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NO. 29556

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

STATE OF HAWAI'I, Plaintiff-Appellee, v.
WENDIE M. SCHWAB, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CR. NO. 07-1-0582)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION
(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of the record for this case, it appears that we lack jurisdiction over Defendant-Appellant Wendie M. Schwab's (Appellant Schwab) appeal from the Honorable Joseph E. Cardoza's December 10, 2008 "Order Denying Motion to Dismiss Indictment for Failure to Allege Essential Element" (the December 10, 2008 interlocutory order), because the December 10, 2008 interlocutory order is not an independently appealable order.

"In a circuit court criminal case, a defendant may appeal from the judgment of the circuit court, see [Hawaii Revised Statutes (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). Appellant Schwab's appeal from the December 10, 2008 interlocutory order does not fit into any of these three categories.

With respect to HRS § 641-11 (Supp. 2007), "[a]ny party deeming oneself aggrieved by the judgment of a circuit court in a criminal matter, may appeal to the intermediate appellate court,

subject to chapter 602 in the manner and within the time provided by the rules of the court." However, under HRS § 641-11, "[t]he sentence of the court in a criminal case shall be the judgment." The circuit court has not yet entered any sentence against Appellant Schwab, and, thus, HRS § 641-11 does not authorize Appellant Schwab's appeal at this time.

The record shows that the circuit court denied Appellant Schwab's motion for leave to assert an interlocutory appeal from the December 10, 2008 interlocutory order pursuant to HRS § 641-17 (Supp. 2007). "The refusal of the judge to allow an interlocutory appeal to the appellate court shall not be reviewable by any other court." Id.

Finally, the December 10, 2008 interlocutory order did not relate to the issue of double jeopardy. Nevertheless, Appellant Schwab argues that the December 10, 2008 interlocutory order is appealable under the collateral order doctrine.

> [U]nder the collateral order exception, an interlocutory order is appealable if it: (1) fully disposes of the question at issue; (2) resolves an issue completely collateral to the merits of the case; and (3) involved important rights which would be irreparably lost if review had to await a final judgment.

State v. Baranco, 77 Hawai'i 351, 355, 884 P.2d 729, 7331-32 (1994) (citation omitted). "Generally, the collateral order exception is applicable in criminal cases only upon a denial of pretrial motions to reduce bail, motions to dismiss based on double jeopardy grounds, and motions to dismiss under the Speech and Debate Clause." State v. Johnson, 96 Hawai'i 462, 470 n.12, 32 P.3d 106, 114 n.12 (App. 2001) (citation omitted). The December 10, 2008 interlocutory order does not relate to a denial of pretrial motions to reduce bail, motions to dismiss based on

double jeopardy grounds, and motions to dismiss under the Speech and Debate Clause. More importantly, the December 10, 2008 interlocutory order does not satisfy the three requirements for the collateral order doctrine, and Appellant Schwab has failed cite a single published opinion that is on point with her assertion that the collateral order doctrine applies to an order such as the December 10, 2008 interlocutory order that denies a motion to dismiss an indictment for failure to allege an essential element of a charged crime.

Absent an appealable order or judgment, Appellant Schwab's appeal is premature and we lack jurisdiction. Accordingly,

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

DATED: Honolulu, Hawai'i, April 15, 2009.

Daniel R. Foley
Presiding Judge

Associate Judge

Associate Judge