

NO. 28455

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
PATRICK I. HANATO, Defendant-Appellant

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 05-1-0725)

ORDER DISMISSING APPEAL

(By: Recktenwald, C.J., Watanabe, and Foley, J.)

Upon review of the record, it appears that Defendant-Appellant Patrick I. Hanato (Appellant), although represented by counsel, is appealing pro se from an oral order denying Appellant's motion to dismiss for violation of Hawai'i Rules of Penal Procedure (HRPP) Rule 48 where the Circuit Court of the First Circuit (the circuit court) has not yet pronounced sentence or entered a final judgment. We dismiss this appeal for lack of jurisdiction.

"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) (internal quotation marks omitted). "In a circuit court criminal case, a defendant may appeal from the judgment of the circuit court, see [Hawaii Revised Statutes (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).

1. Jurisdiction does not exist based upon an appealable, final judgment.

The circuit court did not sentence Appellant and did not file a written judgment. Consequently, no final judgment exists to enable appellate review of the circuit court's denial of Appellant's motion to dismiss. Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b); HRS § 641-11; State v. Baxley, 102 Hawai'i 130, 133 n.7, 73 P.3d 668, 671 n.7 (2003); State v. Kilborn, 109 Hawai'i 435, 442, 127 P.3d 95, 102 (App. 2006).

Although a notice of appeal may be deemed to be a premature filing of an appeal pursuant to HRAP Rule 4(b)(4) if it is filed "after the announcement of a decision, sentence or order but before entry of the judgment or order[,]" the circuit court in this case has not yet announced its decision on sentencing. As such, Appellant's notice of appeal cannot be deemed to be a premature filing of an appeal.

2. Jurisdiction does not exist based upon a filed order or certified interlocutory status.

The circuit court's oral order denying Appellant's motion to dismiss was not reduced to a filed written order. Thus, the oral order does not constitute an appealable order, and no jurisdiction exists for this court's review of the circuit court's oral order denying Appellant's motion to dismiss. HRAP Rule 4(b); State v. Bohannon, 102 Hawai'i 228, 235, 74 P.3d 980, 987 (2003).

Even if the order were memorialized in writing and filed, no jurisdiction exists where the circuit court did not certify the interlocutory order denying Appellant's motion to dismiss for interlocutory appeal, as required under HRS § 641-17.

3. Jurisdiction does not exist based upon the collateral order exception permitting appeal from a non-certified interlocutory order denying a motion to dismiss based on double jeopardy.

Although, pursuant to State v. Baranco, 77 Hawai'i 351, 352-55, 884 P.2d 729, 730-33 (1994), "the collateral order exception to the final judgment rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds[,]" Appellant's motion to dismiss was premised upon violation of HRPP Rule 48, and not upon double jeopardy. Consequently, jurisdiction cannot be based upon the collateral order exception.

4. A dismissal for want of jurisdiction does not deprive Appellant of his right to appeal.

The instant circumstances are distinguishable from situations where the court has exercised jurisdiction despite a defective filing of the notice of appeal because "an indigent criminal defendant is entitled, on his [or her] first appeal, to court-appointed counsel who may not deprive him [or her] of his [or her] appeal by electing to forego compliance with procedural rules[,]" State v. Erwin, 57 Haw. 268, 270, 554 P.2d 236, 238 (1976) (emphasis added), or "where . . . defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[.]" State v. Irvine, 88 Hawai'i 404, 407, 967 P.2d 236, 239 (1998). Appellant's counsel was appointed to represent Appellant specifically "at all stages of the proceedings, including appeal[.]" HRS § 802-5 (Supp. 2006). Appellant's counsel has not inexcusably failed to pursue Appellant's appeal where no appealable order of judgment has yet been filed. At this point,

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Appellant has not acted through his counsel and has not afforded his counsel the opportunity to timely appeal the judgment after the judgment has been entered.

In light of the foregoing, we do not have jurisdiction over this appeal. Therefore,

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

DATED: Honolulu, Hawai'i, June 7, 2007.

Man E. Rowland

Chief Judge

Corinne Kā Watanabe

Associate Judge

Daniel R. Foley

Associate Judge