IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. David R. Hittle, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060740-CA F I L E D (November 16, 2006) 2006 UT App 463

Third District, Salt Lake Department, 051903613
The Honorable L.A. Dever

Attorneys: David R. Hittle, South Salt Lake, Appellant Pro Se
Mark L. Shurtleff and Kris C. Leonard, Salt Lake City, for Appellee

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Before Judges Greenwood, McHugh, and Thorne.

PER CURIAM:

This case is before the court on a sua sponte motion for summary dismissal for lack of jurisdiction because no final appealable order has been entered by the district court.

At the preliminary hearing on June 22, 2006, the district court found that probable cause existed to bind over Appellant David R. Hittle as charged. On June 27, 2006, Hittle filed a notice of appeal seeking to appeal from that portion of the June 22 ruling in which the judge allegedly refused to recuse himself when Hittle requested that he do so.[1] Following a jury trial on September 19, 2006, the jury found Hittle guilty as charged. The court set sentencing for November 13, 2006.

"In a criminal case, it is 'the sentence itself which constitutes the final judgment from which the appellant has the right to appeal.'" State v. Bowers, 2002 UT 100,¶4, 57 P.3d 1065 (quoting State v. Gerrard, 584 P.2d 885, 886 (Utah 1978)). A ruling denying a motion to recuse is an interlocutory order.

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1. Although the court subsequently appointed counsel to represent Hittle at trial, Hittle is pursuing this appeal pro se.

Hittle did not file a timely petition for permission to appeal from an interlocutory order under rule 5 of the Utah Rules of Appellate Procedure; accordingly, we did not grant permission to appeal. See Utah R. App. P. 5.

Because Hittle had not been sentenced when he filed the notice of appeal, the district court had not entered a final, appealable judgment and we lack jurisdiction to consider the appeal. Once a court determines that it lacks jurisdiction, it retains only the authority to dismiss the action. See Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah Ct. App. 1989).

We dismiss the appeal for lack of jurisdiction. Our dismissal is without prejudice to a timely appeal taken after entry of a final, appealable judgment.

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Pamela T. Greenwood,
Associate Presiding Judge

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Carolyn B. McHugh, Judge

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William A. Thorne Jr., Judge