

NO. 29894

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII,  
Plaintiff-Appellee,

v.

MARK ALAN MARTINS,  
Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 07-1-0283)

ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION  
(By: Nakamura, C.J., Watanabe and Leonard, JJ.)

Upon review of the record, it appears that we lack jurisdiction over the appeal that Defendant-Appellant Mark Alan Martins (Appellant Martins) asserted from the Honorable Joseph Edward Cardoza's June 12, 2009 judgment of conviction in Criminal No. 07-1-0283 pursuant to Hawaii Revised Statutes (HRS) § 641-11 (Supp. 2008).

"The right to an appeal is strictly statutory." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996) (citation omitted). "Any 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. "The sentence of the court in a criminal case

shall be the judgment." Id. The June 12, 2009 judgment enters convictions against Appellant Martins for the following crimes:

1. one count of assault in the second degree in violation of HRS § 707-711 (Supp. 2007);
- one count of terroristic threatening in the first degree in violation of HRS § 707-716 (Supp. 2008);
- one count of reckless endangering in the first degree in violation of HRS § 707-713 (1993);
- one count of criminal property damage in the first degree in violation of HRS § 708-820 (Supp. 2008);
- one count of carrying, using or threatening to use a firearm in the commission of a separate felony in violation of HRS § 134-21 (Supp. 2008);
- one count of prohibited possession of a firearm in violation of HRS § 134-7 (Supp. 2008);
- one count of prohibited possession of ammunition in violation of HRS § 134-7 (Supp. 2008); and
- two counts of prohibited ownership or possession of a pistol magazine in violation of HRS §134-8 (1993).

The June 12, 2009 judgment imposes a sentence of imprisonment, various fines, as well as "restitution in an amount to be determined at a Restitution Hearing on June 25, 2009 at 10:00 a.m." However, the record does not contain a written order that determines the amount of restitution that Appellant Martins must pay as a part of his sentence.

Under similar circumstances in an appeal from a district court judgment, we held that

[j]udgments 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.

State v. Kilborn, 109 Hawai'i 435, 442, 127 P.3d 95, 102 (App. 2005). Similarly in the instant case, the June 12, 2009 judgment indicates that the circuit court intended to sentence Appellant Martins to pay restitution in a specific amount that the circuit court would determine at a later date, and yet, the record does not contain a written order that determines the amount of restitution that Appellant Martins must pay as a part of his sentence. Consequently, the June 12, 2009 judgment is not final, and, thus, the June 12, 2009 judgment is not appealable under HRS § 641-11. Absent an order that specifically determines the amount of restitution that Appellant Martins must pay as a part of his sentence, the sentence in this case is not yet complete, and we lack appellate jurisdiction under HRS § 641-11.

Therefore, IT IS HEREBY ORDERED that Appellant Martins's appeal in appellate court case number 29894 is dismissed for lack of jurisdiction. This order of dismissal does not preclude Appellant Martins from asserting a new appeal under a new appellate court case number when the circuit court makes Appellant Martins's judgment of conviction final by entering an appealable written order that determines the amount of

restitution that Appellant Martins is required to pay as a part of his sentence.

DATED: Honolulu, Hawai'i, November 13, 2009.

Chief Judge

Associate Judge

Associate Judge