

NO. 29617

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
SERGIO AFANASENKO, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 06-1-0341)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION

(By: Watanabe, Acting Chief Judge, Foley and Fujise, JJ.)

Upon review of the record for this case, it appears that we lack jurisdiction over the appeal that Defendant-Appellant Sergio Afanasenko (Appellant Afanasenko) asserted from the Honorable Greg K. Nakamura's January 13, 2009 "Order Granting Motion for Deferred Acceptance of No Contest Plea" (the January 13, 2009 order granting Appellant Afanasenko's DANC plea), because Hawaii Revised Statutes (HRS) § 641-11 (Supp. 2008) does not authorize such an appeal.

"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). The December 31, 2008 dismissal order does not belong to any of these three categories of statutorily authorized appeals for a criminal defendant. For example, "[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." HRS § 641-11 (Supp. 2008). Nevertheless, under similar circumstances, the supreme court has explained that,

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[u]nder HRS § 641-11, the sentence of the court in a criminal case is the judgment from which an appeal is authorized. Because there is no conviction when the acceptance of a plea is deferred, . . . an order granting a DANC plea such as the one issued here is not a conviction nor is it a sentence. There having been no conviction and sentence in this case, there can be no appeal under HRS § 641-11 from the . . . order granting Defendant's plea deferral.

State v. Kealaiki, 95 Hawai'i 309, 312, 22 P.3d 588, 591 (2001) (citations, internal quotation marks, original brackets, and original ellipsis points omitted) (dismissing a defendant's appeal from an order granting a DANC plea for lack of appellate jurisdiction). Similarly in the instant case, HRS § 641-11 does not authorize Appellant Afanasenko's appeal from the January 13, 2009 order granting Appellant Afanasenko's DANC plea.

Absent a statute authorizing an appeal from the January 13, 2009 order granting Appellant Afanasenko's DANC plea, we lack jurisdiction over Appellant Afanasenko's appeal.

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

DATED: Honolulu, Hawai'i, May 21, 2009.

Cornnie KA Watanabe

Acting Chief Judge

Coniel R. Foley

Associate Judge

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Associate Judge