

NO. 27259

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ERIK BAREND DERYKE, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2006 DEC 27 AM 10:31

FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
KANEHOHE DIVISION
(HPD TRAFFIC NO. 02436927)

ORDER DENYING MOTION FOR RECONSIDERATION
(By: Lim, Presiding Judge, and Nakamura, J.;
and Foley, J., Dissenting)

On December 18, 2006, Defendant-Appellant Erik Barend Deryke (Deryke) filed a motion for reconsideration of this court's December 8, 2006, opinion. Having considered Deryke's motion for reconsideration, the memorandum in support of the motion, and the records and files herein, we hereby order that the motion is denied.

As one of his grounds for reconsideration, Deryke argues that this court erred in relying upon matters contained in the traffic calendar of the District Court of the First Circuit (district court) because the calendar was not properly part of the record on appeal. The calendar was designated as part of the record on appeal by the Clerk of the district court, was described in the index of the record as "Minutes of Court

Proceedings," and was included in the "Record on Appeal" filed by the Clerk of the Appellate Courts. Deryke did not object to the inclusion of the calendar as part of the record on appeal. Under Hawai'i Rules of Appellate Procedure (HRAP) Rule 11(c)(1) (2006), Deryke was obligated to pursue proceedings in the district court to remove the calendar from the record on appeal if he believed the inclusion of the calendar was in error. Deryke did not pursue proceedings to remove the calendar from the record.

Indeed, in his opening brief, Deryke cites to the calendar in referring to statements made by his counsel at district court hearings. (Deryke's Opening Brief at 2) ("[D]efense counsel appeared before the Court and requested additional continuances because Defendant was sent to California by his employer for a six-month management training program. RA at 6, 35-36. Counsel further requested the court set the trial for possible change of Defendant's plea, thus negating the need for subpoenaed witnesses. RA at 35-36."). Deryke did not challenge the accuracy of the calendar with respect to the calendar's disclosure of what had occurred at the various hearings in the district court. See HRAP Rule 10(e) (2006). Under these circumstances, we conclude that Deryke waived any

claim that the calendar was not properly part of the record on appeal and could not be relied upon by this court.

DATED: Honolulu, Hawai'i, December 27, 2006.

On the motion:

James A. DeLacy
Brian A. Costa
(Costa & DeLacy)
for Defendant-Appellant

A large, stylized signature in black ink, appearing to be 'Craig W. Nakamura', written over a horizontal line.

Presiding Judge

A handwritten signature in black ink that reads 'Craig W. Nakamura'.

Associate Judge

I would grant the motion for reconsideration for reasons stated in my dissent of December 8, 2006.

A handwritten signature in black ink that reads 'Daniel R. Foley'.

Associate Judge