

NO. 25777

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

SCOTT MIKASA, Defendant-Appellant

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APPEAL FROM THE SECOND CIRCUIT COURT  
(CR. NO. 02-1-0498)

ORDER DENYING APPELLANT'S MOTION FOR DISMISSAL OF THE APPEAL  
(By: Duffy, J. for the court<sup>1</sup>)

Upon consideration of Defendant-Appellant Scott Mikasa's motion for dismissal of appeal, the declaration in support, and the records and files herein, it appears that:

(1) Appellant entered a no contest plea and was subsequently sentenced to a term of imprisonment; (2) on April 17, 2003, he filed a notice of appeal from the judgment of conviction and sentence; (3) he now wishes to withdraw his appeal and he indicates that he intends to file a petition for post conviction relief pursuant to HRPP Rule 40; (4) pursuant to HRAP Rule 42(c), dismissal of a criminal appeal is appropriate if the defendant's declaration indicates that he has a knowing and intelligent understanding of the consequences of the dismissal of his appeal; (5) because Appellant wants to dismiss his appeal and file a HRPP Rule 40 petition, it is not clear that Petitioner understands that by dismissing his appeal relief in a Rule 40 proceeding may

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<sup>1</sup> Considered by: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

not be available to him. See HRPP Rule 40(c) (Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised on appeal, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure). Therefore,

IT IS HEREBY ORDERED that Defendant-Appellant Scott Mikasa's motion for dismissal of the appeal is denied. This denial is without prejudice to a subsequent motion that includes an affidavit or declaration of Appellant that reflects a knowing and intelligent understanding of all of the consequences of the dismissal of the appeal, including the impact of dismissal of the appeal on any future HRPP Rule 40 petition.

DATED: Honolulu, Hawai'i, April 27, 2004.

Christopher M. Dunn  
for defendant-appellant  
on the motion

FOR THE COURT:

Associate Justice