

NO. 28530

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

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

KHAMAKADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAI'I

2007 SEP -7 AM 8:01

FILED

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(Case No. 1P106-18657)

ORDER GRANTING DEFENDANT-APPELLANT  
ROBERT LEE'S AUGUST 30, 2007 MOTION TO  
DISMISS APPEAL FOR LACK OF APPELLATE JURISDICTION  
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Upon review of (1) Defendant-Appellant Robert Lee's (Appellant Lee) August 30, 2007 motion to dismiss appellate court case number 28530 for lack of jurisdiction and (2) the record, it appears that Appellant Lee's August 30, 2007 motion to dismiss appellate court case number 28530 for lack of jurisdiction has merit.

"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. 2006), "[a]n offense . . . for which a sentence of imprisonment is authorized constitutes a crime." HRS § 701-107(1) (1993). Theft in the fourth degree in violation of HRS § 708-833 (1993) is a petty misdemeanor that is punishable by imprisonment. HRS § 706-663 (1993). Therefore, the April 2, judgment of conviction against Appellant Lee for theft in the fourth degree in violation of HRS § 708-833 (1993) is a district court "criminal matter" under HRS § 641-12 (Supp. 2006).

Nevertheless, "[j]udgments of conviction entered in the district courts may not be appealed unless they are final." State v. Kilborn, 109 Hawai'i 435, 442, 127 P.3d 95, 102 (App. 2005). Thus, we have held that a district court judgment of conviction is not an appealable judgment when the district court has left open the possibility that the sentence might include an order requiring the defendant to pay restitution:

Judgments of conviction are not final unless they include the final adjudication and the final sentence. In the instant case, the sentence imposed was not the final sentence because the district court expressly left open the possibility that its sentence of Kilborn might include an order requiring Kilborn to pay restitution. The court did not finally decide whether it would order Kilborn to pay restitution and, if so, in what amount. Consequently, the December 5, 2003 Judgment is not final and, because it is not final, it is not appealable.

Accordingly, IT IS HEREBY ORDERED that the appeal from the December 5, 2003 Judgment is dismissed for lack of appellate jurisdiction.

Id.

In the instant case, the Honorable Michael Marr's April 2, 2007 judgment indicates that the district court intends to enter a subsequent restitution order that will determine the exact amount of restitution that Appellant Lee is required to pay as a part of his sentence. Based on the absence of a subsequent restitution order in the record, it appears that the district court has not yet determined the amount of restitution that Appellant Lee is required to pay as a part of his sentence. Until the district court determines the exact amount of restitution that Appellant Lee is required to pay as a part of his sentence, the conviction against Appellant Lee for theft in the fourth degree in violation of HRS § 708-833 (1993) is not final, and, thus, it is not yet appealable under HRS § 641-12 (Supp. 2006). Therefore,

IT IS HEREBY ORDERED that Appellant Lee's August 30, 2007 motion to dismiss appellate court case number 28530 for lack of jurisdiction is granted, and appellate court case number 28530 is dismissed. This order of dismissal does not preclude Appellant Lee from asserting a new appeal when and if the district court makes Appellant Lee's judgment of conviction final by entering an appealable written order that determines the amount of restitution that Appellant Lee is required to pay as a part of his sentence.

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

*Min A. H. ...*  
Chief Judge

*Corinne K. Watanabe*  
Associate Judge

*Craig M. Nakamura*  
Associate Judge