NO. 30071

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MANEX KUMOS, Plaintiff-Appellant, v.
STATE OF HAWAIʻI, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(S.P.P. NO. 09-1-0032; CR NO. 07-1-166)

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

Upon review of the record, it appears that we lack
jurisdiction over the appeal that Petitioner-Appellant Manex
Kumos (Appellant Kumos) has asserted from the Honorable Karen S.
S. Ahn's August 18, 2009 "Findings of Fact, Conclusions of Law,
and Order Denying Petitioner's Motion to Set Aside No Contest
Pleas and Judgment Pursuant to Rule 40 of the Hawaii Rules of
Penal Procedure; Notice of Entry" (the August 18, 2009 order)
because the appeal is untimely under Rule 4(b) of the Hawaiʻi
Rules of Appellate Procedure (HRAP).

"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 Hawaiʻi 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 Hawaiʻi
309, 312, 22 P.3d 588, 591 (2001) (citation omitted). Therefore,

pursuant to Hawai‘i Revised Statutes (HRS) § 641-11 (Supp. 2008) 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 accordance with Rule 4(b) of the Hawai‘i Rules of Appellate Procedure (HRAP)." <u>Grattafiori v. State</u>, 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 (<u>see</u> <u>Jenkins v. Cades Schutte Fleming & Wright</u>, 76 Hawai‘i 115, 869 P.2d 1334 (1994)) to special proceedings for motions for post-conviction relief pursuant to HRPP Rule 40. The August 18, 2009 order resolved all of the issues in Appellant Kumos's July 21, 2009 HRPP Rule 40 petition for post-conviction relief by denying all of the relief for which Appellant Kumos prayed, leaving nothing further to be accomplished. Therefore, the August 18, 2009 order is an appealable final order pursuant to HRS § 641-11 and HRPP Rule 40(h).

Although Appellant Kumos's September 23, 2009 notice of appeal purports to assert an appeal from a September 2, 2009 minute order announcing the circuit court's intent to deny Appellant Kumos's August 28, 2009 motion to reconsider the August 18, 2009 order, "a minute order is <u>not</u> an appealable order." <u>Abrams v. Cades, Schutte, Fleming & Wright</u>, 88 Hawai‘i 319, 321 n.3, 966 P.2d 631, 633 n.3 (1998) (emphasis added). Therefore, the September 2, 2009 minute order is not an appealable order. We note that the record on appeal does not a written order that disposes of Appellant Kumos's August 28, 2009 motion to reconsider the August 18, 2009 order. The only

appealable order in the record on appeal is the August 18, 2009
order. Although Appellant Kumos's September 23, 2009 notice of
appeal mistakenly designates the September 2, 2009 minute order
rather than the August 18, 2009 order as the order that Appellant
Kumos is appealing, "[a]n appeal <u>shall not be dismissed</u> for
informality of form or title of the notice of appeal." HRAP
Rule 3(c)(2) (emphasis added). Consequently, "a mistake in
designating the judgment . . . should not result in [the] loss of
the appeal as long as the intention to appeal from a specific
judgment can be fairly inferred from the notice and the appellee
is not misled by the mistake." <u>State v. Graybeard</u>, 93 Hawaiʻi
513, 516, 6 P.3d 385, 388 (App. 2000) (internal quotation marks
omitted) (quoting <u>City & County v. Midkiff</u>, 57 Haw. 273, 275-76,
554 P.2d 233, 235 (1976) (quoting 9 <u>Moore's Federal Practice</u>
§ 203.18 (1975))); <u>City & County v. Midkiff</u>, 57 Haw. 273, 275-76,
554 P.2d 233, 235 (1976); <u>Ek v. Boggs</u>, 102 Hawaiʻi 289, 294, 75
P.3d 1180, 1185 (2003); <u>In re Brandon</u>, 113 Hawaiʻi 154, 155, 149
P.3d 806, 807 (App. 2006). Therefore, Appellant Kumos's
September 23, 2009 notice of appeal applies to the appealable
August 18, 2009 order rather than the unappealable September 2,
2009 minute order.

        "[P]ursuant to HRAP Rule 4(b), 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." <u>Grattafiori v. State</u>, 79 Hawaiʻi
at 13, 897 P.2d at 940. Appellant Kumos did not file the
September 23, 2009 notice of appeal within thirty days after
entry of the August 18, 2009 order denying Appellant Kumos's HRPP

Rule 40 petition for post-conviction relief, as HRAP Rule 4(b)(1) requires. Appellant Kumos's August 18, 2009 motion for reconsideration of the August 18, 2009 order did not extend the time period for filing a notice of appeal pursuant to HRAP Rule 4(b)(2), because Appellant Kumos's August 18, 2009 motion for reconsideration was neither a motion in arrest of judgment under HRPP Rule 34 nor a motion for a new trial under HRPP Rule 33. Therefore, Appellant Kumos's September 23, 2009 notice of appeal from the August 18, 2009 order is <u>not</u> timely.

"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." <u>Grattafiori v. State</u>, 79 Hawaiʻi 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."). Accordingly,

IT IS HEREBY ORDERED that appellate court case number 30071 is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawaiʻi, February 11, 2010.

Chief Judge

Associate Judge

Associate Judge