

NO. 24479

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

MARK ANDREW BENSON, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE SECOND CIRCUIT
(CASE NO. TR1 of 4/20/00)

ORDER DISMISSING APPEAL
(By: Moon, C.J., Levinson,
Nakayama, Ramil, and Acoba, JJ.)

Upon review of the record, it appears that we do not have appellate jurisdiction over Defendant-Appellant Mark Andrew Benson's ("Appellant Benson") direct appeal from his April 20, 2000 conviction in the District Court of the Second Circuit, Lahaina Division, State of Hawai'i, Case No. TR1 of 4/20/2000. We dismissed Appellant Benson's direct appeal from his April 20, 2000 conviction in supreme court case number 23471. "When a court of superior jurisdiction has made a final decision on an area of law during the case, lower courts may not review the issue, as it has become the law of the case." State v. Oshiro, 5 Haw. App. 404, 409, 696 P.2d 846, 851 (1985) (citations and internal quotation marks omitted). Although Appellant Benson was entitled to seek relief from his conviction through a post-conviction petition pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP), HRPP Rule 40(g) did not authorize the district court, the Honorable Douglas H. Ige presiding, to enter an order that, in effect, required the supreme court to assume

jurisdiction over Appellant Benson's second direct appeal. Furthermore, "[t]he clear provisions of HRAP 4(b) and of HRPP 40(g) do not allow the trial judge the power to enter an order, in an HRPP 40 proceeding, extending the expired time for appeal in the underlying criminal case." State v. Mamalias, 69 Haw. 581, 582, 751 P.2d 1029, 1030 (1988). Appellant Benson's August 6, 2001 notice of appeal from his April 20, 2000 conviction is not timely under Rule 4(b) of the Hawaii Rules of Appellate Procedure. Although we have made an exception in criminal cases to the requirement that notices of appeal be timely filed where "defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[,]" State v. Irvine, 88 Hawai'i 404, 407, 967 P.2d 236, 239 (1998) (emphasis added), this exception does not apply because Appellant Benson's August 6, 2001 notice of appeal is his second direct appeal. Accordingly,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, February 14, 2002.