

NO. 27699

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
MARC K. DAVIS, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 99-2130)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

Jean Kimamoto

2008 JUL -2 AM 7:56

FILED

ORDER DISMISSING APPEAL

(By: Foley, Presiding Judge, Nakamura and Leonard, JJ.)

Upon review of (1) the May 22, 2006 Amended Opening Brief by Defendant-Appellant Marc K. Davis (Davis), (2) the August 1, 2006 Answering Brief by Plaintiff-Appellee State of Hawai'i, (3) Davis's August 28, 2006 Reply Brief, and (4) the record, it appears that we lack jurisdiction over this appeal because Davis's appeal from the Honorable Russel S. Nagata's November 8, 2005 Order of Resentencing (Order of Resentencing) is untimely under Rule 4(b)(1) of the Hawai'i Rules of Appellate Procedure (HRAP).

"The right to an appeal is strictly statutory." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996). Hawaii Revised Statutes (HRS) § 571-54 (2006 Repl.) provides that, in family court matters, "[a]n interested party, aggrieved by any order or decree of the court, may appeal to the intermediate appellate court for review of questions of law and fact upon the same terms and conditions as in other cases in the circuit court and review shall be governed by chapter 602[.]" The Intermediate Court of Appeals has jurisdiction "[t]o hear and determine appeals from any court or agency when appeals are allowed by law[.]" HRS § 602-57(1) (Supp. 2007). In similar criminal matters in the circuit court, "[a]ny party aggrieved by the judgment of a circuit court in a criminal matter may appeal to the intermediate appellate court[.]" HRS § 641-11 (Supp.

2007). "The sentence of the court in a criminal case shall be the judgment." Id.

In Davis's January 5, 2006 Notice of Appeal, he appealed from (1) the December 8, 2005 "Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion to Dismiss for Violation of H.R.P.P. Rule 9" (FOF/COL/Order) and (2) the Order of Resentencing. However, the FOF/COL/Order did not impose a sentence on Davis and is not an appealable judgment pursuant to HRS §§ 571-54 and 641-11. In contrast, the Order of Resentencing is an appealable judgment pursuant to HRS §§ 571-54 and 641-11.

"In a criminal case, the notice of appeal shall be filed in the . . . family court within 30 days after the entry of the judgment or order appealed from." HRAP Rule 4(b)(1). Davis did not file his January 5, 2006 Notice of Appeal within thirty days after entry of the November 8, 2005 Order of Resentencing. Therefore, Davis's Notice of Appeal is untimely.

On January 17, 2006, the family court granted Davis's ex parte motion to extend the time to file a notice of appeal pursuant to HRAP Rule 4(b)(5). Pursuant to HRAP Rule 4(b)(5), the family court was authorized to grant such an extension no later than January 7, 2006, i.e., "no later than 30 days after the time [for filing a notice of appeal from the Order of Resentencing] ha[d] expired[.]" HRAP Rule 4(b)(5). Therefore, the family court abused its discretion when it entered the untimely January 17, 2008 order granting Davis's motion to extend the time to file a notice of appeal pursuant to HRAP Rule 4(b)(5).

We note that, "[i]n criminal cases, [the Hawai'i 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

involve 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). Neither of these two exceptions applies to the instant case because (1) Davis is not appealing from his original conviction (the family court's June 28, 1999 Judgment), and (2) as indicated by Davis's signature on the Order of Resentencing, the family court announced, and provided sufficient notice of, its decision to resentence Davis through the Order of Resentencing.

Davis's appeal from the Order of Resentencing is untimely. "As a general rule, compliance with the requirement of the timely filing of a notice of appeal is jurisdictional, and we must dismiss an appeal on our motion if we lack jurisdiction." Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995) (internal quotation marks, citations, and brackets omitted); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."). Accordingly,

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

DATED: Honolulu, Hawai'i, July 2, 2008.


Daniel R. Foley
Presiding Judge


Carol H. Nakamura
Associate Judge


Associate Judge