

NO. 23139

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

DANIEL LAU, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. No. 99-0012(2))

ORDER DISMISSING APPEAL FOR UNTIMELINESS
(By: Burns, C.J., Watanabe, and Lim, JJ.)

This pro se appeal by Petitioner-Appellant Daniel Lau (Lau) stems from a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition filed by Lau, seeking post-conviction relief from a judgment entered by the Circuit Court of the Second Circuit (the circuit court) on January 31, 1995, convicting and sentencing him on two counts of sexual assault in the third degree and four counts of sexual assault in the first degree.¹ We conclude that we lack jurisdiction to consider Lau's appeal because Lau's notice of appeal was untimely filed.

A.

Upon review of the record, it appears that: (1) on November 24, 1999, the circuit court entered its "Findings of

¹ On February 28, 1995, Petitioner-Appellant Daniel Lau (Lau) filed a notice of appeal from the January 31, 1995 judgment. On April 21, 1997, this court filed a Summary Disposition Order affirming Lau's conviction, but without prejudice to his filing a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition based on ineffective assistance of counsel.

Fact, Conclusions of Law, and Order Denying Petitioner's Petition for Post-Conviction Relief" (November 24, 1999 Order), which was received by Lau on December 1, 1999; (2) on December 7, 1999, Lau filed a "Motion for Relief from Judgment," pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 60, requesting that the circuit court withdraw its November 24, 1999 Order and grant his December 1, 1999 Motion for Leave of Court to Amend Petition; (3) on January 18, 2000, the circuit court denied Lau's Motion for Relief from Judgment; and (4) on February 4, 2000, Lau filed his notice of appeal.

Pursuant to HRPP Rule 40(h), "[a]ny party may appeal to the supreme court from a judgment entered in the proceeding in accordance with Rule 4(b) of the Hawai'i Rules of Appellate Procedure [(HRAP)]." According to HRAP Rule 4(b), entitled "Appeals in Criminal Cases[,]" "the notice of appeal shall be filed in the circuit, district, or family court within 30 days after the entry of the judgment or order appealed from." HRAP Rule 4(b)(1) (emphasis added). HRPP Rule 40(g)(3) provides that "[t]he court shall state its findings of fact and conclusions of law in entering its judgment on the [HRPP Rule 40] petition." Thus, an order deciding an HRPP Rule 40 petition and entering findings of fact and conclusions of law regarding the petition is

the judgment for appeal purposes, and appeals from such an order are governed by the rules governing criminal appeals.

In Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995), the supreme court held that "pursuant 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." In this case, the November 24, 1999 Order was the judgment for appeal purposes. Lau's notice of appeal was filed on February 4, 2000, more than thirty days after the November 24, 1999 Order. Therefore, we do not have jurisdiction to consider Lau's appeal from the November 24, 1999 Order unless Lau's December 7, 1999 Motion for Relief from Judgment tolled the November 24, 1999 Order until January 18, 2000, the date on which the circuit court denied Lau's Motion for Relief from Judgment.

B.

Pursuant to HRAP Rule 4(b)(2),² the only recognized

² Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(b)(2) provides as follows:

(2) *Effect of Post-Judgment Motions.* If a timely motion in arrest of judgment under Rule 34 of the [HRPP] or for a new trial under Rule 33 of the [HRPP] has been made, an appeal from a judgment of conviction may be taken within 30 days after the entry of any order denying the motion.

tolling motions in a criminal proceeding are an HRPP Rule 34³ motion in arrest of judgment and an HRPP Rule 33⁴ motion for a new trial. However, both HRPP Rules 33 and 34 limit the use of such motions to a time period after a defendant is convicted in a criminal trial and are not applicable to HRPP Rule 40 situations.

Lau appears to have predicated⁵ his Motion for Relief from Judgment on HRCP Rule 60(b), which provides:

³ HRPP Rule 34 states:

ARREST OF JUDGMENT.

The court on motion of a defendant shall arrest judgment if the charge does not allege an offense or if the court was without jurisdiction of the offense alleged. The motion in arrest of judgment shall be made within 10 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 10-day period. The finding of guilty or *nolo contendere* may be entered in writing or orally on the record.

⁴ HRPP Rule 33 states as follows:

NEW TRIAL.

The court on motion of a defendant may grant a new trial to him or her if required in the interest of justice. If trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period. The finding of guilty may be entered in writing or orally on the record.

⁵ Lau's motion initially indicates that it was filed "pursuant to Rule 60 of the Hawaii Rules of Circuit Courts," which does not exist. Later in his motion, however, Lau states that the motion was filed "pursuant to Rule 60 of the Hawaii Rules of Civil Procedure."

RELIEF FROM JUDGMENT OR ORDER.

. . . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic); misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

However, HRCP Rule 1, entitled "Scope of Rules[,]" specifically provides that the HRCP "govern the procedure in the circuit courts of the State in all suits of a civil nature whether cognizable as cases at law or in equity," with certain exceptions not applicable to this case. (Emphasis added.) Since HRPP Rule 40 proceedings are treated as criminal proceedings subject to the HRPP, Lau cannot rely on HRCP Rule 60(b) as authorization for his Motion for Relief from Judgment. Cf. United States v.

Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998) (holding that Federal Rules of Civil Procedure Rule 60(b), the federal counterpart to HRCF Rule 60(b), "simply does not provide for relief from judgment in a criminal case[.]").

C.

The HRPP do not specifically allow for motions for reconsideration to be filed in criminal proceedings. Even if we were to treat Lau's motion as a motion for reconsideration and assume that courts have inherent power to entertain such motions, Lau's motion for reconsideration would not have tolled the time for filing an appeal from the November 24, 1999 Order. In State v. Brandimart, 68 Haw. 495, 497, 720 P.2d 1009, 1010 (1986), the Hawai'i Supreme Court held that in a criminal proceeding, a motion for reconsideration does not toll the thirty-day period for filing a notice of appeal.

D.

The appellate courts have, on occasion, relaxed the deadline for filing appeals in criminal cases where exceptional circumstances exist. For example, late notices of appeal have been permitted where "defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance" or "the lower court's decision was unannounced and no notice of the entry of judgment

was ever provided." Grattafiori, 79 Hawai'i at 13-14, 897 P.2d at 940-41. However, an untimely appeal has never been allowed from an order denying an HRPP Rule 40 petition where a defendant pursued an appeal from his or her conviction. Therefore, we decline to relax the filing deadline in this case.

CONCLUSION

In light of the foregoing discussion, we dismiss Lau's appeal for untimeliness.

DATED: Honolulu, Hawai'i, December 13, 2001.

On the briefs:

Daniel Lau,
petitioner-appellant, pro se.

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Prosecuting Attorney, County
of Maui, for respondent-appellee.