

***** NOT FOR PUBLICATION *****

NO. 25705

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

THOMAS DIAS, III, Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-0776)

SUMMARY DISPOSITION ORDER

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

The plaintiff-appellant State of Hawai'i [hereinafter, "the prosecution"] appeals from the judgment of the first circuit court, the Honorable Karl K. Sakamoto presiding, filed on March 11, 2003, convicting the defendant-appellee Thomas Dias, III of and sentencing him for the offense of promoting a dangerous drug in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2002) (Count I). On appeal, the prosecution contends: (1) that the circuit court erred in finding (a) that the conviction in the present matter was for possession of drugs, rather than for the distribution or manufacture of drugs, and (b) that Dias is a nonviolent offender; and (2) that the circuit court erred in concluding that HRS § 706-622.5 (Supp. 2002) overrides the provisions of HRS § 706-606.5 (1993 & Supp. 2002), such that the court should have sentenced Dias in accordance with HRS § 706-606.5.

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 resolve the

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prosecution's appeal as follows:

This court's decision in State v. Smith, 103 Hawai'i 228, 81 P.3d 408 (2003), is entirely dispositive of the present matter. Id. at 234, 81 P.3d at 414 (holding 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"). Thus, given the "plain and unambiguous" ruling of this court in Smith, the circuit court erred in sentencing Dias pursuant to HRS § 706-622.5 instead of applying HRS § 706-606.5. Inasmuch as Smith requires the application of HRS § 706-606.5 over HRS § 706-622.5, this court need not reach the prosecution's claims that the circuit court's findings of fact, which concern factors that are relevant only to the application of HRS § 706-622.5, were clearly erroneous. Therefore,

IT IS HEREBY ORDERED that the portion of the circuit court's judgment sentencing Dias pursuant to HRS § 706-622.5 is vacated; we remand this matter to the circuit court for resentencing in accordance with the provisions of HRS § 706-606.5.

DATED: Honolulu, Hawai'i, February 18, 2004.

On the briefs:

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deputy prosecuting
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