

NO. 28257

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.
EDWIN BALACY, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
EWA DIVISION
(HPD CR. NO. 98401432 (1P399-00532))

E.M. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2007 JAN 29 PM 1:53

FILED

ORDER GRANTING THE JANUARY 22, 2007 MOTION TO DISMISS APPEAL

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

Upon review of (1) Defendant-Appellant Edwin Balacy's (Appellant Balacy) January 22, 2007 motion to dismiss this appeal for lack of appellate jurisdiction, and (2) the record, it appears that we lack jurisdiction over Appellant Balacy's appeal because the district court has not entered a written post-judgment order that is appealable pursuant to HRS § 641-12 (Supp. 2005).

"The right to an appeal is strictly statutory." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996) (citation omitted). "Appeals from the district court, in criminal cases, are authorized by HRS § 641-12, which . . . provides in pertinent part that appeals upon the record shall be allowed from all final decisions and final judgments of district courts in all criminal matters." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996) (internal quotation marks and

brackets omitted). With respect to the "criminal matter" requirement for an appeal under HRS § 641-12 (Supp. 2005), "[a]n offense . . . for which a sentence of imprisonment is authorized constitutes a crime." HRS § 701-107(1) (1993). This case qualifies as a criminal matter because sexual assault in the fourth degree in violation of HRS § 707-733 (1993) is a misdemeanor that is punishable by imprisonment. See HRS § 706-663 (1993). However, the district court has not yet entered a written judgment or order that expressly denies Appellant Balacy's motion to terminate his probation, and, "in order to appeal a criminal matter in the district court, the appealing party must appeal from a written judgment or order that has been filed with the clerk of the court pursuant to HRAP Rule 4(b)(3)." State v. Bohannon, 102 Hawai'i 228, 236, 74 P.3d 980, 988 (2003). Furthermore, even if the district court had entered a written order that expressly denied Appellant Balacy's motion to terminate his probation, there is no statute that authorizes an appeal from an order denying a motion to terminate probation.

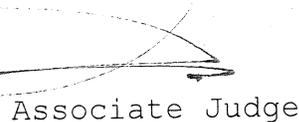
Absent a written order or judgment that is appealable pursuant to HRS § 641-12 (Supp. 2005), we lack appellate jurisdiction, and this appeal must be dismissed. We note that Appellant Balacy requests that we dismiss this appeal "without prejudice" to Appellant Balacy's asserting a future appeal from a future order on Appellee State of Hawaii's pending motion to revoke Appellant Balacy's probation. However, it is not

necessary for us to dismiss this appeal "without prejudice" in order to allow Appellant Balacy to assert a future appeal. If the district court enters a written order or judgment in the future that is appealable pursuant to HRS § 641-12 (Supp. 2005), then an aggrieved party will be entitled to assert an appeal pursuant to HRS § 641-12 (Supp. 2005), notwithstanding our dismissal of this appeal. Therefore,

IT IS HEREBY ORDERED that Appellant Balacy's January 22, 2007 motion to dismiss this appeal is granted, and this appeal in appellate court case number 28257 is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, January 29, 2007.


Chief Judge


Associate Judge


Associate Judge