

NO. 24123

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

LLEWELLYN K. WAILEHUA, JR., Petitioner-Appellant, v. STATE
OF HAWAI'I, THEODORE SAKAI, DIRECTOR OF PUBLIC SAFETY,
Respondents-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. No. 99-0027
(Cr. Nos. 93-2720, 94-1061, and 94-1813))

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Petitioner-Appellant Llewellyn K. Wailehua, Jr.

(Wailehua) appeals from a February 14, 2001 order of the Circuit Court of the First Circuit (the circuit court), denying reconsideration of a November 30, 1999 order that had denied his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition, filed on September 16, 1999, seeking "release from illegal custody [and] declaratory and injunctive relief." We affirm the order denying reconsideration but conclude that we lack jurisdiction to consider Wailehua's untimely appeal from the order denying his Rule 40 petition.

BACKGROUND

On September 16, 1999, Wailehua filed an HRPP Rule 40 petition, seeking to be released from the Diamondback

Correctional Facility in Watonga, Oklahoma, where he had been incarcerated following his conviction and sentence for various drug offenses. Wailehua claimed in his petition that he was being illegally imprisoned because: (1) the minimum term sentences for his convictions had expired on August 8, 1999; and (2) he had been granted parole but (3) had not yet been released.

The record reveals that on November 30, 1999, the circuit court, Judge Virginia Lea Crandall presiding, entered "Findings of Fact, Conclusions of Law and Order Summarily Dismissing [Wailehua's] Petition for Post-Conviction Relief" (November 30, 1999 Order), on grounds that Wailehua failed to state a colorable claim for relief. Wailehua did not file a notice of appeal from the November 30, 1999 Order. However, almost a year later, on November 17, 2000, Wailehua filed two apparently identical motions for reconsideration of the November 30, 1999 Order, both of which were denied on February 14, 2001. On January 16, 2001, Wailehua filed another motion for reconsideration,¹ which was denied by an order filed in the circuit court on February 14, 2001. On March 5, 2001, Wailehua filed his notice of appeal.

^{1/} This motion for reconsideration does not appear to be in the record on appeal.

DISCUSSION

A. The Untimeliness of Wailehua's Appeal from the November 30, 1999 Order

Pursuant to HRPP Rule 40(h), "[a]ny party may appeal to the supreme court from a judgment entered in the proceeding in accordance with Rule 4(b) of the Hawai'i Rules of Appellate Procedure [(HRAP)]." According to HRAP Rule 4(b), entitled "Appeals in Criminal Cases[,]" "the notice of appeal shall be filed in the circuit, district, or family court within 30 days after the entry of the judgment or order appealed from." HRAP Rule 4(b)(1) (emphasis added). HRPP Rule 40(g)(3) provides that "[t]he court shall state its findings of fact and conclusions of law in entering its judgment on the [HRPP Rule 40] petition." Thus, an order deciding an HRPP Rule 40 petition and entering findings of fact and conclusions of law regarding the petition is the judgment for appeal purposes, and appeals from such an order are governed by the rules governing criminal appeals.

In Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995), the Hawai'i Supreme Court held that "pursuant to HRAP Rule 4(b), an appeal from an order denying post-conviction relief must either be filed within thirty days after the entry of the order denying the HRPP Rule 40 petition or, in the alternative, after the announcement but before the entry of the order." In this case, the November 30, 1999 Order was the

judgment for appeal purposes, and pursuant to State v. Brandimart, 68 Haw. 495, 497, 720 P.2d 1009. 1010 (1986), Wailehua's various motions for reconsideration did not toll the time for filing an appeal from the November 30, 1994 Order.

Since Wailehua's notice of appeal was filed on March 5, 2001, more than a year after the November 30, 1999 Order, we do not have jurisdiction to consider Wailehua's appeal from the November 30, 1999 Order.

B. The Circuit Court Did Not Abuse Its Discretion in Refusing to Reconsider Its Order Denying Wailehua's Rule 40 Petition

Hawai'i Revised Statutes § 353-68 (1993) provides that "[p]aroles may be granted by the Hawaii paroling authority at any time after the prisoner has served the minimum term of imprisonment fixed according to law[.]" In filing his HRPP Rule 40 petition, Wailehua appears to have been under the mistaken impression that he had been granted parole by the Hawai'i Paroling Authority (HPA), effective August 8, 1999, the date when Wailehua's minimum term of imprisonment was to expire. In actuality, however, the HPA's June 25, 1999 decision with respect to Wailehua's parole stated, in relevant part, as follows:

Parole is tentatively approved with [the HPA] Chair to fix date of release upon notification by the Department of Public Safety of [Wailehua's] return to Hawaii. Award of \$150 is made under Act 201. The parole term shall be the maximum allowed by law.

Since the foregoing language clearly indicates that Wailehua's release on parole was to be fixed by the HPA Chair upon Wailehua's return to Hawai'i, Wailehua was not entitled to be released on parole on August 8, 1999 and the circuit court did not abuse its discretion in denying Wailehua's motions for reconsideration of the order denying Wailehua's HRPP Rule 40 petition.

DATED: Honolulu, Hawai'i, June 7, 2002.

On the briefs:

Llewellyn K. Wailehua, Jr.,
petitioner-appellant, pro se.

Cindy S. Inouye and
Kendall J. Moser, Deputy
Attorneys General, State of
Hawai'i, for respondents-
appellees.