

NO. 29449

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

KENNETH JELKS, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP NO. 05-1-0061; CR. NO. 94-0257)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION

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

Upon review of the record, it appears that we lack jurisdiction over Petitioner-Appellant Kenneth Jelks's (Appellant Jelks) appeal from (1) the Honorable Richard K. Perkins's March 24, 2006 decision and order dismissing Appellant Jelks's petition for post-conviction relief pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP), and (2) an order denying Appellant Jelks's October 31, 2008 motion for clarification.¹

"The right of appeal in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision." State v. Poohina, 97 Hawai'i 505, 509, 40 P.3d 907, 911 (2002) (citation and internal quotation marks omitted). "In a circuit court criminal case, a defendant may appeal from the judgment of the circuit court, see HRS § 641-11 (1993), from a certified interlocutory order, see HRS § 641-17 (1993), or from an interlocutory order denying a motion to dismiss based on double jeopardy." State v. Kealaiki, 95 Hawai'i 309, 312, 22 P.3d 588, 591 (2001) (citation omitted). Therefore, pursuant to HRS § 641-11 (Supp. 2007) and "HRPP Rule 40(h), appeals from proceedings for post-conviction relief may be made from a judgment entered in the proceeding and must be taken in

¹ The record on appeal includes a document filed by the Circuit Court entitled "Inmate Correspondence Dated 10/1/08 and Response Dated 10/13/08" which purports to transmit an order. However, no order is attached to the papers filed and no separate order is included in the record. Likewise, no order was entered on Jelks' 10/31/08 motion for clarification.

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CLERK OF APPELLATE COURTS
STATE OF HAWAII

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accordance with Rule 4(b) of the Hawai'i Rules of Appellate Procedure (HRAP)." Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995) (internal quotation marks and brackets omitted). The supreme court does not apply the separate document rule (see Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994)) to special proceedings for motions for post-conviction relief pursuant to HRPP Rule 40. Therefore, the March 24, 2006 order denying Appellant Jelks's HRPP Rule 40 petition for post-conviction relief was an appealable final order.

Nevertheless, 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, 79 Hawai'i at 13, 897 P.2d at 940. Appellant Jelks did not file his October 31, 2008 notice of appeal within thirty days after entry of the March 24, 2006 order denying Appellate Jelks's HRPP 40 petition for post-conviction relief. Therefore, Appellant Jelks's appeal from the March 24, 2006 order denying Appellant Jelks's HRPP 40 petition for post-conviction relief is not timely.

There is no written order that disposes of Appellant Jelks's October 31, 2008 motion for clarification. Rule 4(b) of the Hawai'i Rules of Appellate Procedure (HRAP), "which, by its plain language, makes no distinction between proceedings in the district or circuit courts - requires that a final and appealable judgment or order in criminal cases be in written form." State v. Bohannon, 102 Hawai'i 228, 235, 74 P.3d 980, 987 (2003) (citation omitted). Therefore, there is no order from which Appellant Jelks can assert an appeal.

"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, 79 Hawai'i at 13, 897 P.2d at 940 (citations, internal quotation marks, and brackets omitted);

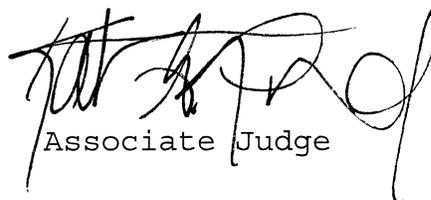
HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules.").

Therefore, IT IS HEREBY ORDERED that Appellant Jelks' appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, March 5, 2009.


Daniel R. Foley
Presiding Judge


Craig W. Nakamura
Associate Judge


Associate Judge