

NO. 23819

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

MARK DUERING, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 96-0220)

ORDER DENYING RELIEF FROM DEFAULT OF OPENING BRIEF
AND DISMISSING APPEAL

(By: Moon, C.J., Levinson, Nakayama, and Ramil, JJ.
and Circuit Judge Amano, in place of Acoba, J., recused)

Upon consideration of Appellant's December 6, 2001 motion for a further extension of time to file his opening brief, which shall be deemed a motion for relief from default of the opening brief, the papers in support and the record, it appears that Appellant is charged in Cr. No. 96-0220 with intimidating a witness and appeals from a September 19, 2000 circuit court interlocutory order denying Appellant's March 28, 2000 "Motion to Dismiss and for Other Motions." The circuit court refused to certify the September 19, 2000 order for interlocutory appeal, but Appellant appealed the order by notice of appeal filed October 19, 2000 and asserts appellate jurisdiction under the collateral order doctrine of State v. Baranco, 77 Hawai'i 351, 884 P.2d 729 (1994). Under Baranco, Appellant's appeal is limited to that part of the September 19, 2000 order that denied dismissal of the complaint based on the assertion that the prosecution of Cr. No. 96-0220 is barred by a prior acquittal for spouse abuse. See State v. Ontiveros, 82 Hawai'i 446, 451, 923 P.2d 388, 393 (1996).

The record on appeal was filed December 18, 2000 and Appellants opening brief was due forty days later on January 27,

2001. HRAP 28(b). Beginning January 9, 2001 and for the next nine months, Appellant sought and obtained twelve extensions of the opening brief deadline. The first extension gave Appellant thirty additional days under the automatic extension rule of HRAP 29(a). The second through sixth extensions gave Appellant seventy-seven additional days because of the delay in completing the transcripts requested for the record on appeal. The extension requests all asserted that Appellant needed fourteen to twenty days after the completion of the transcripts to complete his opening brief. All transcripts were completed by April 30, 2001. By that time, Appellant had four months to prepare his brief. He did not do so and he sought a further extension.

The seventh extension was sought in conjunction with Appellant's motion to correct and to supplement the record on appeal, which was granted only as to supplementing the record with a videotape. Supplementation was ordered within thirty days and the opening brief deadline was concomitantly extended for thirty more days. Appellant already had a copy of the videotape when he moved for supplementation. He did not complete his brief during the extension period and sought a further extension.

The eighth extension was sought in conjunction with Appellant's second motion to supplement the record with a court reporter's certificate. Supplementation was granted and ordered within ten days and the opening brief deadline was concomitantly extended for thirty more days. Appellant already had a copy of the reporter's certificate when he moved for supplementation. He did not complete his brief during the extension period and sought a further extension.

The ninth extension was sought in conjunction with Appellant's third motion to supplement the record with discovery materials and a transcript. Supplementation was denied as to the discovery materials, granted as to the transcript and the opening

brief deadline was extended for thirty more days to accommodate completion of the transcript. The transcript was completed and filed one day after supplementation was ordered.

During the ninth extension period, Appellant moved for reconsideration of the denial of supplementation of the discovery materials and sought a tenth extension of the opening brief deadline until after the motion for reconsideration was decided. An extension was granted and the opening brief deadline was extended for thirty more days. The motion for reconsideration was denied thirteen days later. Appellant did not complete his brief during the ninth and tenth extension periods and sought a further extension.

The eleventh extension was sought in conjunction with Appellant's fourth motion to supplement the record with the same discovery materials for which supplementation was denied and with additional discovery materials and another transcript. Supplementation was denied, but Appellant was given thirty more days to complete his opening brief. He did not do so and sought a further extension.

The twelfth extension was sought to allow Appellant to investigate a claim of audiotape tampering. An extension of ten additional days was granted. Appellant did not complete his opening brief during the extension period and sought a further extension. A further extension was denied.

The twelfth extension gave Appellant until October 21, 2001 to file his opening brief. No brief was filed. On November 30, 2001, in accordance with HRAP 30, the appellate clerk notified Appellant that the opening brief was in default and that the matter would be called to the attention of this court for such action as this court deems proper and that the appeal may be dismissed.

Appellant seeks relief from the default of his opening

brief by asserting that the denial of his motions to supplement and to correct the record contributed to his inability to prepare his opening brief. However, the matters for which supplementation and correction of the record were sought related to matters for which interlocutory certification was denied and did not relate to the issue of whether the pending prosecution in Cr. No. 96-0220 is barred by Appellant's prior acquittal for spouse abuse, which is the sole issue in this appeal; even if it did, the pleadings in Cr. No. 96-0220 preserved the issue for appeal and provided a sufficient basis for briefing.

Appellant also asserts that his *pro se* status contributed to his inability to prepare his opening brief. However, since electing to proceed *pro se* in March 2000, Appellant has vigorously represented himself through voluminous filings in the trial and appellate courts. His filings in the appellate court total eight volumes to date and are inconsistent with a claim of "legal incompetency." The voluminous appellate court filings since February 2001, including the most recent December 6, 2001 filings, are also inconsistent with a claim of "medical incompetency" to prepare an opening brief during the past ten months.

Appellant having failed to file an opening brief after twelve extensions of the briefing deadline and ten months to prepare the opening brief and having failed to show good cause for relief from the default of the opening brief,

IT IS HEREBY ORDERED that this appeal is dismissed.
HRAP 30.

DATED: Honolulu, Hawai'i, December 28, 2001.

Mark Duering
appellant pro se
on the motion