NO. 24843

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant,

vs.

SYDNEY TOKUNAGA, Defendant-Appellee.

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STATE OF HAWAII

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 01-1-1172)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Acoba, and Duffy, JJ.;
Nakayama, J., Dissenting)

Plaintiff-appellant State of Hawaiʻi [hereinafter, the prosecution] appeals from the first circuit court's[1] December 17, 2001 order dismissing the charge of attempted assault in the second degree against defendant-appellee Sydney Tokunaga. On appeal, the prosecution contends that the circuit court erred in (1) finding that there was no rational basis in the evidence to submit the charge of attempted assault in the second degree to the jury and (2) concluding that retrial on the attempted assault charge was barred by the double-jeopardy clause. As such, the prosecution requests that this court reverse the trial court's order dismissing the attempted assault charge, vacate Tokunaga's

[1] The Honorable Richard K. Perkins presided over the matter at issue on appeal.

plea to assault in the third degree, and remand this case for a new trial on the attempted assault charge.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that the instant appeal is moot.

> It is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected relations between the parties that the two conditions for justiciability -- adverse interest and effective remedy -- have been compromised.

State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997) (citations omitted). Although neither party raises a jurisdictional issue in the instant appeal, "[a]n 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)). "Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so." Territory v. Aldridge, 35 Haw. 565, 568 (1940).

An adverse interest arose between the prosecution and defense when the prosecution sought to convict Tokunaga of assault, attempted assault, or assault in the third degree as a

lesser included offense for his conduct on July 13, 2001. However, the adverse interest was compromised when, without objection by the prosecution, Tokunaga pled guilty to assault in the third degree on December 6, 2001. By obtaining a conviction for the lesser included offense, the prosecution was barred from re-trying Tokunaga on the greater offenses by the double jeopardy clause.[2] See State v. Brantley, 99 Hawai'i 463, 473, 56 P.3d 1252, 1261 (2002) (holding that the double jeopardy clause prohibits the prosecution from trying a defendant for a greater offense after it has convicted him of a lesser included offense).

With respect to effective remedy, we recognize that the prosecution's appeal from the December 17, 2001 order dismissing the attempted assault charge is proper under HRS § 641-13(1) (1993).[3] However, inasmuch as HRS § 641-13 does not permit the prosecution to appeal a judgment entered pursuant to a plea of no-contest, the December 14, 2001 judgment is not appealable. Thus, this court lacks jurisdiction to vacate the December 14, 2001 judgment. Consequently, Tokunaga's conviction of assault in the third degree must stand, and this court is prohibited by the double jeopardy clause from ordering a retrial on the attempted

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[2] Even without the conviction on the lesser included offense, Tokunaga could not be retried for the assault charge inasmuch as the jury unanimously found that he was not guilty of this offense.

[3] Although HRS § 641-13(1) provides that appeals by the prosecution may be taken from "an order . . . sustaining a motion to dismiss . . . any count [of an indictment]" (emphasis added), this court held in State v. Poohina that, "[a]lthough the order [entered by the court, sua sponte, dismissing the prosecution's case] was not entered in response to a motion, it was an order of dismissal appealable under HRS § 641-13(1)." 97 Hawai'i 505, 510, 40 P.3d 907, 912 (emphasis added).

assault charge. See Brantley, 99 Hawai'i at 473, 56 P.3d at 1261. Given the foregoing and notwithstanding the fact that the December 17, 2001 order is appealable, this court cannot grant the prosecution an effective remedy for its appeal from that order. Therefore, inasmuch as the two conditions of justiciability have been compromised,

IT IS HEREBY ORDERED that the prosecution's appeal from the circuit court's December 17, 2001 order is dismissed with prejudice as moot.

DATED: Honolulu, Hawai'i, June 7, 2005.

On the briefs:

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