

*** NOT FOR PUBLICATION ***

NO. 26892

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

SAMSON K. KAUIHI, Petitioner-Appellant,

vs.

STATE OF HAWAI'I, Respondent-Appellee.

NORMA T. YARA
CLERK APPELLATE COURTS
STATE OF HAWAII

2005 AUG -4 AM 11:05

FILED

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 03-1-0048)ORDER DISMISSING APPEAL(By: Nakayama, J. for the court¹)

Upon review of the record, it appears that the circuit court's August 31, 2004 order denying appellant's HRPP Rule 40 petition for post-conviction relief was appealable by notice of appeal filed with the circuit court within thirty days after the order was entered. See HRPP 40(h); HRAP 4(b)(1). Appellant's notice of appeal was deemed filed with the circuit court on October 6, 2004, the date the notice of appeal was received by the clerk of the supreme court and transmitted to the clerk of the circuit court. HRAP 4(a)(1). The notice of appeal deemed filed on October 6, 2004 was filed thirty-six days after entry of the August 31, 2004 order and was untimely. Our recognized exceptions to the requirement that notices of appeal be timely filed do not apply in this case.

It further appears that appellant's notice of appeal does not fall within the prisoner mailbox rule because the record

¹Considered by: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.

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does not indicate that appellant tendered his notice of appeal to prison officials at the Diamondback Correctional Facility for forwarding to the clerk of the circuit court on or before September 30, 2004. See Setala v. J.C. Penney, 97 Hawai'i 484, 40 P.3d 886 (2002). Thus, we lack jurisdiction. See Grattafiori v. State, 79 Hawai'i 10, 13, 897 P.2d 937, 940 (1995)

("[C]ompliance with the requirement of the timely filing of a notice of appeal is jurisdictional, and we must dismiss an appeal on our own motion if we lack jurisdiction."). Therefore,

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

DATED: Honolulu, Hawai'i, August 4, 2005.

FOR THE COURT:

Auna C. Nakemian

Associate Justice

