

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5204
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS McDANIEL, III,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 93-CR-26
- - - - -
(September 23, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

This Court is compelled to raise sua sponte the issue of timeliness, for a timely notice of appeal is "a mandatory precondition" to the Court's jurisdiction. Nelson v. Foti, 707 F.2d 170, 171 (5th Cir. 1983).

The notice of appeal in a criminal case must be "`filed in the district court within 10 days after the entry of the judgment or order appealed from.'" United States v. Golding, 739 F.2d 183, 184 (5th Cir. 1984) (quoting Fed. R. App. P. 4(b)). Rule

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

4(b), however, allows the district court to grant an additional thirty days with or without motion and notice upon showing of excusable neglect. Id. In criminal cases, the Court customarily treats the filing of an untimely notice of appeal within the additional thirty-day period as a motion for a determination as to whether excusable neglect entitled a defendant to an extension of time to appeal. United States v. Winn, 948 F.2d 145, 153 n.24 (5th Cir. 1991), cert. denied, 112 S.Ct. 1599 (1992). This Court may remand cases to the district court for a determination whether excusable neglect entitles a defendant to an extension of time to appeal. See id.

McDaniel's pro se notice of appeal is within the 30-day period. The district court never made a determination regarding excusable neglect. Therefore, this case is remanded to the district court for a determination whether excusable neglect entitles McDaniel to an extension.

If the district court determines that McDaniel's appeal should proceed, we caution counsel that he has not filed a proper appellate brief. If counsel desires to demonstrate that there are no non-frivolous issues for appealing McDaniel's conviction or sentence, counsel should file a motion to withdraw and a supporting brief, as required by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

LIMITED REMAND.