***** NOT FOR PUBLICATION in WEST'S HAWAI'I REPORTS and PACIFIC REPORTER *****

NO. 26013

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

OSMUND Y.H. LEE, Defendant-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(Cr. No. 03-1-0164)

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 July 16, 2003 judgment of the circuit court of the first circuit, the Honorable Derrick H.M. Chan presiding.

On appeal, the prosecution contends that the circuit court erred in sentencing the defendant-appellee Osmund Y.H. Lee to probation in Cr. No. 03-1-0164, pursuant to 2002 Haw. Sess. L. Act 161, § 3 at 572 (codified as Hawai'i Revised Statutes (HRS) § 706-622.5 (Supp. 2002)), rather than to a mandatory minimum term of imprisonment, pursuant to HRS § 706-606.5 (Supp. 1999), inasmuch as: (1) HRS § 706-606.5 trumps HRS § 706-622.5 in situations involving repeat offenders; and (2) Lee's prior convictions for theft in the second degree, in violation of HRS § 708-831(1)(b) (Supp. 1998) (Cr. No. 01-1-0659), and for the unauthorized control of a propelled vehicle, in violation of HRS § 708-836 (Supp. 2001) (Cr. No. 00-1-0656), mandated that he be sentenced as a repeat offender.

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 conclude that this court's decisions in State v. Smith, 103 Hawai'i 228, 81 P.3d 408 (2003), and State v. Walker, 106 Hawai'i 1, 100 P.3d 595 (2004), are entirely dispositive of the present matter.

In Smith, "we h[e]ld 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." 103 Hawai'i at 234, 81 P.3d at 414.

Effective July 1, 2004, the legislature amended HRS § 706-622.5. See 2004 Haw. Sess. L. Act 44, §§ 11 and 33 at 214, 227. In our November 4, 2004 published opinion in Walker, we considered the effect of Act 44 upon the Smith rule. We concluded (1) that Smith remains consonant with the legislature's stated purposes in amending HRS § 706-622.5, and (2) that, in any case, the legislature expressly provided that Act 44 does not apply retroactively to any "cases involving 'rights and duties that matured, penalties that were incurred, and proceedings that were begun, before [the] effective date [of Act 44],' i.e., July 1, 2004." See 106 Hawai'i at 4 & n.5, 100 P.3d at 598 & n.5 (brackets in original).

In sum, the primacy of HRS § 706-606.5 vis-à-vis HRS § 706-622.5 has been established. Therefore,

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IT IS HEREBY ORDERED that the portion of the circuit court's judgment sentencing Lee 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, September 26, 2006.

On the briefs:
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Osmund Y.H. Lee