

NO. 30145

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
KENNETH WAYNE MATHISON, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CR. NO. 93-0473)

ORDER DISMISSING APPEAL
FOR LACK OF APPELLATE JURISDICTION
(By: Nakamura, Chief Judge, Watanabe and Fujise, JJ.)

Upon review of the record, it appears that we lack jurisdiction over the appeal that Appellant Kenneth Wayne Mathison (Appellant Mathison) has asserted from Appellee Hawai'i Paroling Authority's (Appellee HPA)¹ September 15, 2009 order fixing the minimum terms of imprisonment that Appellant Mathison must serve in the sentence that he received in his March 5, 1996 conviction for kidnapping in violation of Hawaii Revised Statutes (HRS) § 707-720 (1993) and murder in the second degree in violation of HRS § 707-701.5 (1993) in Criminal No. 93-473. Apparently, Appellee HPA entered the September 15, 2009 order pursuant to the circuit court's instructions in the circuit court's August 19, 2008 findings of fact, conclusions of law, and order granting in part and denying in part Appellant Mathison's September 1, 2004 petition for post-conviction relief pursuant to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP), and our affirmance of the August 19, 2008 findings of fact, conclusions

¹ According to Appellee Hawai'i Paroling Authority's (Appellee HPA) September 15, 2009 order, Appellee HPA was comprised of Chair Person Albert Tufono, Member Dane K. Oda, and Member Roy W. Reeber.

of law, and order in appellate court case number 29356.

"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). However, there is no statutory authority for an appeal from an order by Appellee HPA that fixes a minimum term of imprisonment. Therefore, Appellee HPA's September 15, 2009 order is not an appealable order.

The statute that governs Appellee HPA's procedure for fixing a minimum term of imprisonment is HRS § 706-669 (1993 & Supp. 2008). HRS § 706-669 does not authorize a party to appeal from Appellee HPA's orders directly to the intermediate court of appeals. The supreme court has acknowledged that a criminal defendant may seek judicial review of Appellee HPA's orders regarding minimum terms of imprisonment by petitioning a circuit court for post-conviction relief from such orders pursuant to HRPP Rule 40. Williamson v. Hawai'i Paroling Authority, 97 Hawaii 183, 194-95, 35 P.3d 210, 221-22 (2001). When the circuit court adjudicates a petition for post-conviction relief pursuant to HRPP Rule 40, the criminal defendant can seek further judicial

review from the intermediate court of appeals by way of an appeal pursuant to HRS § 641-11 (Supp. 2008) and HRPP Rule 40(h).

Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940

(1995). Appellant Mathison has not yet sought judicial review of Appellee HPA's September 15, 2009 order by petitioning the circuit court for post-conviction relief from Appellee HPA's September 15, 2009 order pursuant to HRPP Rule 40. Absent an appealable judgment or order, we lack jurisdiction over this appeal by Appellant Mathison. Therefore,

IT IS HEREBY ORDERED that appellate court case number 30145 is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, December 29, 2009.

Chief Judge

Associate Judge

Associate Judge