

NO. 29002

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,

v.

KENNETH W. MATHISON, Defendant-Appellant.

EMERITANDO
GENERAL APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 93-0473 (Hilo))

ORDER DISMISSING APPEAL

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

Upon review of the record, it appears that we lack jurisdiction over the appeal that Petitioner-Appellant Kenneth W. Mathison (Appellant Mathison) has asserted from the Honorable Elizabeth A. Strance's October 10, 2007 "Findings of Fact, Conclusions of Law, and Order Denying Hearing on Petition for Post-Conviction Relief [Pursuant to Rule 40 of the Hawaii Rules of Penal Procedure (HRPP)]" (the October 10, 2007 order denying Appellant Mathison's HRPP Rule 40 petition for post-conviction relief) because the appeal is untimely under Rule 4(b) of the Hawaii Rules of Appellate Procedure (HRAP).

"[P]ursuant to HRAP Rule 4(b), an appeal from an order denying post-conviction relief must either be filed within thirty days after the entry of the order denying the HRPP Rule 40 petition or, in the alternative, after the announcement but before the entry of the order." Grattafiori v. State, 79 Hawaii 10, 13, 897 P.2d 937, 940 (1995). Under similar circumstances, the supreme court has held that, when a pro se prisoner attempts to assert an appeal, the "notice of appeal is deemed filed for purposes of Hawaii Rules of Appellate Procedure (HRAP) Rule 4(a) on the day it is tendered to prison officials by a pro se prisoner." Setala v. J.C. Penney Company, 97 Hawaii 484, 485, 40 P.3d 886, 887 (2002) (internal quotation marks omitted). In the instant case, HRAP Rule 4(b) provides the controlling time period for filing a notice of appeal rather than HRAP Rule 4(a),

but the holding in Setala v. J.C. Penny Company applies to the instant case. Although the file-stamped date on Appellant Mathison's notice of appeal is February 11, 2008, Appellant Mathison tendered his notice of appeal to prison officials for mailing on February 4, 2008, and, thus, the controlling date is February 4, 2008. However, contrary to the thirty-day time limitation under HRAP Rule 4(b)(1), Appellant Mathison did not tender his February 4, 2008 notice of appeal within thirty days after entry of the October 10, 2007 order denying Appellant Mathison's HRPP 40 petition for post-conviction relief. Therefore, Appellant Mathison's appeal is not timely.

"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). Specifically, the supreme court has permitted belated appeals under two sets of circumstances:

- (1) [when] defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance, or
- (2) [when] the lower court's decision was unannounced and no notice of the entry of judgment was ever provided.

Grattafiori v. State, 79 Hawai'i at 13-14, 897 P.2d at 940-41 (citations omitted). These two exceptions do not apply to the instant case because; (1) this case is not Appellant Mathison's appeal from his criminal conviction in the first instance; and (2) Appellant Mathison has admitted that on October 23, 2007, Appellant Mathison received a copy of the October 10, 2007 order denying Appellant Mathison's January 16, 2007 HRPP Rule 40 petition for post-conviction relief.

Appellant Mathison's motion for reconsideration, which Appellant Mathison tendered to prison officials for mailing on October 26, 2007, did not extend the time period for filing a notice of appeal pursuant to HRAP Rule 4(b)(2), because Appellant Mathison's motion for reconsideration was neither an applicable motion under HRAP Rule 4(b)(2) nor was Appellant Mathison's motion for reconsideration timely. Therefore, Appellant Mathison's motion for reconsideration did not extend the standard thirty-day time period under HRAP Rule 4(b)(1) for filing a

notice of appeal.

Appellant Mathison's appeal is not timely. "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."

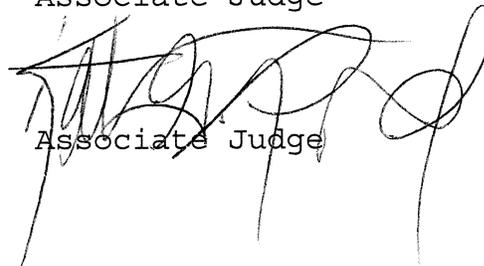
Grattafiori v. State, 79 Hawai'i at 13, 897 P.2d at 940 (citations, internal quotation marks, and brackets omitted); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."). Accordingly,

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

DATED: Honolulu, Hawai'i, August 21, 2008.


Daniel R. Foley
Presiding Judge


Associate Judge


Associate Judge