

NOT FOR PUBLICATION

NO. 25024

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
RICHARD NEUBERGER, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIFTH CIRCUIT
(NO. 992993K)

AMENDED ORDER DISMISSING APPEAL WITH PREJUDICE

Defendant-Appellant Richard Neuberger (Neuberger) appealed his conviction for driving under the influence of drugs. On August 3, 2004, this court issued an order directing Neuberger and Plaintiff-Appellee State of Hawaii (the State) to each file a supplemental brief by September 7, 2004, on three specified issues. On August 30, 2004, this court also notified the parties that the case would be set for oral argument.

Neither party submitted the supplemental brief required by our August 3rd order. Instead, on September 7, 2004, the parties submitted a stipulation, signed by counsel, to dismiss the appeal with prejudice. On September 14, 2004, we issued an order declining to approve the parties' stipulation because it did not comply with Rule 42(c) of the Hawai'i Rules of Appellate Procedure (HRAP). In particular, the stipulation was not accompanied by an affidavit or declaration by Neuberger

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supporting the dismissal or by an affidavit or declaration by Neuberger's counsel stating that Neuberger could not be located after a diligent effort. We invited the parties to resubmit a stipulation for dismissal that complied with HRAP Rule 42(c).

Subsequently, this court received information that Neuberger had passed away. On January 7, 2005, we issued an order directing Neuberger's counsel, Michael Green, to:

- (1) submit verification of the death of Defendant-Appellant; and
- (2) inform the court whether there will be a substitution of party pursuant to State v. Makaila, 79 Hawai'i 40, 897 P.2d 967 (1995).

The order required Neuberger's counsel to comply by January 27, 2005, and warned that "[f]ailure to comply with this order may result in sanctions."

On February 1, 2005, Mr. Green filed a declaration which stated, among other things, that 1) he was informed by members of Neuberger's family that Neuberger passed away during the later part of 2004; 2) because of Neuberger's untimely passing, the issues raised by this appeal are now moot; and 3) Mr. Green and his office had been unable to obtain a copy of Neuberger's death certificate from Neuberger's family despite their diligent efforts. Mr. Green requested that this court enter an order granting a revised stipulation for dismissal of Neuberger's appeal with prejudice, which he submitted with his declaration. Mr. Green indicated that because Neuberger's death certificate could not be obtained after a diligent effort, the

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stipulation complied with HRAP Rule 42(c). Alternatively, Mr. Green requested additional time to obtain Neuberger's death certificate.

We decline to approve the proffered revised stipulation for dismissal with prejudice pursuant to HRAP 42(c). Instead, we hereby order that the appeal be dismissed with prejudice as a sanction for the failure of Neuberger's counsel to comply with our January 7, 2005 order. Each party shall bear its own costs and attorney's fees.

DATED: Honolulu, Hawai'i, March 2, 2005.

On the briefs:

Michael Jay Green, Esq.
for Defendant-Appellant

Chief Judge

Craig A. De Costa, First
Deputy Prosecuting Attorney
County of Lihue, Kauai
for Plaintiff-Appellee

Associate Judge

Associate Judge