

CHAPTER 853
CRIMINAL PROCEDURE: DEFERRED ACCEPTANCE OF GUILTY
PLEA, NOLO CONTENDERE PLEA

Section

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Chapter heading amended by L 1983, c 290, §1.

Case Notes

A conditional plea under HRPP rule 11(a)(2) is inconsistent with the granting of a deferred acceptance of guilty plea pursuant to this chapter; defendant's appeal from trial court's order granting motion for deferred plea did not provide a jurisdictional basis for review of an adverse pretrial suppression order purportedly preserved by the trial court's allowance of defendant's conditional plea. 95 H. 309, 22 P.3d 588 (2001).

" **§853-1 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.

(b) The proceedings may be deferred upon any of the conditions specified by section 706-624. As a further condition, the court shall impose a compensation fee pursuant to section 351-62.6 and a probation services fee pursuant to section 706-648 upon every defendant who has entered a plea of guilty or nolo contendere to a petty misdemeanor, misdemeanor, or felony; provided that the court shall waive the imposition of a compensation or probation services fee, if it finds that the defendant is unable to pay the compensation or probation services fee. The court may defer the proceedings for a period of time as the court shall direct but in no case to exceed the maximum sentence allowable; provided that, if the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, the court may defer the proceedings for a period not to exceed one year. The defendant may be subject to bail or

recognizance at the court's discretion during the period during which the proceedings are deferred.

(c) Upon the defendant's completion of the period designated by the court and in compliance with the terms and conditions established, the court shall discharge the defendant and dismiss the charge against the defendant.

(d) Discharge of the defendant and dismissal of the charge against the defendant under this section shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is not a conviction.

(e) Upon discharge of the defendant and dismissal of the charge against the defendant under this section, the defendant may apply for expungement not less than one year following discharge, pursuant to section 831-3.2. [L 1976, c 154, pt of §2; am L 1979, c 147, §1 and c 155, §1; am L 1980, c 232, §42; am L 1983, c 290, §2(1), (2); gen ch 1985; am L 1988, c 184, §1; am L 2000, c 115, §3; am L 2012, c 295, §2]

Note

The 2012 amendment shall not apply to any defendant granted a deferred acceptance of guilty or no contest plea before July 9, 2012. L 2012, c 295, §3.

Case Notes

Deferred acceptance of guilty plea constitutes a form of punishment under the Assimilated Crimes Act. 866 F.2d 315 (1989).

Procedure (under earlier program) does not impose an impermissible burden on exercise of right of trial by jury. 58 H. 304, 568 P.2d 1194 (1977).

Under procedures established before enactment of this section, it was held that a motion for DAG plea was not seasonably made after a plea of not guilty and a trial resulting in a finding of guilt. 58 H. 412, 570 P.2d 1323 (1977).

Denial of motion for deferred acceptance of guilty plea is within discretion of trial court. 59 H. 562, 584 P.2d 126 (1978).

Deferred acceptance of guilty plea is not a conviction and may not be used for impeachment purposes. 62 H. 259, 614 P.2d 386 (1980).

Did not limit trial court's power to accept nolo contendere plea to cases where plea is entered before trial begins. 66 H. 364, 662 P.2d 212 (1983).

Deferred acceptance of guilty and no contest pleas are not appealable. 69 H. 438, 746 P.2d 568 (1987).

The tolling provisions under §706-627 apply to deferral periods pursuant to a deferred acceptance of guilty plea. 92 H. 322, 991 P.2d 832 (2000).

A conditional plea under HRPP rule 11(a)(2) is inconsistent with the granting of a deferred acceptance of guilty plea pursuant to this chapter; defendant's appeal from trial court's order granting motion for deferred plea did not provide a jurisdictional basis for review of an adverse pretrial suppression order purportedly preserved by the trial court's allowance of defendant's conditional plea. 95 H. 309, 22 P.3d 588 (2001).

Where defendant entered no contest plea after trial commenced, pursuant to subsection (a)(1), defendant was not eligible for plea deferral; only available remedy to defendant was to permit defendant to withdraw plea. 95 H. 398, 23 P.3d 733 (2001).

In connection with the conditions from §706-624 that are incorporated by reference in this section, the "provision" in §706-624(3) that requires a defendant who is granted probation to be given a written copy of the conditions, must necessarily apply to a defendant granted a deferred acceptance of guilty plea, who must adhere to such similar conditions. 118 H. 15, 185 P.3d 200 (2008).

Where State did not file a written motion to revoke defendant's deferred acceptance of guilty plea, the probationary period was not tolled; thus, as the deferment period had expired two months earlier, trial court lacked jurisdiction to revoke defendant's deferred acceptance of guilty plea. 118 H. 15, 185 P.3d 200 (2008).

Where the State promised as a condition of the plea agreement to "take no position" on petitioner's deferred acceptance of no contest plea (DANCP) motion but prosecutor's comments directly addressed the issues pertinent to the motion, the terms of the agreement were not fulfilled and petitioner was denied petitioner's due process rights; because this contravention of petitioner's DANCP plea agreement violated petitioner's fundamental rights and resulted in manifest injustice, this was plain error under HRPP rule 52, the error was not harmless beyond a reasonable doubt and sentencing by another judge was the proper remedy. 122 H. 92, 223 P.3d 157 (2010).

Granting or denial of motion for deferred acceptance of guilty plea is within discretion of trial court and will not be disturbed unless there has been manifest abuse. 1 H. App. 157, 616 P.2d 226 (1980).

This chapter does not prohibit trial court's inherent power to grant or deny deferred acceptance of nolo contendere pleas. 1 H. App. 602, 623 P.2d 892 (1981).

Subsection (a)(1)'s requirement that defendant plead guilty "prior to commencement of trial" means that it be done prior to commencement of first trial; defendant's plea of guilty after first trial and before new trial did not satisfy that requirement. 10 H. App. 31, 859 P.2d 1380 (1993).

In light of §706-624(n), family court was authorized to require defendant to undergo polygraph testing as a reasonable condition of the granting of defendant's deferred acceptance of nolo contendere plea under this section. 92 H. 289 (App.), 990 P.2d 1171 (1999).

Mentioned: 74 H. 75, 837 P.2d 776 (1992); 10 H. App. 148, 861 P.2d 759 (1993).

" **§853-2 Plea of guilty or nolo contendere; procedure.** Upon motion made before sentence by the defendant, the prosecutor, or on its own motion, the court will either proceed in accordance with section 853-1, or deny the motion and accept the defendant's plea of guilty or nolo contendere, or allow the defendant to withdraw the defendant's plea of guilty or nolo contendere only for good cause. [L 1976, c 154, pt of §2; am L 1983, c 290, §3; gen ch 1985]

Case Notes

Denial of withdrawal of guilty plea is not abuse of discretion. (Earlier program.) 58 H. 304, 568 P.2d 1194 (1977).

" **§853-3 Violation of terms and conditions during deferment; result.** Upon violation of a term or condition set by the court for a deferred acceptance of guilty plea or deferred acceptance of nolo contendere plea, the court may enter an adjudication of guilt and proceed as otherwise provided. [L 1976, c 154, pt of §2; am L 1983, c 290, §4]

Case Notes

Because a court's course of action following revocation of a deferred acceptance of guilty plea is expressly set forth in this section, no need or justification arises for resort to any other statute, such as §706-625(5). 93 H. 362, 3 P.3d 1239 (2000).

Section 706-625(5), which permits a trial court on revocation of probation to impose any sentence that might have originally been imposed at the time of conviction, does not apply to the sentencing procedure attendant to revocation of a deferred

acceptance of guilty plea, which is already specifically governed by this section. 93 H. 362, 3 P.3d 1239 (2000).

No abuse of discretion where family court concluded that defendant's refusal to take polygraph examination, resulting in defendant's termination from sex offender treatment program, constituted a violation of the terms and conditions of the deferred acceptance of nolo contendere plea order, warranting that it be set aside. 92 H. 289 (App.), 990 P.2d 1171 (1999).

" **§853-4 Chapter not applicable; when.** (a) This chapter shall not apply when:

- (1) The offense charged involves the intentional, knowing, reckless, or negligent killing of another person;
- (2) The offense charged is:
 - (A) A felony that involves the intentional, knowing, or reckless bodily injury, substantial bodily injury, or serious bodily injury of another person; or
 - (B) A misdemeanor or petty misdemeanor that carries a mandatory minimum sentence and that involves the intentional, knowing, or reckless bodily injury, substantial bodily injury, or serious bodily injury of another person;
- (3) The offense charged involves a conspiracy or solicitation to intentionally, knowingly, or recklessly kill another person or to cause serious bodily injury to another person;
- (4) The offense charged is a class A felony;
- (5) The offense charged is nonprobationable;
- (6) The defendant has been convicted of any offense defined as a felony by the Hawaii Penal Code or has been convicted for any conduct that if perpetrated in this State would be punishable as a felony;
- (7) The defendant is found to be a law violator or delinquent child for the commission of any offense defined as a felony by the Hawaii Penal Code or for any conduct that if perpetrated in this State would constitute a felony;
- (8) The defendant has a prior conviction for a felony committed in any state, federal, or foreign jurisdiction;
- (9) A firearm was used in the commission of the offense charged;
- (10) The defendant is charged with the distribution of a dangerous, harmful, or detrimental drug to a minor;
- (11) The defendant has been charged with a felony offense and has been previously granted deferred acceptance of

- guilty plea or no contest plea for a prior offense, regardless of whether the period of deferral has already expired;
- (12) The defendant has been charged with a misdemeanor offense and has been previously granted deferred acceptance of guilty plea or no contest plea for a prior felony, misdemeanor, or petty misdemeanor for which the period of deferral has not yet expired;
- (13) The offense charged is:
- (A) Escape in the first degree;
 - (B) Escape in the second degree;
 - (C) Promoting prison contraband in the first degree;
 - (D) Promoting prison contraband in the second degree;
 - (E) Bail jumping in the first degree;
 - (F) Bail jumping in the second degree;
 - (G) Bribery;
 - (H) Bribery of or by a witness;
 - (I) Intimidating a witness;
 - (J) Bribery of or by a juror;
 - (K) Intimidating a juror;
 - (L) Jury tampering;
 - (M) Promoting prostitution;
 - (N) Abuse of family or household member;
 - (O) Sexual assault in the second degree;
 - (P) Sexual assault in the third degree;
 - (Q) A violation of an order issued pursuant to chapter 586;
 - (R) Promoting child abuse in the second degree;
 - (S) Promoting child abuse in the third degree;
 - (T) Electronic enticement of a child in the first degree;
 - (U) Electronic enticement of a child in the second degree;
 - (V) Prostitution pursuant to section 712-1200(1)(b);
 - (W) Street solicitation of prostitution under section 712-1207(1)(b);
 - (X) Solicitation of prostitution near schools or public parks under section 712-1209;
 - (Y) Habitual solicitation of prostitution under section 712-1209.5; or
 - (Z) Solicitation of a minor for prostitution under section 712-1209.1;
- (14) The defendant has been charged with:
- (A) Knowingly or intentionally falsifying any report required under chapter 11, part XIII with the intent to circumvent the law or deceive the campaign spending commission; or

- (B) Violating section 11-352 or 11-353; or
- (15) The defendant holds a commercial driver's license and has been charged with violating a traffic control law, other than a parking law, in connection with the operation of any type of motor vehicle.

(b) The court may adopt by rule other criteria for purposes of this section. [L 1976, c 154, pt of §2; am L 1980, c 292, §2; am L 1993, c 130, §4 and c 234, §1; am L 1996, c 201, §3; am L 1997, c 55, §1; am L 1998, c 172, §9; am L 2000, c 4, §7; am L 2004, c 85, §1; am L 2005, c 203, §25; am L 2006, c 80, §4; am L 2007, c 288, §3; am L 2008, c 171, §11; am L 2009, c 88, §13; am L 2010, c 166, §22 and c 211, §§7, 8, 13; am L 2011, c 145, §5; am L 2013, c 53, §1; am L 2014, c 114, §5; am L 2016, c 206, §20 and c 231, §68]

Case Notes

Paragraph (7) is limited to cases involving minors who were waived for adult prosecution under §571-22. 61 H. 385, 605 P.2d 496 (1980).

Subsections are not to be read conjunctively. 69 H. 602, 752 P.2d 597 (1988).

As sentencing court limited to alternatives expressly enumerated in §188-70 and probation not an enumerated alternative, offense of fishing with gill nets under §188-30.2 nonprobationable; thus, under paragraph (5), deferred acceptance of no contest plea not allowed for that offense. 87 H. 102, 952 P.2d 390 (1998).

The plain and unambiguous language of paragraph (2) does not prohibit the grant of a deferred acceptance of no contest plea for assault in the second degree under §707-711 causing "substantial bodily injury", as statutory prohibition expressly applies only to felony and misdemeanor assaults inflicting "bodily injury" or "serious bodily injury". 101 H. 409, 70 P.3d 635 (2003).

By the express terms of §712-1207(4) and (5), the offense of street solicitation under §712-1207(1) is probationable, and thus not excludable under paragraph (5); appeals court therefore erred in affirming trial court's refusal to consider defendant's motion for a deferred acceptance of no contest plea. 116 H. 519, 174 P.3d 358 (2007).

When family court implicitly entered a deferred acceptance of guilty plea pursuant to §853-1 and conditioned deferral upon defendant's submitting to counseling according to schedule and not committing any subsequent offenses, family court violated paragraph (2), where defendant was charged with abuse of family

and household member (§709-906). 10 H. App. 148, 861 P.2d 759 (1993).

Where the indictment alleges that a "dangerous instrument" was used in the commission of the offense charged so as to allow proof that a "firearm" was used, the possibility exists that the defendant is not eligible for a deferred acceptance of no contest (DANC) plea; in such cases, if prior to the court's decision on the defendant's motion for a DANC plea the court is informed that the "dangerous instrument" was a "firearm", the defendant is not eligible for, and the court is not authorized to enter, a DANC plea. 101 H. 65 (App.), 62 P.3d 628 (2002).

Mentioned: 74 H. 75, 837 P.2d 776 (1992).