

NOT FOR PUBLICATION

NO. 25148

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
OSOVALE ATAPUAI, Defendant-Appellant,
and FAIVAE TUPUIAVAO, Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 96-0747)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION

(By: Burns, C.J., Watanabe, and Foley, JJ.)

Defendant-Appellant Osovale Atapuai (Atapuai) appeals from the May 6, 2002 Order of the Circuit Court of the First Circuit (the circuit court), Judge Wilfred K. Watanabe (Judge Watanabe) presiding, denying Atapuai's October 18, 2001 Motion to Withdraw Plea of No Contest and to Reset Case for Trial (motion to withdraw plea).

The record on appeal reveals that on November 1, 1996, Atapuai pled no contest to a charge of Promoting a Dangerous Drug in the Second Degree, a violation of Hawaii Revised Statutes § 712-1242(1)(c) (1993). The circuit court sentenced Atapuai on April 2, 1997 to five years' probation and one hundred hours of community service.

On July 6, 2001, Plaintiff-Appellee State of Hawaii (the State) moved to revoke Atapuai's probation, resentence Atapuai, and issue a bench warrant for Atapuai's arrest on grounds that Atapuai: (1) had failed to report to his probation officer, and (2) had moved his residence and failed to report his new address to his probation officer.

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On October 18, 2001, Atapuai moved to withdraw his no-contest plea, arguing that he had not been specifically informed "in open court that he had 'the right to plead not guilty, or to persist in that plea if it has already been made,' as required by [Hawai'i Rules of Penal Procedure (HRPP)] Rule 11." By a written order dated May 6, 2002, Judge Watanabe denied Atapuai's motion to withdraw his plea. This appeal followed on June 4, 2002.

In State v. Johnson, 96 Hawai'i 462, 468-70, 32 P.3d 106, 112-14 (App. 2001), application for cert. dismissed (Oct. 8, 2001), this court held that an order denying a defendant's motion to withdraw a no-contest plea is not an appealable "final order" or an immediately appealable collateral order if a motion to revoke probation is still pending in the same case.

It appears from the record that the State's July 6, 2001 motion to revoke Atapuai's probation is still pending. Accordingly, in light of Johnson, this appeal is hereby dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, July 30, 2003.

Chief Judge

Associate Judge

Associate Judge