

DISSENTING OPINION BY NAKAYAMA, J.

The majority in this case has decided, sua sponte, to dismiss the appeal. It is unquestioned that, having declared a mistrial in the circuit court case, the prosecution was then statutorily authorized to appeal the order dismissing Count II pursuant to Hawai'i Revised Statutes (HRS) § 641-13(1). The majority has decided, however, that the circuit court, having accepted a no contest plea by the defendant to an included offense without the consent of the prosecution, thereby denied the prosecution's statutory right to appeal. To allow the circuit court to curtail appeal rights of the prosecution and to also prevent appellate review of the circuit court's orders for error, cannot be. It should be noted that neither the state nor the defendant have raised the issues deemed dispositive by the majority and it would seem inherently unfair to dismiss the case without having allowed the prosecution to brief the issue.

In this case, the prosecution has exercised its statutory right to appeal an order of the court pursuant to HRS § 641-13(1). It has not appealed from, has not alleged as a point of error on appeal and has not argued that the court erred by accepting a no contest plea. Therefore, contrary to the majority's decision, this court has jurisdiction to address the appeal.

Should the prosecution prevail on appeal, the underlying judgment, entered pursuant to a no contest plea, would then be vacated. There is nothing in the Hawai'i Revised

Statutes and the majority fails to point out any statutory prohibition to setting aside a judgment that may result from a no contest plea.

It should also be noted that it is within the prosecution's authority to decide which offense to prosecute. In light of this authority, a trial court may not accept a plea to a lesser included offense of an offense charged in an indictment without the prosecution's consent. See, e.g., Sanchez v. Superior Court, 102 Cal. App. 4th 1266, 1269, 126 Cal. Rptr. 2d 200, 202 (Cal. App. 2d Dist. 2002) ("A plea of guilty may be made to the offense actually charged, not a lesser or different offense, unless the prosecution consents to the plea."); Commonwealth v. Gordan, 574 N.E.2d 974, 976 (Mass. 1991) (holding that the trial court's decision to accept, over the prosecutor's objection, the defendant's guilty plea to second degree murder when he had been indicted for first degree murder usurped the decision-making authority constitutionally reserved for the prosecutor). I further emphasize that the record must affirmatively show consent by the prosecution. We simply cannot allow any court to accept a plea to a lesser offense without the consent of the prosecution. This undercuts the Executive Branch's authority to decide which offenses to prosecute and oversteps the authority of the Judiciary to the detriment of the Executive Branch.

In the instant case, the indictment charged the defendant with (1) assault in the second degree, and (2)

attempted assault in the second degree. The defendant has not demonstrated and the record does not establish that the prosecution agreed to the defendant's no contest plea to the lesser included (and uncharged) offense of assault in the third degree. Indeed, in light of the prosecution's strenuous objection to the circuit court's refusal to instruct the jury on Count II, the only rational conclusion would be that the prosecution did not consent to the defendant's plea. Without the prosecution's consent, the circuit court lacked authority to accept the defendant's plea to the lesser. Consequently, the plea and the judgment are invalid. The invalidity of the judgment renders the double jeopardy concerns stated by the majority unavailing.

The ramifications of the majority decision in this case are drastic. The circuit court could, as in this case, wrongly dismiss a count, accept a no contest plea to a lesser included offense without the consent of the prosecution, and preclude appeal by the prosecution or review by the appellate courts. For the reasons stated above, I disagree with the majority's decision.

*Amun C. Nakayama*