

NO. 28739

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

STATE OF HAWAI'I, Plaintiff-Appellee,

v.

ERIN E. BRYAN, aka ERIN BRYAN MERRIAM, Defendant-Appellant.

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

2008 FEB -5 PM 12:40

FILED

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CR. NO. 01448590)

ORDER DISMISSING APPEAL AND SANCTIONING
DEFENDANT-APPELLANT ERIN E. BRYAN'S COUNSEL
(By: Recktenwald, C.J., Watanabe and Nakamura, JJ.)

Upon review of (1) the December 26, 2007 order requiring Defendant-Appellant Erin E. Bryan (Appellant Bryan) to show cause (a) why we should not dismiss Appellant Bryan's appeal as untimely and (b) why Appellant Bryan did not file a statement of jurisdiction pursuant to Rule 4(b)(1) of the Hawai'i Rules of Appellate Procedure (HRAP), (2) Appellant Bryan's January 10, 2008 response to the December 26, 2007 order to show cause, and (3) the record, it appears that we lack jurisdiction over Appellant Bryan's appeal from the Honorable Lono J. Lee's April 18, 2007 "Findings of Fact, Conclusions of Law, and Order Denying Motion for Reconsideration of Order Granting Defendant Erin E. Bryan's Oral Motion for Deferred Acceptance of No Contest Plea" (the April 18, 2007 order) because Appellant Bryan's appeal is not timely under HRAP Rule 4(b)(1).

"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, "[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 crime that is punishable by imprisonment up to thirty days. HRS § 706-663 (1993). Therefore, this case satisfies the "criminal matter" requirement under HRS § 641-12 (Supp. 2006).

However, Appellant Bryan was required to file her notice of appeal from the April 18, 2007 order "within 30 days after the entry of the judgment or order appealed from." HRAP Rule 4(b)(1). Appellant Bryan did not file her September 7, 2007 notice of appeal within thirty days after entry of the April 18, 2007 order, as HRAP Rule 4(b)(1) requires. Therefore, Appellant Bryan's appeal is untimely.

"In 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 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). Appellant Bryan does not qualify for either of these two exceptions to the timely appeal requirement. The first exception to the timely appeal requirement does not apply to Bryan because Bryan is not appealing from a "criminal conviction." The second exception to the timely appeal requirement does not apply to Appellant Bryan, because the record shows that Appellant Bryan received notice of the district court's oral ruling and the resulting April 18, 2007 order more than thirty days before Appellant Bryan filed her September 7, 2007 notice of appeal. In district court criminal cases, "compliance with the requirement of the timely filing of a notice of appeal, as set forth in HRAP Rule 4(b)(1), is jurisdictional." State v. Bohannon, 102 Hawai'i 228, 234, 74 P.3d 980, 986 (2003) (citation, internal quotation marks, and original brackets omitted). Therefore, we lack jurisdiction over Appellant Bryan's untimely appeal. Accordingly,

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

In addition to failing to file a timely notice of

appeal pursuant to HRAP Rule 4(b)(1), Appellant Bryan failed to file a statement of jurisdiction pursuant to HRAP Rule 12.1. In light of the fact that court records show that Appellant Bryan's attorney, Emlyn H. Higa, has violated the Hawai'i Rules of Appellate Procedure on previous occasions, it appears that a sanction against Emlyn H. Higa is warranted pursuant to HRAP Rule 51. Therefore,

IT IS FURTHER HEREBY ORDERED that attorney Emlyn H. Higa (attorney number 3200) is sanctioned in the amount of \$100.00. Mr. Higa shall write a check in the amount of \$100.00 to the Hawai'i State Director of Finance, and Mr. Higa shall submit his check with an attached copy of this order to the Appellate Court Clerk within ten (10) days after the date of this order. In addition, Mr. Higa shall file a declaration attesting to said payment with the Hawai'i Intermediate Court of Appeals within ten (10) days after the date of this order.

Failure to comply with this order will result in additional sanctions.

DATED: Honolulu, Hawai'i, February 5, 2008.

Mon Redmond

Chief Judge

Courinne K.A. Watanabe

Associate Judge

Cyril Valera

Associate Judge