

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-7697  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEANDRO RAMIREZ,

Defendant-Appellant.

---

Appeal from the United States District Court  
For the Southern District of Texas  
(CR-88-L-153(07);CA-L-92-16)

---

(August 23, 1993)

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Currently serving a 14-year term for convictions of conspiracy to possess with intent to distribute cocaine and the substantive offense, both convictions having been affirmed on appeal, Leandro Ramirez seeks collateral relief under 28 U.S.C. § 2255. The district court granted summary judgment, rejecting his contention of ineffective assistance of counsel and erroneous assessment of the evidence by this court on direct appeal. Ramirez did not

---

\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal; rather, four months after the judgment became final, he sought relief under Fed.R.Civ.P. 60(b) or, alternatively, an out-of-time appeal. Both were denied by the trial court and Ramirez timely appealed that order.

The decision to grant or deny Rule 60(b) relief is committed to the sound discretion of the district court. Relief under the rule is available where the entry of final judgment was in error or the result of manifest unfairness and the failure to correct that error or unfairness would result in substantial injustice.<sup>1</sup> Ramirez sought relief from the judgment because the court: (1) "overlooked readily available evidence of a material nature and failed to consider controlling principles of law"; (2) failed to provide 10-days notice before entering summary judgment; (3) failed to conduct an evidentiary hearing before granting summary judgment; and (4) denied Ramirez leave to amend his motion.

The government's response correctly pointed to the patent vagueness of Ramirez's contentions and to his failure to raise the majority of these issues on direct appeal, resulting in a procedural default. Of the four points advanced in his motion for relief from the judgment, the first is simply too vague to apprise the court of any cognizable error.<sup>2</sup> In any event, our review of

---

<sup>1</sup> Rule 60(b) details a number of specific circumstances warranting relief from a final judgment; it also provides for relief where there is "any other reason justifying relief."

<sup>2</sup> In his Rule 60(b) motion Ramirez essentially restates the basis for each of his ineffective assistance arguments.

the record as it bears on this point supports the court's decision not to reexamine the propriety of summary judgment. The remaining arguments are no more availing.

Rule 56(c) provides that a party must be given 10 days advance notice before a hearing on a motion for summary judgment. No hearing was conducted on the summary judgment motion in this case. While Ramirez had a right to notice that the motion would be taken under advisement by a certain date,<sup>3</sup> that notice can be, and in this case was, provided by local rule.<sup>4</sup>

Likewise, neither the failure to conduct an evidentiary hearing<sup>5</sup> nor the trial court's refusal to allow Ramirez to amend his pleading to include statements from potential character witnesses constituted error, let alone abuse of discretion, for which relief may be had on appeal. The court determined that counsel's failure to call character witnesses did not affect the outcome of Ramirez's trial. The decision not to allow amendment of the motion to reflect the availability of these character witnesses, yet another matter committed to the court's discretion,<sup>6</sup>

---

<sup>3</sup> **Daniels v. Morris**, 746 F.2d 271, 274-75 (5th Cir. 1984).

<sup>4</sup> **Id.** at 275; S.D.Tex. Loc. R. 6D.

<sup>5</sup> An evidentiary hearing is not required when the court's review of the motion and the record confirms conclusively that relief is not available. **United States v. Briggs**, 939 F.2d 222 (5th Cir. 1991), cert. denied, 113 S.Ct. 1016 (1993).

<sup>6</sup> **Hernandez v. Garrison**, 916 F.2d 291 (5th Cir. 1990).

was appropriate.

Ramirez also complains of the court's refusal to extend leave to file an out-of-time appeal. Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides that the district court may reopen the time for appeal for a 14-day period if (1) the movant did not receive notice of the entry of judgment, notwithstanding his right to same, and (2) no party would be prejudiced by the extension. In order to avail himself of this relief, Ramirez had to act within 180 days of the entry of judgment and within seven days of his acquiring knowledge thereof.

Here, despite its confidence that the required notice had been sent, the court afforded Ramirez the opportunity to provide the date on which he and his lawyer first were informed of the judgment. Neither responded. Ramirez did submit his wife's affidavit in which she claimed to have received notice on May 4 or 5, 1992 and thereafter promptly to have notified Ramirez's attorney. Ramirez did not file his motion for an extension of time until June 30, 1992. Without question, his wife and lawyer were aware of the entry of judgment over seven weeks before Ramirez filed his motion. The district court correctly determined that the motion did not come within seven days after Ramirez acquired knowledge of the entry of judgment. Hence, there was no error nor abuse of discretion in the court's refusal of leave to file an out-of-time appeal.

The judgment of the district court is AFFIRMED.