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Supreme Court  
SCPW-15-0000098  
07-JUL-2015  
03:33 PM

SCPW-15-0000098

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Petitioner,

vs.

THE HONORABLE RANDAL K.O. LEE,  
Judge of the Circuit Court of the First Circuit,  
State of Hawai'i, Respondent Judge,

and

TRACY T. YOSHIMURA, EUGENE M. SIMEONA, JR., MICHAEL D.  
MILLER, MICHAEL A. MADALI, JR., CLAYTON SIMEONA,  
DESIREE U. HAINA, QUENTIN D.R. CANENCIA, GARY G. DANLEY, JR.,  
and ALEXANDER R. ALEJANDRO, Respondents.

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ORIGINAL PROCEEDING  
(CR. NO. 14-1-0717)

CONCURRENCE BY NAKAYAMA, J.

I concur in the disposition of this case but for reasons other than those stated by the majority.

On October 9, 2014, Petitioner State of Hawai'i filed an ex parte motion to nolle prosequi without prejudice in the underlying criminal case. The motion was granted by the circuit court. The next day, Defendant Yoshimura moved for reconsideration of the nolle prosequi order, asking that the

circuit court enter a nolle prosequi with prejudice. An evidentiary hearing on the motion for reconsideration was held on November 18, 19, and 21, 2014. On November 21, 2014 the circuit court orally denied the motion for reconsideration. After the circuit court denied the motion, counsel for Defendant Simeona orally moved to disqualify the office of the prosecuting attorney. The State objected to the motion, asked that the motion be made in writing, and asked that the State be given time to respond. Though the State did not have prior notice that a motion to disqualify would be made during the hearing on the motion for reconsideration, the circuit court disqualified Deputy Prosecuting Attorney Katherine Kealoha and Deputy Prosecuting Attorney Jacob Delaplane.

In accordance with Hawai'i Revised Statutes § 806-56 and Hawai'i Rules of Penal Procedure Rule 48, the underlying case was terminated upon the filing of the order granting the ex parte motion to nolle prosequi without prejudice. Consequently, at the time the circuit court considered the motion for reconsideration, the only matter properly before the court was whether the dismissal would be with or without prejudice. The circuit court, therefore, in light of the case having been terminated, lacked authority to consider and grant the oral motion for disqualification. See United States v. Rossi, 39 F.2d 432, 433 (9th Cir. 1930) (nolle prosequi does not bar second indictment for the same offense but terminates the present proceedings

subject to the court's power over its own orders within term); Mackey v. State, 595 S.E.2d 241, 242 (S.C. 2004) (recognizing prior holdings in its jurisdiction that all proceedings following an entry of a nolle prosequi are void because the indictment is no longer valid).

Because the circuit court did not have the authority to consider and grant the defendant's motion for disqualification after the case had been dismissed, the defendant could move to disqualify if or when he is recharged, but not after the case has been dismissed. For these reasons, I would grant the Petition in part and vacate the Disqualification Order due to lack of jurisdiction without reaching the merits of the Petition.

DATED: Honolulu, Hawai'i, July 7, 2015.

/s/ Paula A. Nakayama

