

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

November 4, 2010

Lyle W. Cayce
Clerk

No. 09-50131
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARVIN LYDELL STARKS,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:04-CR-15-ALL

Before JOLLY, GARZA, and STEWART, Circuit Judges.

PER CURIAM:*

Marvin Lydell Starks, federal prisoner # 35930-180, seeks leave to proceed in forma pauperis (IFP) on appeal from the district court's denial of his 18 U.S.C. § 3582(c)(2) motion to reduce his sentence based on recent amendments to the Sentencing Guidelines relating to offenses involving crack cocaine. He was convicted of possession with intent to distribute crack cocaine within 1000 feet of a school and carrying a firearm during the commission of a drug trafficking crime. By moving to proceed IFP, Starks is challenging the district court's

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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certification decision that his appeal was not taken in good faith because it is frivolous. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

Starks did not file a notice of appeal within the ten-day appeal period in Rule 4(b)(1) of the Federal Rules of Appellate Procedure. This court remanded the case to the district court for a determination of whether the untimely filing of the notice of appeal was due to excusable neglect or good cause. The district court determined that Starks had not shown that the untimely notice of appeal was due to excusable neglect or good cause.

This court can dismiss an appeal if the appeal “is frivolous and entirely without merit.” 5TH CIR. R. 42.2. Because Starks did not file a timely notice of appeal, the district court did not err in enforcing the time limitations set forth in Rule 4(b), and this court may not reverse its decision to do so. *See United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir. 2006). Because the instant appeal is without arguable merit, Starks’s motion for leave to proceed IFP on appeal is DENIED, and the appeal is DISMISSED as frivolous. *See* 5TH CIR. R. 42.2.