

NO. 26193

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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MELVIN D. FREITAS, JR., Petitioner-Appellant

vs.

STATE OF HAWAI'I, Respondent-Appellee

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APPEAL FROM THE FIRST CIRCUIT COURT  
(S.P.P. NO. 02-1-0028)

ORDER GRANTING MOTION FOR RECONSIDERATION, REINSTATING APPEAL  
AND TEMPORARILY REMANDING CASE TO THE CIRCUIT COURT

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Upon consideration of the letter dated March 4, 2004, which shall be treated as a motion for reconsideration of the February 20, 2004 order dismissing appeal, the papers in support and the record, it appears that this appeal was dismissed as untimely because the circuit court's August 28, 2003 order denying appellant's HRPP Rule 40 petition for post-conviction relief was appealable by notice of appeal filed September 27, 2003, but appellant's notice of appeal was filed on October 31, 2003 and appellant did not claim that the notice was timely under the prisoner mailbox rule of Setala v. J.C. Penney, 97 Hawai'i 484, 40 P.3d 886 (2002). On reconsideration, appellant invokes the Setala prisoner mailbox rule by asserting that he deposited his notice of appeal in the prisoner mailbox on September 23, 2003. However, appellant has not provided evidence to support his assertion. Therefore,

IT IS HEREBY ORDERED that the motion for reconsideration is granted and this appeal is reinstated.

IT IS FURTHER ORDERED that this case is temporarily remanded to the first circuit court for the taking of evidence, entry of findings and supplementation of the record concerning

the date that appellant Melvin Freitas tendered his notice of appeal to prison officials at the Diamondback Correctional Facility. Appellant Freitas shall, within 30 days from the date of this order, submit to the circuit court a non-hearing motion for determination of the date that he tendered his notice of appeal to prison officials at the Diamondback Correctional Facility for transmission to the Hawai'i circuit court.

Appellant Freitas shall attach to his motion any documents, affidavits, declaration, or other admissible evidence in support of his motion. Plaintiff-appellee State of Hawai'i shall, within 30 days thereafter, respond to the motion and its attachments.

The clerk of the supreme court shall forthwith transfer the files previously docketed under No. 26193 to the first circuit court. The circuit court shall, no later than 180 days from the date of this order, enter its findings as to when appellant Freitas tendered his notice of appeal to prison officials at the Diamondback Correctional Center. Within 10 days after entry of the circuit court's findings, the clerk of the circuit court shall retransmit the record, as supplemented, so that we may consider this matter further.

DATED: Honolulu, Hawai'i, May 4, 2004.