FSM SUPREME COURT APPELLATE DIVISION

JOSHUA WAGAR, Appellant, vs. FEDERATED STATES OF MICRONESIA, Appellee.	)	APPEAL CASE NO. C1-2018

ORDER DISMISSING APPEAL

Decided: July 9, 2021

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellant: Daniel J. Rescue, Jr., Esq.
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For the Appellee: Josephine Leben James, Esq.
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HEADNOTES

Appellate Review – Notice of Appeal

In criminal cases, a notice of appeal by a defendant must be filed within 10 days after the entry of the judgment appealed from. Wagar v. FSM, 23 FSM R. 357, 358 (App. 2021).

Appellate Review – Motions; Appellate Review – Notice of Appeal

The FSM Supreme Court appellate division for good cause shown may upon motion enlarge the time prescribed for doing an act, or may permit an act to be done after the expiration of such time; but the appellate division cannot enlarge the time for filing a notice of appeal, or a petition for permission to appeal. Wagar v. FSM, 23 FSM R. 357, 359 (App. 2021).

Appellate Review – Notice of Appeal – Extension of Time

In a criminal case, the court appealed from may, upon a showing of excusable neglect and before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed. Wagar v. FSM, 23 FSM R. 357, 359 (App. 2021).

Appellate Review – Notice of Appeal – Extension of Time

The appellate division does not have the authority to extend the time for filing a notice of appeal. It is the court appealed from that has that authority to extend the time to file a notice of appeal which, upon a finding of excusable neglect, cannot exceed 30 days. Wagar v. FSM, 23 FSM R. 357, 359 (App. 2021).

Appellate Review – Notice of Appeal

Even if there had been a thirty-day extension from the court appealed from, a notice of appeal in a criminal case would still be untimely filed, specifically a day late, when it was filed forty-one days after the entry of judgment of conviction. Wagar v. FSM, 23 FSM R. 357, 359 (App. 2021).

Appellate Review – Dismissal; Appellate Review – Notice of Appeal

In the absence of a timely notice of appeal, the appellate court does not have jurisdiction over a criminal appeal, and because it does not have jurisdiction over the appeal, it will not address the pending motions, and will dismiss the appeal. Wagar v. FSM, 23 FSM R. 357, 359 (App. 2021).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

I. BACKGROUND

On July 16, 2018, Appellant Joshua Wagar ("Wagar") filed a notice of appeal pro se pursuant to FSM Appellate Rule 4(b). On August 15, 2018, a ready record notice was issued in this appeal. On December 27, 2018, a notice of appearance as Wagar's attorney of record was filed by Daniel Rescue, Jr., Esq. along with a motion to stay deportation proceedings and a motion for injunctive relief. On January 17, 2019, the appellate division, through an order issued by a single justice, required further briefing on the issue of jurisdiction over this criminal appeal. On January 28, 2019, the Appellee Federated States of Micronesia ("FSM") filed its brief regarding jurisdiction. On March 25, 2019, Wagar filed its Supplemental Filings. On April 25, 2019, the FSM filed a Motion for Leave to Respond to Supplemental Filings.

For the following reasons below, we dismiss this criminal appeal for lack of jurisdiction.

II. DISCUSSION

Wagar is appealing his conviction, and this is thus a criminal appeal governed by FSM Appellate Rule 4(b). FSM Appellate Rule 4(b) states that:

> In criminal cases appeals are permitted from: (1) all final decisions of the Trial Division of the Federated States of Micronesia Supreme Court and of the Kosrae state court, (2) all final decisions of the Chuuk State Supreme Court appellate division, and (3) all final decisions of the highest state courts in Pohnpei and Yap if the cases require an interpretation of the national Constitution, national law, or a treaty.
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> The notice of appeal by a defendant shall be filed as provided in Rule 3 within 10 days after the entry of the judgment appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction

> if the motion is made before or within 10 days after entry of the judgment. A judgment is entered within the meaning of this subdivision when it is filed. Upon a showing of excusable neglect the court appealed from may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

In his notice of appeal, Wagar stated that he is appealing his conviction entered on June 5, 2018 on the grounds of insufficiency of counsel. Wagar claimed that his counsel did not sufficiently advise him of the legal ramifications of his plea of nolo contendere on two felony counts of illegal possession of a firearm and ammunition pursuant to 11 F.S.M.C. 1005; thus, he is seeking to overturn his convictions. Wagar represented that he files his notice of appeal in accordance with FSM Appellate Rule 4(b), and he requests extension of the time in which he may file his notice of appeal because it had been difficult to retain counsel to assist him in this appeal.

We note that from the date his conviction was entered until the date that he filed his notice was forty-one days. We recognize that Wagar is requesting an extension of time within which he may file his notice of appeal. FSM Appellate Rule 26(b) governs enlargement of time and it provides that "[t]he court for good cause shown may upon motion enlarge the time prescribed for doing an act, or may permit an act to be done after the expiration of such time; but the Federated States of Micronesia Supreme Court appellate division may not enlarge the time for filing a notice of appeal, or a petition for permission to appeal." Moreover, FSM Appellate Rule 4(b) provides that "[u]pon a showing of excusable neglect the court appealed from may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. "In light of the above appellate rules, it is evident that the appellate division does not have the authority to extend the time for filing a notice of appeal. It is the court appealed from that has that authority to extend the time to file a notice of appeal which would not exceed 30 days upon a finding of excusable neglect.

Furthermore, we acknowledge that the record before us does not show that Wagar made a request to the court appealed from for an extension of the time to file his notice of appeal or that the trial court found excusable neglect and extended the time to file his notice of appeal. Nonetheless, we determine that even with a thirty-day extension from the court appealed from Wagar's notice of appeal would still be untimely filed, specifically a day late, since he filed it forty-one days after the entry of judgment of conviction. Timing requirements are crucial in the appellate process because they may even determine whether the appellate court has jurisdiction over the appeal. Furthermore, in the absence of a timely notice of appeal, the appellate court does not have jurisdiction over the appeal. Ruben v. Chuuk, 18 FSM R. 604, 607 (App. 2013).

Accordingly, in the absence of a timely notice of appeal, we do not have jurisdiction over this criminal appeal. Because we do not have jurisdiction over this criminal appeal, we will not address the pending motions in it. Heirs of Henry v. Heirs of Akinaga, 18 FSM R. 542, 545 (App. 2013) (the issue of jurisdiction must be determined first because any ruling made on the merits without jurisdiction would merely be an advisory opinion which the court did not have jurisdiction to issue). Additionally, with an untimely notice of appeal, this criminal appeal should be dismissed. Tilfas v. Heirs of Lonno, 21 FSM R. 51, 56 (App. 2016) (in the absence of a timely notice of appeal the court does not have jurisdiction over an appeal and the proper remedy would be to dismiss it).

III. CONCLUSION

Having found that we do not have jurisdiction to consider this appeal, NOW, THEREFORE, IT IS HEREBY ORDERED that this criminal appeal is HEREBY DISMISSED.

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