

*** NOT FOR PUBLICATION ***

NO. 26298

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,
vs.

EDWARD JOHANSEN, III, Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-1926)

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 following judgment and order of the first circuit court, the Honorable Karl K. Sakamoto presiding: (1) the judgment, guilty conviction, and probation sentence, filed on December 1, 2003, convicting the defendant-appellee Edward Johansen, 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. 2003); and (2) the December 5, 2003 findings of fact (FOFs), conclusions of law (COLs), and order denying the prosecution's motion for sentencing of repeat offender, filed on April 22, 2003. The prosecution contends that the circuit court erred (1) in denying the prosecution's motion to sentence Johansen as a repeat offender, in accordance with HRS § 706-606.5 (1993 & Supp. 2003), and (2) in sentencing Johansen to probation pursuant to HRS § 706-622.5 (Supp. 2003). In response, Johansen argues, inter alia, that the legislature's amendment of HRS § 706-622.5 in Act 44, see 2004 Haw. Sess. L. Act 44, pt. II, § 11 at _____, confirms that the legislature intended that the first time drug offender statute apply in lieu of 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 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 Johansen pursuant to HRS § 706-622.5 instead of applying HRS § 706-606.5.

With regard to Johansen's contention that Act 44 indicates that the circuit court correctly applied HRS § 706-622.5, we note that Act 44: (1) provides that it did not take effect until July 1, 2004, after the underlying crime had occurred and Johansen had been sentenced; (2) does not expressly state that it applies retroactively; and (3) plainly states that it "does not affect . . . penalties that were incurred, and proceedings that were begun, before its effective date." See 2004 Haw. Sess. L. Act 44, pt. IX, § 33 at ___; HRS § 1-3 (1993) ("No law has any retrospective operation, unless otherwise expressed or obviously intended."); 2004 Haw. Sess. L. Act 44, pt. IX, § 29 at ___ (emphasis added). Moreover, by its plain language, Act 44 prospectively permits greater discretion to sentencing courts confronted with conflicts between HRS

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§§ 706-606.5 and 706-622.5, which implicitly confirms that the circuit courts did not previously have such discretion. See 2004 Haw. Sess. L. Act 44, pt. II, § 9 at ___ (“[T]he legislature intends that a broader group of nonviolent drug offenders will be eligible for consideration for probation The purpose of this amendment is to provide the court with discretion in sentencing a first-time non-violent drug offender to probation regardless of whether the offender has prior convictions.” (Emphasis added.)). Thus, based on the legislative intent unequivocally reflected in Act 44, the version of HRS § 706-622.5 under which Johansen was sentenced did not trump the repeat offender statute. Cf. In re John Doe, Born on January 5, 1976, 76 Hawai‘i 85, 92 n.10, 869 P.2d 1304, 1311 n.10 (1994) (citing Franks v. City and County of Honolulu, 74 Haw. 328, 340 n.6, 843 P.2d 668, 674 n.6 (1993) for the proposition that “this court has used subsequent legislative history or amendments to confirm its interpretation of an earlier statutory provision”). Therefore,

IT IS HEREBY ORDERED that the portion circuit court’s judgment sentencing Johansen 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, August 9, 2004.

On the briefs:

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