

***** NOT FOR PUBLICATION *****

NO. 25927

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

LOUIS JOSEPH SOUZA, JR., Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2685)

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 Wilfred K. Watanabe presiding, filed on May 7, 2003, convicting the defendant-appellee Louis Joseph Souza, Jr. of and sentencing him for the offenses of promoting a dangerous drug in the third degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1243 (1993 & Supp. 2002) (Count I), and promoting a detrimental drug in the third degree, in violation of HRS § 712-1249 (1993) (Count II). The prosecution's sole contention on appeal is that the circuit court erred in sentencing Souza pursuant to HRS § 706-622.5 (Supp. 2002) and that the circuit court should have sentenced him in accordance with HRS § 706-606.5 (1993 & Supp. 2002).

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 prosecution's appeal as follows:

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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 Souza pursuant to HRS § 706-622.5 instead of applying HRS § 706-606.5. Therefore,

IT IS HEREBY ORDERED that the portion of the circuit court's judgment sentencing Souza pursuant to HRS § 706-622.5 is vacated, and 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 17, 2004.

On the briefs:

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deputy prosecuting
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