*** NOT FOR PUBLICATION ***

NO. 24143

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

THOMAS S. SCHILLACI, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 96-0394)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, and Nakayama, JJ.,
Circuit Judge Chang, in place of Acoba, J., recused, and
Circuit Judge Sakamoto, assigned by reason of vacancy)

Defendant-appellant Thomas S. Schillaci, also known as Steven Collura, appeals from the February 16, 2001 judgment of the circuit court of the second circuit, the Honorable Artemio C. Baxa presiding, convicting Schillaci of (1) twenty-one counts of felon in possession of any firearm, in violation of Hawai'i Revised Statutes (HRS) § 134-7(b) (Supp. 1996)[1] (Counts 6-26), (2) thirteen counts of felon in possession of firearm ammunition, in violation of HRS § 134-7(b) (Counts 27-39), and (3) one count of possession of a prohibited firearm or device, in violation of

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[1] HRS § 134-7(b) provides:

> (b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State or elsewhere of having committed a felony, or any crime of violence, or an illegal sale of any drug shall own, possess, or control any firearm or ammunition therefor.

HRS § 134-8 (1993)[2] (Count 40). On appeal, Schillaci argues that the circuit court erred by denying his motion to (1) dismiss all charges on the basis of HRS §§ 701-111(1)(b) (1993)[3] and 701-109(2) (1993),[4] (2) dismiss all charges on the basis of a speedy trial violation, (3) suppress evidence of firearms and drug paraphernalia recovered from the residence and cottage at 552-C Piiholo Road, (4) arrest judgment for Counts 6-39 on the basis of

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[2] HRS § 134-8 provides in relevant part:

> (a) The manufacture, possession, sale, barter, trade, gift, transfer, or acquisition of any of the following is prohibited: assault pistols, except as provided by section 134-4(e)[.]
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> . . . .
>
> (d) Any person violating subsection (a) or (b) shall be guilty of a class C felony and shall be imprisoned for a term of five years without probation. . . .

[3] HRS § 701-111(1)(b) provides in relevant part:

> Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution under any of the following circumstances:
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> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3) and the subsequent prosecution is for:
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> . . . .
>
> (b) Any offense for which the defendant should have been tried on the first prosecution under section 701-109 unless the court ordered a separate trial of the offense[.]

[4] HRS § 701-109 provides in relevant part:

> (2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.
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> (3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

a double jeopardy violation, and (5) compel attendance of a key witness.

The State of Hawai‘i [hereinafter, "the prosecution"] asserts, as an initial matter, that this court lacks jurisdiction over several points of error, including whether the circuit court should have dismissed the charges based on HRS § 701-111(1)(b) and HRS § 701-109(2), because Schillaci failed to set forth and attach relevant orders to his notice of appeal, as required by Hawai‘i Rules of Appellate Procedure (HRAP) Rule 3(c)(2).[5] In the alternative, the prosecution asserts that Schillaci's arguments are without merit.

We hold that (1) although Schillaci failed to comply with HRAP Rule 3(c)(2) by neglecting to set forth and attach the relevant orders appealed from, this court does not lack jurisdiction to review his appeal, and (2) inasmuch as Counts 6-40 arose out of the same conduct or episode as the charges in Cr. No. 96-0316(3), the circuit court erred by denying Schillaci's motion to dismiss all charges pursuant to HRS § 701-109(2) and HRS § 701-111(1)(b). Based on this disposition, the judgment in this case must be reversed and Schillaci's other points on appeal are not addressed.

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[5] HRAP Rule 3(c)(2) provides in relevant part:

> (c) Content of notice of appeal.
> . . . .
> (2) The notice of appeal shall designate the judgment, order, or part thereof and the court or agency appealed from. A copy of the judgment or order shall be attached as an exhibit. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

I. BACKGROUND

A. Statement of Facts

Sometime prior to June 1996, Mike and Danette Waltze [hereinafter, "the Waltzes"] leased a residence and cottage, both located at 552-C Piiholo Road, to Schillaci and his girlfriend, Carmencita Lista. After several unsuccessful attempts to collect past due rent, the Waltzes sent William Simpson to the premises. On June 3, 1996, Simpson arrived at 552-C Piiholo Road and an altercation ensued between Simpson and Schillaci. Simpson was shot with a .45 caliber semiautomatic firearm. Schillaci and Lista fled the premises, Lista in a truck and Schillaci in the Karman Ghia that Simpson had driven to the premises. Schillaci abandoned the Karman Ghia down the road and jumped into the truck.

Meanwhile, Maui Police Department (MPD) police officers arriving at 552-C Piiholo Road found Simpson lying in a large pool of blood with injuries sustained from the shooting. Officers observed spent casings around Simpson that appeared to belong to a .45 caliber semiautomatic firearm. Officers conducted a brief search of the residence to look for other victims or the possible shooter. No one else was found in the residence, but the officers noticed firearms and items of drug paraphernalia in plain view.[6] The officers also noticed a surveillance camera and audio system. Search warrants were obtained, resulting in the recovery of numerous firearms,

[6] Among the items noticed in plain view were a 12-gauge shotgun, a loaded handgun magazine, a pistol holster, a glass smoking pipe, and a propane torch, commonly associated with illicit drug use.

including an illegal assault pistol, firearm ammunition, and several items of drug paraphernalia from both the residence and cottage.[7] The .45 caliber semiautomatic firearm used to shoot Simpson was never recovered.

After a high speed car chase, officers, who had set up a barricade, stopped the truck and apprehended Lista. Schillaci, who had previously "bail[ed] out" of the truck, was not found. Schillaci evaded officers by running into a nearby pineapple field, jumping into a truck owned by the pineapple company, and driving away. Three days later, on June 6, 1996, Schillaci was apprehended at a friend's residence.

B. Procedural History

Schillaci's arrest resulted in two separate indictments. In the first case, Cr. No. 96-0316(3), Schillaci was charged with (1) murder in the second degree, in violation of

[7] Among the items of firearms and firearm ammunition recovered that Schillaci was later charged with possessing include (1) an H & K .308 caliber semiautomatic rifle, (2) a Remington 12 gauge shotgun, (3) an HI-Standard .22 caliber revolver, (4) a Ruger .44 caliber revolver, (5) a Ruger .22 caliber revolver, (6) a Colt .357 magnum caliber revolver, (7) a Colt .38 special revolver, (8) a Walther 7.65 mm caliber semiautomatic pistol, (9) a Lorcin .380 caliber semiautomatic pistol, (10) an HI-Standard .22 caliber semiautomatic pistol, (11) a P-38 9 mm semiautomatic pistol, (12) two Winchester 12 gauge shotguns, (13) a Feather Industries 9 mm semiautomatic rifle, (14) an Intratec 9 mm semiautomatic assault pistol, (15) two Colt .223 caliber semiautomatic rifles, (16) a Ruger .44 magnum semiautomatic rifle, (17) an AMT .22 caliber rifle, (18) two Winchester .30-30 caliber rifles, (19) .308 caliber ammunition, (20) .223 caliber ammunition, (21) .410 gauge ammunition, (22) .22 caliber long rifle ammunition, (23) .22 magnum caliber ammunition, (24) .380 caliber ammunition, (25) 9 mm ammunition, (26) 12 gauge shotgun ammunition, (27) .30-30 caliber ammunition, (28) .44 magnum caliber ammunition, (29) 7.62 x 39 mm ammunition, (30).300 magnum caliber ammunition, and (31) .30-06 caliber ammunition.

HRS § 707-701.5 (1993),[8] for the shooting that resulted in Simpson's death, (2) carrying or use of a firearm in the commission of a separate felony, in violation of HRS § 134-6(a) (Supp. 1996),[9] for using a .45 caliber semiautomatic firearm while engaged in the felony offense of murder in the second degree or manslaughter, (3) felon in possession, in violation of HRS § 134-7(b), see supra note 1, for possession of the .45 caliber semiautomatic firearm and ammunition, and (4) unauthorized control of a propelled vehicle, in violation of HRS § 708-836(1) (1993),[10] for exerting control over the Karman Ghia.

Approximately one month later,[11] in the second and present case, Schillaci was charged with (1) unauthorized control of a propelled vehicle, in violation of HRS § 708-836, for exerting control over the truck owned by the pineapple company, (2) two counts of promoting a dangerous drug in the third degree,

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[8] HRS § 707-701.5 provides in relevant part that "a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person."

[9] HRS § 134-6(a) provides in relevant part:

> (a) It shall be unlawful for a person to knowingly carry on the person or have within the person's immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony[.]

[10] HRS § 708-836 provides in relevant part:

> (1) A person commits the offense of unauthorized control of a propelled vehicle if the person intentionally exerts unauthorized control over another's propelled vehicle by operating the vehicle without the owner's conduct or by changing the identity of the vehicle without the owner's consent.

[11] Schillaci's indictment in Cr. No. 96-0316(3) was filed on June 7, 1996, and the indictment in the present case was filed on July 15, 1996.

in violation of HRS § 712-1243(1) (1993),[12] (3) two counts of prohibited acts related to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993),[13] (4) Counts 6-39, felon in possession, in violation of HRS § 134-7(b), for possession of the numerous firearms and firearm ammunition recovered pursuant to search warrant from the residence and cottage at 552-C Piiholo Road, and (5) Count 40, possession of a prohibited firearm or device, in violation of HRS § 134-8, see supra note 2, for possession of the illegal assault pistol.

In Cr. No. 96-0316(3), Schillaci filed a motion to suppress the evidence recovered from the residence and cottage, requesting that this motion apply to the proceedings in both Cr. No. 96-0316(3) and the present case. At the February 20, 1997 hearing,[14] the prosecution factually recounted the shooting, high speed car chase, and initial search for other victims in order to establish probable cause to search the residence and cottage. Finding that probable cause existed, the circuit court denied

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[12] HRS § 712-1243(1) provides that "[a] person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount."

[13] HRS § 329-43.5(a) provides:

> (a) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. . . .

[14] Although the circuit court's written order denying the motion to suppress indicates that the hearing occurred on February 17, 1997, the record did not contain any transcripts for this date, and instead, contained transcripts for February 20, 1997 during which the hearing on the motion to suppress occurred.

Schillaci's motion to suppress, issuing identical written orders for both cases. In Cr. No. 96-0316(3), a jury found Schillaci guilty on all counts, with the exception of reducing the murder offense to manslaughter, pursuant to HRS § 707-702(2) (1993),[15] based on extreme mental or emotional disturbance.[16]

In the present case, Schillaci filed a motion to dismiss the charges, arguing that prosecution was barred by HRS § 701-111(1)(b) and HRS § 701-109(2) where he was already indicted for the same conduct or episode in the first case, Cr. No. 96-0316(3).[17] The circuit court denied this motion, finding and concluding in relevant part:

> Findings of Fact
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> . . . .
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> 6. None of the drugs, paraphernalia, firearms or ammunition which form the basis for Counts Two through Forty in [this case] are alleged to have been involved in the shooting of William Simpson or in Defendant's flight from the scene on June 3, 1996 which constituted the subject matter of Cr. No. 96-0316(3).
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> . . . .
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> 12. Proof of the charges in Cr. No. 96-0316(3) did not require proof of the details of Defendant's possession or control of the drugs, drug paraphernalia, firearms, and firearm ammunition charged in [this case and vice versa.]

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[15] HRS § 707-702(2) provides in relevant part:

> (2) In a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.

[16] Schillaci appealed this judgment in No. 22340.

[17] A hearing on this motion was set for May 9, 2000, but the transcripts were not a part of the record on appeal.

. . . .

14. The charges in this case are not based on the same conduct, the same episode, or the same facts which provided the basis for the charges against Defendant in State v. Schillaci, Criminal No. 96-0316(3).

Conclusions of Law

. . . .

4. Based on the foregoing authorities, the fact that drugs, paraphernalia, firearms and ammunition were found in the warranted searches of Defendant's property which occurred because Simpson was killed on Defendant's property on June 3, 1996, does not mean that the charges in Cr. Nos. 96-0316(3) and [this case] arise from the same episode or that they are based on the same conduct or same facts for purposes of applying HRS § 701-109(2) or 701-111(b).

The circuit court thus ruled that there was "no basis for a dismissal of the charges" as asserted by Schillaci.

On October 25, 2000, the jury returned the verdicts in the present case, finding Schillaci guilty as to Counts 6-40 and not guilty as to the other counts.[18] The circuit court entered a final judgment, sentencing Schillaci to "twenty (20) years with the possibility of parole in Counts 6-39 and to an extended term of ten (10) years in Count 40 with a mandatory minimum term of imprisonment of five (5) years," the terms to run concurrently with each other and consecutively with Cr. No. 96-0316(3). Schillaci filed a notice of appeal, reading, in its entirety:

Notice is hereby given that Defendant, [Thomas S.

[18] The jury found Schillaci not guilty on all drug-related charges. It is somewhat unclear from the record on appeal what happened to the charge for unauthorized control of a propelled vehicle. The jury verdict forms indicate that this charge was not given to the jury to consider. The judgment form reflects that no judgment was entered as to this charge. The prosecution's answering brief notes that this charge was dismissed at the hearing on the motion to dismiss pursuant to HRS §§ 701-111(1)(b) and 701-109(2) on the basis that it arose from the "same episode" as in Cr. No. 96-0316(3). The prosecution also notes that the transcripts for this hearing were not requested by Schillaci, as required pursuant to HRAP Rule 11.

> Schillaci,[19]] by and through his attorney, Alan G. Warner, appeals to the Supreme Court and Intermediate Court of Appeals of the State of Hawaii from the judgment and sentence entered on February 16, 2001 and attached hereto as Exhibit "A."
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> This appeal is brought pursuant to Chapter 641-11 Hawaii Revised Statutes and Rules 3 and 4 of the Hawaii Rules of Appellate Procedure.

II. STANDARD OF REVIEW

A. Appellate Court Jurisdiction

"An appellate court has . . . an independent obligation to ensure jurisdiction over each case and to dismiss the appeal sua sponte if a jurisdictional defect exists." State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000) (citing Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986)).

B. Motion to Dismiss Based on HRS § 701-111(1)(b) and HRS § 701-109(2).

A trial court's ruling as to whether HRS § 701-111(1)(b) and HRS § 701-109(2) bar a subsequent prosecution is a conclusion of law that is reviewed under the right/wrong standard. See State v. Locquiao, 100 Hawai'i 195, 203, 58 P.3d 1242, 1250 (2002) (noting that the standard of review for conclusions of law in a pretrial ruling is the right/wrong standard).

III. DISCUSSION

A. Although Schillaci failed to set forth and attach relevant orders in his notice of appeal, this failure does not preclude this court's jurisdiction.

The prosecution argues, as an initial matter, that this

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[19] The notice of appeal did not correctly contain Schillaci's name.

court does not have jurisdiction because Schillaci failed to set forth and attach relevant orders in his notice of appeal, as required by HRAP Rule 3(c)(2). Although the prosecution is correct that Schillaci's notice of appeal contained flaws in its form, these flaws do not divest this court of appellate jurisdiction.

HRAP Rule 3(c)(2) requires that "[t]he notice of appeal . . . designate the judgment, order, or part thereof and the court or agency appealed from" and that "[a] copy of the judgment or order" be "attached as an exhibit." HRAP Rule 3(c)(2) further provides that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal."

This court has held that "the requirement that the notice of appeal designate the judgment or part thereof appealed from is not jurisdictional." City and County of Honolulu v. Midkiff, 57 Haw. 273, 275, 554 P.2d 233, 235 (1976) (citing Yoshizaki v. Hilo Hospital, 50 Haw. 1, 2, 427 P.2d 845, 846 (1967), and Credit Associates v. Montilliano, 51 Haw. 325, 328, 460 P.2d 762, 764 (1969)); see also Graybeard, 93 Hawai'i at 516, 6 P.3d at 388 ("The designation requirement is not, however, jurisdictional."). As this court has noted,

> a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in a loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.

Midkiff, 57 Haw. at 275-76, 554 P.2d at 235 (citing 9 Moore's Federal Practice 203.18 (1975)); see also Graybeard, 93 Hawai'i at 516, 6 P.3d at 388.

In this case, Schillaci's notice of appeal provided that he was appealing "from the judgment and sentence entered on February 16, 2001 and attached hereto as Exhibit 'A.'" On appeal, Schillaci asserts error in several orders of the circuit court, including the order denying his motion to dismiss based on HRS § 701-111(1)(b) and HRS § 701-109(2). His notice of appeal, however, does not set forth, or provide as attachments, any of these orders. Nonetheless, the intent to appeal from these orders that culminated in the final judgment can be fairly inferred from the notice of appeal and the prosecution has not shown that it was prejudicially misled by the mistake. Accordingly, the flaws in the form of Schillaci's notice of appeal do not result in a loss of this court's jurisdiction.

B. The circuit court erred by denying Schillaci's motion to dismiss, as HRS § 701-111(1)(b) and HRS § 701-109(2) barred the subsequent prosecution of Counts 6-40.

Schillaci argues that the circuit court erred by denying his motion to dismiss all charges on the basis of HRS §§ 701-111(1)(b) and 701-109(2). Inasmuch as Counts 6-40 arose out of the same conduct or episode as the charges in Cr. No. 96-0316(3),[20] the compulsory joinder provisions in HRS § 701-111(1)(b) and HRS § 701-109(2) required that the prosecution

[20] We address the single issue of whether the charges in the present case arose out of the same conduct or episode as the charges in Cr. No. 96-0316(3). We do not address other aspects of HRS § 701-109(2), as it is undisputed that the prosecution knew about the felony offenses charged in this case at the commencement of Cr. No. 96-0316(3) and that the charges in the present case and in Cr. No. 96-0316(3) were within the jurisdiction of a single court.

bring all charges together in one case.[21] The prosecution's failure to do so barred it from prosecuting Schillaci in the present case for Counts 6-40. The circuit court, therefore, erred by denying Schillaci's motion to dismiss on the basis of HRS § 701-111(1)(b) and HRS § 701-109(2).

Under HRS § 701-111(1)(b), "a prosecution for a violation of a different statutory provision is barred by a former prosecution if the former prosecution resulted in a conviction[22] and the subsequent prosecution is for an offense for which the defendant should have been tried on the first prosecution" under HRS § 701-109(2). State v. Solomon, 61 Haw. 127, 129, 596 P.2d 779, 781 (1979). HRS § 701-109(2), also known as "the compulsory joinder of offenses requirement," State v. Aiu, 59 Haw. 92, 96, 576 P.2d 1044, 1047 (1978), provides in relevant part:

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[21] We are mindful of the circuit court's authority to order that charges be tried separately if "justice so requires." See HRS § 701-109(3). It is not asserted that the court ordered separation or that it should have done so. Thus, we do not address this aspect of HRS § 701-109(2) and (3). Furthermore, it is within the court's discretion, not the discretion of the prosecution, as to whether to sever charges. As such, the prosecution must still bring all charges arising from the same conduct or episode against the defendant simultaneously, regardless of whether the court ultimately chooses to sever some of the charges.

[22] A conviction is defined as "a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty or nolo contendere accepted by the court." HRS § 701-110(3) (1993). Schillaci's convictions in Cr. No. 96-0316(3) of manslaughter, in violation of HRS § 707-702(2), and carrying or use of a firearm in the commission of a separate felony, in violation of HRS § 134-6(a), were vacated and remanded for a new trial by this court in No. 22340. We do not consider these vacated convictions in this analysis. Schillaci's remaining convictions that were affirmed in No. 22340 -- felon in possession, in violation of HRS § 134-7(b), and unauthorized control of a propelled vehicle, in violation of HRS § 708-836(1) -- are considered.

> (2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

HRS § 701-109(2) acts as a "procedural limitation upon the State's power . . . to seek convictions for all offenses resulting from a single course of conduct." Aiu, 59 Haw. at 96, 576 P.2d at 1047. HRS § 701-109(2) "reflects a policy that a defendant should not have to face the expense and uncertainties of multiple trials based on essentially the same conduct or episode," State v. Carroll, 63 Haw. 345, 351, 627 P.2d 776, 780 (1981) (citing HRS § 701-109 commentary), and "is designed to prevent the State from harassing a defendant with successive prosecutions where the State is dissatisfied with the punishment previously ordered or where the State has previously failed to convict the defendant," State v. Servantes, 72 Haw. 35, 38, 804 P.2d 1347, 1348 (1991) (citations omitted).

In Carroll, 63 Haw. at 345-46, 627 P.2d at 777, this court was faced with whether HRS § 701-111(1)(b) and HRS § 701-109(2) barred a subsequent prosecution. In that case, the defendant was arrested and charged with attempted criminal property damage for starting a fire at a school. Id. at 346, 627 P.2d at 777. An initial search of the defendant revealed a cannister that was returned to the defendant because the arresting officer did not identify it as a cannister of mace. Id. After booking, a custodial search of the defendant revealed that the cannister contained mace. Id. The defendant was thereafter charged with, brought to trial for, and acquitted of

possession of an obnoxious substance. Id. at 346-47, 627 P.2d at 777-78. In a subsequent trial for the original charge of attempted criminal property damage, the defendant argued that prosecution was barred by HRS § 701-111(1)(b) and HRS § 701-109(2). Id. at 347, 627 P.2d at 778.

In determining whether the charges in Carroll were barred, this court held that "the test for determining the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge." Id. at 351, 627 P.2d at 780. This court noted that

> [w]here the offenses occur at the same time and place and under the same circumstances, it is likely that the facts and issues involved in the charges will be similar. The witnesses to be used and the evidence to be offered will probably overlap to the extent that joinder of the charges would be justified. Compulsory joinder of offenses which share a proximity in time, place and circumstances would not only protect the defendant from successive prosecutions based on the same conduct or episode, but it would also save the defendant and the State time and money required in the presentation of repetitive evidence.

Id. Applying the test, this court found that the offenses occurred at different times and places, under different circumstances. Id. at 352, 627 P.2d at 781. Although the defendant had possession of the mace at the time of the initial arrest, this finding was based on the fact that the arresting officer did not have probable cause at that time to believe that an offense, other than attempted criminal property damage, had been committed. Id. This court also noted that the offenses were discovered under different circumstances resulting in

arrests by different officers. Id.

In Servantes, 72 Haw. at 39-40, 804 P.2d at 1349, this court applied the test previously set forth in Carroll to determine whether HRS §§ 701-111(1)(b) and 701-109(2) barred a subsequent prosecution. In Servantes, the defendant was arrested after officers noticed a clear plastic bag of marijuana in plain view on the seat of the defendant's vehicle. Id. at 36-37, 804 P.2d at 1348. After securing the defendant's vehicle at the police station and obtaining a search warrant, officers recovered cocaine and drug paraphernalia from the vehicle. Id. at 37, 804 P.2d at 1348. For the initial discovery of marijuana, the defendant pled no contest to the misdemeanor offense of promoting a detrimental drug in the third degree. Id. As to the subsequent indictment, based on the recovery of cocaine and drug paraphernalia, the defendant argued that prosecution, for the felony offenses of promoting a dangerous drug in the third degree and possession with intent to use, was barred by HRS §§ 701-111(1)(b) and 701-109(2). Id.

This court distinguished the case from that in Carroll primarily because, at the time of arrest for the misdemeanor marijuana charges, the officers in Servantes had probable cause to suspect the possession of additional illegal drugs. Id. at 39, 804 P.2d at 1349. This court further stated,

> [W]e cannot ignore that [the defendant's] motion, filed previous to trial, to suppress the evidence seized from this car is obviously part of the trial proceedings. In the course of the suppression hearing, the State would have to refer to a factual account of the misdemeanor offense in order to support probable cause for the search. A fortiori, the felony charges [in the present case] cannot be tried without mention of the misdemeanor offense [in the first

case].

Id. As such, this court reversed the circuit court's judgment with instructions to dismiss the cocaine and drug paraphernalia charges with prejudice. Id.

In this case, similar to Servantes, the officers had probable cause to suspect that additional firearms would be found in the possession of Schillaci, a felon, at the same time they had probable cause to suspect that Schillaci was in possession of the .45 caliber semiautomatic firearm for which Schillaci was charged in Cr. No. 96-0316(3). On June 3, 1996, officers were dispatched to 552-C Piiholo Road to investigate a shooting. Upon arriving at the premises, officers found Simpson lying in a pool of blood with injuries sustained from the shooting. Officers observed spent casings around Simpson that appeared to belong to a .45 cali ber semiautomatic firearm. Officers entering the residence observed a 12 gauge shotgun and several items of drug paraphernalia in plain view. At this point, unlike Carroll, officers had probable cause to suspect Schillaci's possession of the .45 caliber semiautomatic firearm that was used in the shooting, as well as additional firearms or contraband.

Additionally, similar to Servantes, we will not ignore Schillaci's motion to suppress evidence recovered from the residence and cottage, filed previous to trial in both cases, which is obviously part of the trial proceedings. Schillaci's single motion to suppress, applied in both cases, was heard on February 20, 1997. In an effort to establish probable cause for the search of the residence and cottage, the prosecution was

required to refer to a factual account of the shooting, the brief search of the residence by the officers to look for other victims or the possible shooter, the firearms and items of drug paraphernalia that were in plain view, and the subsequent recovery of firearms pursuant to search warrant. In light of the foregoing, it is apparent that the conduct alleged in Counts 6-40 was so closely related in time, place, and circumstances that a complete account could not be related without referring to the details of the conduct as charged in Cr. No. 96-0316(3). For these reasons, we hold that the prosecution was barred under HRS § 701-111(1)(b) and HRS § 701-109(2) from prosecuting Schillaci for Counts 6-40.

IV. CONCLUSION

Based on the foregoing, the judgment of the circuit court is reversed.

DATED: Honolulu, Hawai‘i, November 14, 2003.

On the briefs:

Alan G. Warner and
J. Wallace Warner
for defendant-appellant

Simone C. Polak, Deputy
Prosecuting Attorney,
for plaintiff-appellee