

NO. 27732

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

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
ROBERT LEE CAMPBELL, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(CR. NO. 01-1-0096)

NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

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FILED

ORDER DISMISSING APPEAL

(By: Burns, C.J., Lim and Fujise, JJ.)

Upon review of the record, it appears that we do not have jurisdiction over Defendant-Appellant Robert Lee Campbell's (Appellant Campbell) appeal in this matter because Appellant Campbell's appeal is not timely.

"The right of appeal in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision." State v. Poohina, 97 Hawai'i 505, 509, 40 P.3d 907, 911 (2002) (citation and internal quotation marks omitted). "In a circuit court criminal case, a defendant may appeal from the judgment of the circuit court, see HRS § 641-11 (1993), from a certified interlocutory order, see HRS § 641-17 (1993), or from an interlocutory order denying a motion to dismiss based on double jeopardy." State v. Kealaiki, 95 Hawai'i 309, 312, 22 P.3d 588, 591 (2001) (citation omitted). Without addressing the issue of appellate jurisdiction, the supreme court has assumed jurisdiction over appeals from orders denying post-conviction motions to correct sentences pursuant to Rule 35 of

the Hawai'i Rules of Penal Procedure (HRPP). See, e.g., State v. Guillermo, 91 Hawai'i 307, 308, 983 P.2d 819, 820 (1999)

(Reviewing a defendant's appeal "from the circuit court's denial of his motion for re-sentencing filed . . . pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35[.]"); see also State v. De Guair, 108 Hawai'i 179, 118 P.3d 662 (2005); State v. Kamañao, 103 Hawai'i 315, 82 P.2d 401 (2003); State v. Brantley, 99 Hawai'i 463, 56 P.3d 1252 (2002).

However, assuming, arguendo, that the December 12, 2005 order denying Appellant Campbell's November 22, 2005 HRPP Rule 35 motion to amend or correct the August 26, 2004 amended judgment was an appealable final judgment pursuant to HRS § 641-11 (Supp. 2005), Appellant Campbell did not file his January 26, 2006 notice of appeal within thirty days after entry of the December 12, 2006 order denying Appellant Campbell's November 22, 2005 HRPP Rule 35 motion, as Rule 4(b)(1) of the Hawai'i Rules of Appellate Procedure (HRAP) required. Therefore, Appellant Campbell's appeal is not timely.

Granted, "[i]n criminal cases, [the supreme court] ha[s] made exceptions to the requirement that notices of appeal be timely filed." State v. Irvine, 88 Hawai'i 404, 407, 967 P.2d 236, 239 (1998). The recognized exceptions include "circumstances where (1) defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a

criminal conviction in the first instance[,] . . . or (2) the trial court's decision was unannounced and no notice of the entry of judgment was ever provided[.]" Id. (citations omitted). Appellant Campbell's January 26, 2006 notice of appeal specifically refers to the August 26, 2004 amended judgment rather than the December 12, 2006 order denying Appellant Campbell's November 22, 2005 HRPP Rule 35 motion. However, it does not appear that Appellant Campbell's attorney inexcusably or ineffectively failed to pursue Appellant Campbell's appeal from the August 26, 2004 amended judgment. Instead, it appears that Appellant Campbell's attorney pursued a different strategy, namely post-judgment relief through the November 22, 2005 HRPP Rule 35 motion to amend or correct the sentence in the August 26, 2004 amended judgment. This strategy failed to produce the desired result when the circuit court entered the December 12, 2005 order denying Appellant Campbell's November 22, 2005 HRPP Rule 35 motion. However, Appellant Campbell's failure to obtain his desired result through an HRPP Rule 35 motion did not suddenly allow Appellant Campbell to backtrack in time and pursue appellate review of the August 26, 2004 amended judgment one year and four months after the time period for asserting an appeal under HRAP Rule 4(b)(1) had expired. Where, as here, Appellant Campbell's attorney has sought post-judgment relief from an amended judgment through an HRPP Rule 35 motion rather than a

timely appeal from the amended judgment, the exception to the requirement for a timely notice of appeal from the amended judgment does not apply. Therefore, Appellant Campbell's appeal is not timely and we lack appellate jurisdiction. Accordingly,

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

DATED: Honolulu, Hawai'i, December 14, 2006.

On the briefs:

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for Plaintiff-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge