawai'i at 153, 338 P.3d at 534. We engaged in a task routine for appellate courts: interpreting "[t]he plain language of the [contract.]" Id.

Second, in Ontai, the court did not "analyz[e] the facts of the case before it in light of the new definition [of 'enterprise.']" Majority at 35. Rather, Ontai considered whether the evidence adduced by the State, viewed in the light most favorable to the State (in other words, without considering the credibility of that evidence), was, as a matter of law, sufficient to support the indictment. 84 Hawai'i at 63-64, 929 P.2d at 76-77.

background in fact affected his ability to thoughtfully consider the implications of his plea – and we certainly do not know enough to conclude this factor weighs towards granting the motion to withdraw. Pedro is not "a youthful defendant," for Pedro was 33 years old at the time of the plea. Pedro's first language is not English, as he pointed out in his motion to withdraw, but he utilized an interpreter, including when his attorney went over the plea with him and at the hearings. And with respect to Pedro's education, as I have said before, we should avoid "incorrectly equat[ing] the lack of a college education with an inability to grasp significant concepts. While going to college or receiving a high school diploma may be a sign of intellectual achievement that demonstrates a [defendant's choice] was made knowingly and intelligently, the opposite is by no means true." State v. Ernes, 147 Hawai'i 316, 330, 465 P.3d 763, 777 (2020) (Recktenwald, C.J., dissenting) (citation omitted). Indeed, Pedro has never alleged that his English proficiency or educational attainment caused him to misunderstand the nature of the charges, nor has he claimed that he did not comprehend the meaning of "compulsion" and "strong compulsion." Rather, in his motion and subsequent statements to the court, he claimed his first attorney did not adequately explain the nature of the case and his options. Perhaps Pedro's background did affect his plea such that this factor weighs

towards granting the motion to withdraw, but the trial court is in the best position to determine whether Pedro's "ability to strategically evaluate the risks and disadvantages of waiving his constitutional rights" is in fact "sub-optimal," as the majority concludes, and how that factor weighs in the balancing test. Majority at 49-50. In the meantime, we are merely speculating.

IV. CONCLUSION

For the foregoing reasons, I respectfully dissent in part and concur in part. I concur with the majority in that the family court's order should be vacated, and with its formulation of the appropriate test for evaluating the defendant's motion. But I respectfully dissent as to the majority's narrow treatment of the prejudice factor and its de novo application of the balancing test it sets forth. I disagree that the State failed to show prejudice as a matter of law, and I would remand this case to the family court to evaluate the factors it did not consider prior to this opinion and to balance those factors in the first instance.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama