

NO. 29799

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

STATE OF HAWAI'I, Plaintiff-Appellant,

v.

RAYMOND L. FOSTER, aka "RAY", Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 06-1-0449)

ORDER DENYING DEFENDANT-APPELLEE RAYMOND L. FOSTER'S
JULY 15, 2009 HRAP RULE 40 MOTION TO RECONSIDER THE
JULY 13, 2009 ORDER DENYING DEFENDANT-APPELLEE
RAYMOND L. FOSTER'S JUNE 15, 2009 MOTION TO DISMISS APPEAL
(By: Watanabe, Acting C.J., Nakamura and Leonard, JJ.)

Upon review of (1) the July 13, 2009 order denying the
June 15, 2009 motion by Defendant-Appellee Raymond L. Foster
(Appellee Foster) to dismiss this appeal for lack of appellate
jurisdiction, (2) Appellee Foster's July 15, 2009 motion to
reconsider the July 13, 2009 order denying Appellee Foster's
motion to dismiss this appeal for lack of appellate jurisdiction
pursuant to Rule 40 of the Hawai'i Rules of Appellate Procedure
(HRAP), and (3) the record, we conclude that we did not overlook
or misapprehend any points of law or fact when we issued the
July 13, 2009 order denying Appellee Foster's motion to dismiss
this appeal for lack of appellate jurisdiction. Therefore,

IT IS HEREBY ORDERED that Appellee Foster's July 15,
2009 HRAP Rule 40 motion to reconsider the July 13, 2009 order
denying Appellee Foster's motion to dismiss this appeal for lack
of appellate jurisdiction is denied.

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2009 JUL 21 AM 9:21

FILED

With respect to Appellee Foster's request for clarification as to whether this appeal by Plaintiff-Appellant State of Hawai'i (Appellant State) has divested the circuit court of jurisdiction to proceed with the sentencing of Appellee Foster, we note that the "general rule is that the filing of a notice of appeal divests the trial court of jurisdiction over the appealed case." State v. Ontiveros, 82 Hawai'i 446, 448-49, 923 P.2d 388, 390-91 (1996) (citation and internal quotation marks omitted). However, "[n]otwithstanding the general effect of the filing of a notice of appeal, the trial court retains jurisdiction to determine matters collateral or incidental to the judgment, and may act in aid of the appeal." TSA International, Limited v. Shimizu Corp., 92 Hawai'i 243, 265, 990 P.2d 713, 735 (1999) (citations omitted). "The principle governing the transfer of jurisdiction from the trial court to the appellate court is designed to avoid the confusion and inefficiency that might flow from placing the same issue before two courts at the same time." Id. (citation omitted; emphasis added). Therefore,

[i]f an appeal is taken from a judgment that does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal. The filing of a timely and effective notice of appeal divests the district court of jurisdiction only with respect to the judgment brought up for review by the appeal. As an example, an appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits. Similarly, an appeal from an order that is appealable by virtue of certification under Rule 54(b) does not prevent the district court from proceeding with the remaining claims.

20 James Wm. Moore et al., Moore's Federal Practice

§ 303.32[2][b][v] (3d ed. 2009) (footnotes and citations therein)

omitted; emphasis added). For example, where the State of Illinois appealed from an order that had dismissed multiple counts of theft against a criminal defendant prior to the same criminal defendant's trial on remaining multiple counts of forgery, an appellate court in Illinois held that

once the notice of appeal is filed, the trial court only loses jurisdiction as regards those matters which are the subject of the appeal.

An examination of the notice of appeal in the case at bar reveals that the appeal was taken [by the State] only from the dismissal of the two theft counts. As such, the trial court was not deprived of its jurisdiction and the State was not precluded from exercising its discretion and proceeding to trial on the remaining forgery counts. Since the trial court was vested with jurisdiction to proceed with a trial on the forgery counts, we do not find that the trial of the forgery charges was a nullity.

People v. Mitsakopoulos, 524 N.E.2d 1183, 1186 (Ill. App. Ct. 1988) (citations omitted; emphases added)).

In the instant appellate case, appellate court case number 29799, Plaintiff-Appellant State of Hawai'i (Appellant State) is appealing only from the April 2, 2009 order granting Appellee Foster's motion for a judgment of acquittal as to Count 3 (prohibited ownership or possession of a firearm or ammunition in violation of HRS § 134-7 (Supp. 2008)) and Count 4 (prohibited ownership or possession of a firearm or ammunition in violation of HRS § 134-7 (Supp. 2008)) notwithstanding the jury's guilty verdicts on those two counts. The instant appellate court case does not involve the two other crimes for which Appellee Foster still awaits sentencing: Count 1 (promoting a dangerous drug in the third degree in violation of HRS § 712-1243 (Supp. 2008) and Count 5 (promoting a detrimental drug in the third degree in violation of HRS § 712-1249 (1993)). Therefore,

Appellant State's appeal in appellate court case number 29799 has not divested the circuit court of jurisdiction to proceed with the sentencing of Appellee Foster for his conviction for Count 1 (promoting a dangerous drug in the third degree in violation of HRS § 712-1243 (Supp. 2008) and Count 5 (promoting a detrimental drug in the third degree in violation of HRS § 712-1249 (1993)).

DATED: Honolulu, Hawai'i, July 21, 2009.

Corinne K A Watanabe

Acting Chief Judge

Craig W. Nakamoto

Associate Judge

[Signature]

Associate Judge