

NO. 29070

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee,
v.

JOBY LEE DENNY, Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(HPD CR. NO. 06419242 (1P1070012488))

ORDER GRANTING DEFENDANT-APPELLANT JOBY LEE DENNY'S MAY 28, 2008 MOTION TO DISMISS APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Recktenwald, Chief Judge, Foley and Fujise, JJ.)

Upon review of (1) Defendant-Appellant Joby Lee Denny's (Appellant Denny) May 28, 2008 motion to dismiss Appellant Denny's appeal in appellate court case number 29070 for lack of jurisdiction and (2) the record, it appears that Appellant Denny's May 28, 2008 motion to dismiss 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. 2007), "[a]n offense . . . for which a sentence of imprisonment is authorized constitutes a crime." HRS § 701-107(1) (1993). "Harassment is a petty misdemeanor." HRS § 711-1106(2) (Supp. 2007). "[T]he court may sentence a person who has been convicted of . . . a petty misdemeanor to imprisonment for . . . thirty days in the case of a petty misdemeanor." HRS § 706-663 (1993). Therefore, the February 20, 2008 judgment of conviction against Appellant Denny for harassment in violation of HRS § 711-1106 (Supp. 2007) is a

EM. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2008 JUL 30 PM 1:46

FILED

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

district court "criminal matter" under HRS § 641-12 (Supp. 2007).

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 Edwin Nacino's February 20, 2008 judgment indicates that the district court intends to enter a subsequent restitution order that will determine the exact amount of restitution that Appellant Denny is required to pay as a part of his sentence. Based on the absence of a subsequent written restitution order in the record, it appears that the district court has not yet determined the amount of restitution that Appellant Denny is required to pay as a part of his sentence. Until the district court enters a written order that provides the specific amount of restitution that Appellant Denny is required to pay as a part of his sentence, the conviction against Appellant Denny for harassment in violation of HRS § 711-1106 (Supp. 2007) is not final, and, thus, it is not yet appealable under HRS § 641-12 (Supp. 2007). Therefore,

IT IS HEREBY ORDERED that Appellant Denny's May 28, 2008 motion to dismiss appellate court case number 29070 for lack

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

of jurisdiction is granted, and appellate court case number 29070 is dismissed. This order of dismissal does not preclude Appellant Denny from asserting a new appeal when and if the district court makes Appellant Denny's judgment of conviction final by entering an appealable written order that determines the amount of restitution that Appellant Denny is required to pay as a part of his sentence.

DATED: Honolulu, Hawai'i, July 30, 2008.

Muu Redmond

Chief Judge

Daniel R. Foley
Associate Judge

Aunani H. Jinn
Associate Judge