

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 30071

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

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

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

CLERK OF THE COURT  
STATE OF HAWAII

2010 FEB 11 AM 8:36

FILED

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 Hawai'i 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 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). 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)." Grattafiori v. State, 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 (see Jenkins v. Cades Schutte Fleming & Wright, 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 not an appealable order." Abrams v. Cades, Schutte, Fleming & Wright, 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 shall not be dismissed 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." State v. Graybeard, 93 Hawai'i 513, 516, 6 P.3d 385, 388 (App. 2000) (internal quotation marks omitted) (quoting City & County v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976) (quoting 9 Moore's Federal Practice § 203.18 (1975))); City & County v. Midkiff, 57 Haw. 273, 275-76, 554 P.2d 233, 235 (1976); Ek v. Boggs, 102 Hawai'i 289, 294, 75 P.3d 1180, 1185 (2003); In re Brandon, 113 Hawai'i 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." Grattafiori v. State, 79 Hawai'i 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


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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 not timely.

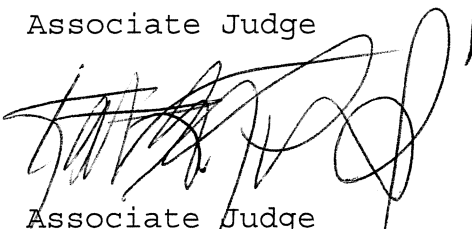
"As a general rule, compliance with the requirement of the timely filing of a notice of appeal is jurisdictional, . . . and we must dismiss an appeal on our motion if we lack jurisdiction." Grattafiori v. State, 79 Hawai'i at 13, 897 P.2d at 940 (citations, internal quotation marks, and brackets omitted); 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, Hawai'i, February 11, 2010.

  
Chief Judge

  
Associate Judge

  
Associate Judge