

NO. 24814

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee

vs.

JAMES KEALOHAPAUOLE, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 60279)

ORDER DISMISSING APPEAL

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Upon review of the record, it appears that we do not have appellate jurisdiction over Defendant-Appellant James Kealohapauole, Jr.'s (Appellant Kealohapauole) appeal from the November 21, 2001 order denying his post-conviction motion for correction of illegal sentence. "The right to an appeal is strictly statutory." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996) (citation omitted). HRS § 641-11 (1993) authorizes an appeal from a circuit court order denying a post-conviction motion for correction of an illegal sentence, but any such appeal is subject to the thirty-day time period for filing a notice of appeal under Rule 4(b) of the Hawai'i Rules of Appellate Procedure (HRAP). "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 10, 13, 897 P.2d 937, 940 (1995) (citations and internal quotation

marks omitted). According to both the postage stamp-cancellation date, December 29, 2001, and the circuit court filing date, January 4, 2001, for Appellant Kealohapauole's notice of appeal, Appellant Kealohapauole did not file his notice of appeal within thirty days after entry of the November 21, 2001 order denying his post-conviction motion for correction of illegal sentence, as HRAP Rule 4(b) requires.

Pursuant to Setala v. J.C. Penney Company, 97 Hawai'i 484, 485, 40 P.3d 886, 897 (2002) ("We hold that a notice of appeal is deemed 'filed' for purposes of Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a) on the day it is tendered to prison officials by a pro se prisoner."), we temporarily remanded this case to the circuit court on May 2, 2002, with instructions that Appellant Kealohapauole demonstrate to the circuit court whether he tendered his notice of appeal to prison officials at the Florence Correctional Center on or before December 21, 2001. On May 2, 2002, the clerk of the supreme court served Appellant Kealohapauole with the May 2, 2002 temporary remand order by way of the United States Mail. According to the circuit court's findings of fact, filed June 27, 2002, Appellant Kealohapauole failed to demonstrate that he tendered his notice of appeal to prison officials at the Florence Correctional Center on or before December 21, 2001.

Neither of the two exceptions to the requirement for a

timely filed notice of appeal apply. State v. Irvine, 88 Hawai'i 404, 407, 967 P.2d 236, 239 (1998) ("Our recognized exceptions involve circumstances where: (1) defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[,]. . . or (2) the trial court's decision was unannounced and no notice of the entry of judgment was ever provided[.]" (Citations omitted).).

Therefore,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, July 25, 2002.