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NO. 25706

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellant

vs.

DANA SUE CUTHRELL, aka Dayna Weier, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 02-1-1248)

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

The plaintiff-appellant State of Hawaiʻi [hereinafter, "the prosecution"] appeals from the March 4, 2003 judgment of the circuit court of the first circuit, the Honorable Karl K. Sakamoto presiding.

On appeal, the prosecution contends that the circuit court erred in sentencing the defendant-appellee Dana Sue Cuthrell to probation in Cr. No. 02-1-1248, pursuant to 2002 Haw. Sess. L. Act 161, § 3 at 572 (codified as Hawaiʻi Revised Statutes (HRS) § 706-622.5 (Supp. 2002)), rather than to a mandatory minimum term of imprisonment, pursuant to HRS § 706-606.5 (Supp. 1999), inasmuch as: (1) HRS § 706-606.5 supplants Act 161 in situations involving repeat offenders; and (2) Cuthrell's prior robbery conviction and the circumstances of the robbery demonstrate a violent history rendering her ineligible for probation under Act 161.

Cuthrell responds that the appeal is moot in light of her subsequent resentencing in Cr. No. 03-1-1315. Both parties concede that Cuthrell's resentencing imposed a mandatory minimum

term of imprisonment of one year and eight months, the precise remedy sought by the prosecution. Moreover, both parties agree that the prosecution's alleged errors satisfy the "public interest" prong of the exception to the mootness doctrine articulated in Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968). The sole determinative factor with respect to the justiciability of this appeal is whether the prosecution's alleged errors are "capable of repetition, yet evading review." See Life of the Land v. Burns, 59 Haw. 244, 250-51, 580 P.2d 405, 409 (1978) (quoting Johnston, 50 Haw. at 381, 441 P.2d at 140).

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 dismiss the present appeal as moot for the following reasons:

(1) State v. Walker, 106 Hawai'i 1, 3 n.5, 9-10, 100 P.3d 595, 597 n.5, 603-04 (2004), and State v. Smith, 103 Hawai'i 228, 234, 81 P.3d 408, 414 (2003), already decided the precise issue raised by the prosecution's first point of error.

In Smith, "[w]e h[e]ld that, in all cases in which HRS § 706-606.5 is applicable, including those in which a defendant would otherwise be eligible for probation under HRS § 706-622.5, the circuit courts must sentence defendants pursuant to the provisions of HRS § 706-606.5." 103 Hawai'i at 234, 81 P.3d at 414.

Effective July 1, 2004, the legislature amended Act 161, § 3, by then codified as HRS § 706-622.5. See 2004 Haw. Sess. L. Act 44, §§ 11(1)-(2) and 33 at 214, 227. In our

November 4, 2004 published opinion in Walker, we considered the effect of Act 44 upon the Smith rule. We concluded (1) that Smith remains consonant with the legislature's stated purposes in amending HRS § 706-622.5, and (2) that, in any case, Act 44 does not apply retroactively to any "cases involving 'rights and duties that matured, penalties that were incurred, and proceedings that were begun, before [the] effective date [of Act 44],' i.e., July 1, 2004." 106 Hawai'i at 3 n.5, 9-10, 100 P.3d at 597 n.5, 603-04 (brackets in original) (citing HRS § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended.")).

In sum, the primacy of HRS § 706-606.5 vis-à-vis HRS § 706-622.5 has been established.

(2) It can hardly be said that the question of which statute takes precedence "evad[es] review." This court has already disposed of all of the related appeals that Cuthrell cites. State v. Nakano, No. 25542, at 1-2 (Haw. Jan. 19, 2005) (SDO); State v. Dias, No. 25705, at 2 (Haw. Feb. 18, 2004) (SDO); State v. Anguay, No. 25341, at 5-6 (Haw. Feb. 11, 2004) (SDO).

(3) The question whether the circuit court erred in determining that Cuthrell was "non-violent" for purposes of eligibility under Act 161 is similarly moot. First, Act 44, § 11(1) amended HRS § 706-622.5(1) so as to eliminate the automatic disqualification of those convicted of a prior "violent felony" within five years of the instant offense. In other words, the prosecution seeks this court's interpretation of defunct statutory language. Moreover, the prosecution has not

shown that the unique circumstances of Cr. No. 98-0-2078 as alleged by the prosecution -- that Cuthrell "scratch[ed], bit[], [and] kick[ed]" a security guard and told somebody she had AIDS -- will "likely" recur in future cases where probation is an option. Therefore,

IT IS HEREBY ORDERED that the appeal is dismissed as moot.

DATED: Honolulu, Hawai'i, August 9, 2006.

On the briefs:
Loren J. Thomas,
Deputy Prosecuting Attorney,
for the plaintiff-appellant
State of Hawai'i

Phyllis J. Hironaka,
Deputy Public Defender,
for the defendant-appellee
Dana Sue Cuthrell

James E. Duffy, Jr.