

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM MOON, C.J., JOINS

I dissent. I believe that the doctrine of judicial estoppel is misapplied by the majority. Because the prosecution in this case agreed to allow the Defendant to enter a conditional plea, the application of the doctrine of judicial estoppel would operate to prevent it from now asserting that it did not enter into the agreement. This it is not attempting to do. Applying the doctrine appropriately would not prevent the prosecution from asserting that the defendant failed to enter a conditional plea, an essential element to a Hawai'i Rules of Penal Procedure (HRPP) Rule 11(a) (2) agreement.

State v. Lei, 95 Hawai'i 278, 21 P.2d 880 (2001) is likewise inapplicable. The holding in Lei allowed the court to consider an appeal when the Rule 11(a) (2) requirement of a written agreement to plead conditionally was not present. However, the record in Lei reflected that a conditional plea was actually entered.

A review of the record reveals that, although there was an agreement that the Defendant was allowed to enter a conditional plea, and the court and the parties acted as if a conditional plea had been made, there is no evidence that a conditional plea was actually entered.

Inasmuch as neither the doctrine of judicial estoppel nor Lei apply, I would decline to address the appeal, because the requirements of HRPP Rule 11(a) (2) have not been met.