

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7133
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EDWARD P. CANTU,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-C92-00118-SS-01)

(November 18, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Edward Cantu appeals his sentence following conviction of conspiracy to defraud the United States, presenting false claims, wire fraud, money laundering, and three counts of making false statements in application for a line of credit, in violation of 18 U.S.C. §§ 286, 287, 343, 1014, 1342, and 1956(a)(1)(B)(i). We

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

remand for a determination of excusable neglect.

I.

The district court sentenced Cantu to separate terms of imprisonment of 48 and 24 months, to be served concurrently, followed by a term of supervised release. The court also ordered him to pay a \$5,000 fine, restitution of approximately \$3.5 million to the Corpus Christi National Bank, and restitution of approximately \$8.1 million to the United States Department of Defense.

Cantu filed a motion for new trial, arguing that the restitution order of \$8.1 million was improper because the government could not prove the amount of its losses. Cantu argued that the amount of loss specified in the presentence report, \$8,251,877.46, was incorrect because that figure represented the amount of the false claims; however, the government paid only 80-85% of the face amount of the false claims. He also argued that the district court dismissed the testimony of the amount-of-loss witness presented by the government at the sentencing hearing, Joseph Satagai; therefore, the record could not support the \$8.1 million restitution order. The court denied Cantu's motion for new trial, finding that the issue raised by Cantu had been fully litigated.

II.

The government argues that Cantu failed to file a timely notice of appeal; therefore, the appeal should be dismissed for lack of jurisdiction. Cantu's notice of appeal would have been

timely if his post-judgment motion had been filed within the period allotted for its entry. Thus, a more accurate statement of the issue is whether Cantu's motion for new trial was timely.

Motions for post-judgment relief and petitions for reconsideration, if filed after the period allotted for their entry, are beyond the jurisdiction of the district court. United States v. Cook, 670 F.2d 46, 48 (5th Cir.), cert. denied, 456 U.S. 982 (1982). Further, such motions do not toll the time for appealing the judgment in a criminal case. Id.

Cantu's motion was not properly characterized as a motion for new trial. United States v. Lewis, 921 F.2d 563, 564 (5th Cir. 1991). Because Cantu pleaded guilty, a motion for new trial was not available to him. Id.

But Cantu's motion may be construed as a motion for reconsideration. See id. Such motions are recognized as legitimate procedural devices, see Cook, 670 F.2d at 48; they must be filed, however, within the period allotted for noticing an appeal. Id. If such a timely motion is made, the time for appealing the judgment is tolled, and an appeal from a judgment of conviction may be taken within ten days after the entry of the order denying the motion. Id.; FED. R. APP. P. 4(b).

In a criminal case, the notice of appeal by a defendant shall be filed in the district court within ten days after the entry of judgment or order appealed from. FED. R. APP. P. 4(b). The judgment or order is entered, within the meaning of this subdivision, when it is entered in the criminal docket. Id.

The judgment of conviction was entered on December 22, 1992. Because the period prescribed is more than seven days, intermediate Saturdays, Sundays, and legal holidays are included in the computation. See FED. R. APP. P. 26(a). Thus, the motion was due on January 1, 1993. Because that day was a Friday and a holiday, the motion was due on the next day that was not a Saturday, Sunday, or holiday, that is, January 4, 1993. See id. The motion was filed on January 5, 1993, and thus was untimely.

In his reply brief, Cantu argues that his counsel tried to file the motion on December 31, 1992, but the federal courthouse closed at noon in anticipation of New Year's Eve. He argues that counsel mailed it to the clerk that afternoon and served copies of the motion on the United States Attorney and probation officer that same day by facsimile. He argues that his counsel called the clerk's office on January 4, 1993, to inquire whether it had received the pleading and was told that it had. Cantu's counsel avowed such in an affidavit attached to the reply brief.

In criminal cases, this court customarily has treated a notice of appeal filed after the ten-day period, and before the lapse of forty days, as a motion for determination whether excusable neglect entitles 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). The district court may extend the time for filing a notice of appeal under FED. R. APP. P. 4(b). Id. Accordingly, we retain jurisdiction but REMAND to permit the district court to determine whether excusable neglect entitles

Cantu to an extension of time to appeal.