

*** NOT FOR PUBLICATION ***

NO. 25798

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

FRANCIS M. NAKAMURA, Defendant-Appellant

and

REGINA SMITH, Defendant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-CR. NO. 93-0001)

ORDER DISMISSING APPEAL

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

Upon review of the record, it appears that we do not have appellate jurisdiction over Defendant-Appellant Francis M. Nakamura's (Appellant Nakamura) appeal from the March 13, 2003 findings of fact, conclusions of law, and order denying Appellant Nakamura's post-conviction motion for correction of an illegal sentence pursuant to Rule 35 of the Hawai'i Rules of Penal Procedure (HRPP). "The right to an appeal is strictly statutory." State v. Ontiveros, 82 Hawai'i 446, 449, 923 P.2d 388, 391 (1996) (citation omitted). In family court cases "[a]n interested party aggrieved by any order or decree of the court may appeal to the supreme court for review of questions of law and fact upon the same terms and conditions as in other cases in the circuit court[.]" HRS § 571-54 (1993). 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

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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, April 24, 2003, and the family court's filing date, April 28, 2003, for Appellant Nakamura's notice of appeal, Appellant Nakamura did not file his notice of appeal within thirty days after entry of the March 13, 2003 findings of fact, conclusions of law, and order denying his post-conviction motion for correction of an illegal sentence, as HRAP Rule 4(b)(1) 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 family court on August 6, 2003, with instructions that Appellant Nakamura demonstrate to the family court whether he tendered his notice of appeal to prison officials at the Florence Correctional Center on or before April 14, 2003. On August 6, 2003, the clerk of the supreme court served Appellant Nakamura with the August 6, 2003 temporary remand order by way of the United States Mail. According to the family court's findings of fact, filed October 7, 2003, Appellant Nakamura failed to demonstrate that he tendered his notice of appeal to prison officials at the Florence Correctional Center on or before April 14, 2003. Therefore, Appellant Nakamura's appeal is not timely.

Neither of the two exceptions to the requirement for a timely filed notice of appeal apply. State v. Irvine, 88 Hawai'i

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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).).

Accordingly,

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

DATED: Honolulu, Hawai'i, October 24, 2003.