

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 26449

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee

vs.

DEREK ALLAN ELABAN, Defendant-Appellant

---

APPEAL FROM THE SECOND CIRCUIT COURT  
(CR. NO. 02-1-0406)

ORDER DISMISSING APPEAL

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

Upon review of defendant-appellant's statement of jurisdiction and the record, it appears that an order dismissing an indictment without prejudice is appealable by the prosecution pursuant to HRS § 641-13(1), but such an order is not appealable by a defendant because HRS § 641-11 authorizes a defendant in a circuit court criminal case to appeal only from a judgment of conviction. Defendant-appellant's appeal of the February 20, 2004 order dismissing the indictment without prejudice is not authorized by HRS § 641-11. Thus, we lack jurisdiction over this appeal. See Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995) ("The right of appeal in a criminal case is purely statutory and exists only when given by some constitutional or statutory provision."). Therefore,

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IT IS HEREBY ORDERED that: (1) this appeal is dismissed for lack of appellate jurisdiction and (2) the "motion to reverse" the February 20, 2004 order is dismissed.

DATED: Honolulu, Hawai'i, June 10, 2004.

I disagree with the dismissal and would allow the appeal.