

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8893
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO GRACIA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A-92-CA-689(A-90-CR-196(8)))

(June 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Convicted prisoner Eduardo Gracia filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 in the district court, and the district court denied this motion on August 25, 1993. Gracia then filed a motion for leave to brief the issue of ineffective assistance of counsel for reconsideration in the district court. On October 5, 1993, the district court also

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

denied this motion. Gracia now appeals both of these rulings. Gracia's appeal from the district court's August 25, 1993 judgment was made in an untimely fashion; thus, we dismiss that portion of his appeal for lack of jurisdiction. We consider, however, Gracia's appeal as it relates to the district court's denial of his motion for leave to brief his ineffective assistance claim, finding that the district court did not abuse its discretion. Accordingly, we affirm the district court.

I

On March 19, 1991, a federal grand jury indicted Eduardo Gracia on charges of conspiring to possess with the intent to distribute more than 1,000 kilograms of marijuana; aiding and abetting the possession of more than 1,000 kilograms of marijuana with the intent to distribute it; and money-laundering. Pursuant to a written plea agreement, Gracia pleaded guilty to conspiring to possess with the intent to distribute more than fifty kilograms of marijuana. The district court accepted Gracia's guilty plea and sentenced him to 180 months in prison, five years of supervised release, a fine of \$10,000, and a \$50 special assessment.

On March 16, 1992, Gracia filed his first appeal in this court.¹ U.S. v. Gracia, 983 F.2d 625, 627 (5th Cir. 1993). As a

¹On direct appeal, Gracia argued: (1) that his guilty plea was involuntary due to violations of Fed. R. Crim. P. 11 at the plea hearing; (2) that the plea was involuntary because the prosecutor and his attorney misinformed him as to the possible sentence; (3) that the district court based the sentence on inaccurate information, including the computation of the amount of marijuana

result of that direct appeal, this court modified the term of Gracia's supervised release to three years, but refused to consider his ineffective-assistance claim, and affirmed as to all other issues. Id. at 627-30.

In December of 1993, during the pendency of his initial appeal, Gracia filed, in the district court, a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.² On January 11, 1993, the government filed a response to Gracia's motion, informing the court that Gracia's appeal was pending and requesting that the court dismiss the motion without prejudice. Gracia then filed a second § 2255 motion.³ The district court summarily denied Gracia's § 2255 motion as meritless, and then denied Gracia's subsequent motion for reconsideration.

Gracia then filed a third motion pursuant to 28 U.S.C. § 2255.⁴ As a part of this third motion, Gracia also asked the

involved; (4) that he suffered from ineffective assistance of counsel in the district court; and (5) that the five-year term of supervised release exceeded the statutory maximum. U.S. v. Gracia, 983 F.2d 625, 627 (5th Cir. 1993).

²In that motion, he argued that the district court erroneously calculated his relevant conduct under U.S.S.G. § 1B1.3 by using conduct outside of the count of conviction for sentencing purposes.

³In this second motion, Gracia requested an additional one-level reduction to his sentence pursuant to the November 1992 amendments to the guidelines. See U.S.S.G. § 3E1.1.

⁴In this third motion, Gracia argued that: (1) the fact-finding used to compute his base offense level was insufficient and clearly erroneous; (2) the district court abused its discretion and violated his rights under the Confrontation Clause by refusing to hold a hearing on his objections to the presentence report ("PSR");

district court to "reopen" the ineffective assistance of counsel claim that he had presented to this court on direct appeal, and Gracia attempted to incorporate the arguments contained in his pro se appellate brief into his § 2255 motion. After ordering the government to respond, the district court denied Gracia's motion. The court determined that Gracia's claims concerning the computation of his base offense level and the alleged Rule 32 violation were not cognizable under § 2255.⁵ As to Gracia's ineffective assistance claim, the court determined that the claim should be rejected because Gracia had not submitted the facts or the law on which he relied to support it. The court issued its judgment denying Gracia's motion on August 17, 1993, and the court's judgment was entered on August 25, 1993.

Gracia, with the assistance of K. Dean Richards, an inmate legal advocate, then filed a motion for leave to brief the issue of ineffective assistance of counsel for reconsideration. In support of this motion, Gracia argued that he was untrained in the law and did not understand how properly to present his ineffective

and (3) the district court violated Fed. R. Crim. P. 32(c)(3)(D) by failing to make findings on disputed factual issues contained in the PSR.

⁵The court rejected Gracia's allegation that it had refused to allow him to test the accuracy of the information in the PSR on the ground that it was conclusory. The court declined to review Gracia's claims that he was improperly sentenced on the basis of relevant conduct and that his rights under the Confrontation Clause were violated because these issues had been decided against him on direct appeal.

assistance claim. That motion was denied by the district court for lack of merit in an order entered on October 5, 1993.

Thereafter, again with the assistance of Richards, Gracia filed a motion for leave to proceed on appeal in forma pauperis in conjunction with a notice of appeal from both the August 25 judgment and the October 5 order denying his motion for leave to brief the ineffective assistance claim. The motion and notice of appeal were dated October 11.⁶ Richards executed a certificate of service by mail, stating that he deposited the documents, postage prepaid, with prison officials on November 22, 1993. The notice of appeal, the motion to proceed in forma pauperis, and the other documents were not filed in the district court until December 14, 1993. The district court denied both of the motions as untimely, and Gracia took this appeal, paying the filing fee.

II

A

The government argues that the present appeal should be dismissed for lack of jurisdiction because the notice of appeal was not timely filed. Gracia maintains that his notice of appeal was timely filed because it is dated October 11, 1993, and he purports to submit a certificate from the court clerk, dated October 11, 1993, in support of that argument. He does not submit such a

⁶Gracia's affidavit in support of the motion was dated October 21, and the certificate in support of the motion was dated October 13.

certificate,⁷ however, and we thus find that his appeal is untimely, in part.

Federal Rule of Appellate Procedure Rule 4(a)(1) provides that a notice of appeal in a civil case in which the United States is a party must be filed within sixty days of date of the entry of the judgment or order from which the appeal is taken. Claims brought under § 2255 are civil actions governed by the sixty-day period of Rule 4(a)(1). U.S. v. Buitrago, 919 F.2d 348, 349 (5th Cir. 1990). "The time limitation for filing a notice of appeal is jurisdictional, and the lack of a timely notice mandates dismissal of the appeal." U.S. v. Garcia-Machado, 845 F.2d 492, 493 (5th Cir. 1988).

A prisoner's pro se notice of appeal is deemed filed when it is delivered to prison officials for forwarding to the court clerk. Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Under Houston, Gracia filed his notice of appeal on November 22, 1993, designating an appeal from both the judgment that was entered on August 25 and the October 5 denial of his motion requesting leave to brief his ineffective assistance claim.

The sixty-day period for appealing the August 25 judgment expired, however, on October 25. Therefore, Gracia's appeal is

⁷The only document signed by the clerk that he has submitted, however, is dated February 23, 1994, and that document reveals only that Marta G. Rivera paid a filing fee of \$105 on his behalf that day.

untimely as to that judgment.⁸ The notice of appeal is timely, though, as to the October 5 order denying the motion for leave to brief the ineffective assistance issue for reconsideration. Thus, the court has jurisdiction over that portion of Gracia's appeal.

B

This court construes a motion filed after ten days of entry of the judgment that asks for some relief other than correction of a purely clerical error as a Fed. R. Civ. P. 60(b) motion. Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665, 667 (5th Cir. 1986). Accordingly, Gracia's motion for leave to brief the ineffective assistance issue for reconsideration will be construed as such. The court reviews the denial of a Rule 60(b) motion for abuse of discretion. Brown v. Petrolite Corp., 965 F.2d 38, 50 (5th Cir. 1992). Under this standard, "it is not enough that a grant of the motion might have been permissible." Pease v. Pakhoed Corp., 980 F.2d 995, 998 (5th Cir. 1993).

Gracia's motion requested leave to brief his ineffective assistance of counsel claim, and in his motion, Gracia blamed his pro se status for his initial failure to present this claim in a

⁸We note that the time for filing a notice of appeal can be tolled if a Fed. R. Civ. P. 60 motion is filed within ten days after the entry of judgment. See Fed. R. App. P. 4(a)(4)(E) & (F). In the present case, however, Gracia's motion for leave to brief the issue of ineffective assistance, which is construed as a Rule 60(b) motion, was not filed within ten days after the entry of judgment.

procedurally proper manner.⁹ We find that the district court did not abuse its discretion by denying this motion.

A pro se litigant is not exempt "from compliance with relevant rules of procedural and substantive law." Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981). Federal Rule of Civil Procedure 8(a) requires pleadings to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." None of Gracia's pleadings set forth the legal or factual basis for his ineffective assistance claim; thus, the district court clearly made no error in initially rejecting Gracia's ineffective assistance claim in his third § 2255 motion. As for his motion for leave to brief the issue for reconsideration, Gracia advances no argument on appeal to show that the district court's refusal to grant this motion was an abuse of discretion. Instead, he simply argues the merits of the ineffective assistance issue. Accordingly, Gracia has abandoned any claim that the district court abused its discretion by denying his motion. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

III

Gracia has appealed from the district court's August 25 judgment rejecting his third § 2255 motion as well as from the district court's October 5 order denying his motion for leave to brief his ineffective assistance claim. Because Gracia's appeal

⁹In his earlier filing, Gracia sought to incorporate the facts and argument from his appellate brief into his § 2255 motion.

was untimely filed, however, we lack jurisdiction to consider the district court's August 25 judgment. As to the district court's October 5 order, we affirm the district court, finding that Gracia has made no showing that the district court abused its discretion.

A F F I R M E D.