

Man gets new chance to keep record clean

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WAILUKU - A Maui man will again ask for a chance to keep a misdemeanor assault conviction off his record after the Hawaii Supreme Court vacated his sentence and ordered that he be resentenced by another Family Court judge.

In its 3-2 decision handed down Jan. 25, the majority said the prosecution "breached its plea agreement" with Douglas Miller because, after agreeing to take no position on his request for a deferral of his plea, "it effectively argued against that motion."

"I'm very happy with the Supreme Court's decision because I believed that I didn't get a fair shake," Miller said in a news release issued by his lawyer, Hayden Aluli. "When the prosecutor promised not to take a position about my motion for deferral, I thought that really meant something. I'm so glad the Supreme Court agreed that promises are promises, especially from a prosecutor, and gave me another chance before another judge to keep my record clean."

Maui County First Deputy Prosecuting Attorney Peter Hanano said the prosecution believed its sentencing argument was proper.

"At the time of the defendant's sentencing, we believe that the argument we made at sentencing was in accordance with the plea agreement in the case," Hanano said. "There was certainly no intention by the state of Hawaii to breach that plea agreement. Obviously, it was a difficult 3-to-2 split decision by the Hawaii Supreme Court."

Originally charged with abuse of his former girlfriend, Miller, now 53, pleaded no contest to a charge of third-degree assault. In a plea agreement with the prosecution, he agreed to a two-day jail term, substance abuse assessment, a domestic violence intervention program, restitution and an apology to his former girlfriend. The prosecution agreed to take no position on his request for a chance to keep the conviction off his record if he complied with court requirements for one year.

During Miller's October 2007 sentencing before 2nd Circuit Judge Richard Bissen, Deputy Prosecutor Iwalani Mountcastle said she was taking no position on the request and asked the judge to follow the plea agreement.

"However, this case was borderline strangulation," Mountcastle said. **"(Miller) actually**

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elbows (his former girlfriend), kneed her in the back, punched her, choked her, put his hand over her mouth, and told her to be quiet, and then also took a pillow after that because she wouldn't be quiet and put it over her face.

"At that time, your honor, the witness in this case, the victim, actually feared for her life," the prosecutor said. "And, you know, she's 51 years old. So is the defendant. He does not have a prior criminal record, but you know, at 51 years old, you shouldn't be doing that to a significant loved one. And **this type of beating and brutality should not be accepted in our society.**"

The judge heard arguments on the sentencing and deferral motion at the same time.

Bissen denied Miller's request for a deferral of the plea and sentenced him to one year's probation with the terms outlined in the plea agreement.

Miller appealed. Noting that the defense didn't raise an objection at the time, the state Intermediate Court of Appeals had affirmed the sentence before the Supreme Court decision vacating it.

In a dissenting opinion, Supreme Court Justice Paula Nakayama agreed with the Intermediate Court of Appeals that Miller forfeited his claim that the plea agreement was breached because he didn't raise the issue at sentencing. She wrote that Miller also didn't point to any error by the court and didn't argue how the breached plea agreement affected his rights.

"Mr. Miller is a happy camper," Aluli said in the news release. "During this more than two-year appeal, he's already served his sentence of two days, completed all of his anger management classes, paid full restitution and apologized to his former girlfriend, and completed his one-year probation with flying colors. Mr. Miller is hopeful that another judge will see that he deserved to keep his record clean and will grant the only thing we had asked for at sentencing."

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