

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10600
Summary Calendar

CECIL LEE RUSSELL,

Plaintiff-Appellant,

VERSUS

ROBERT W. HARRELL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(2:92 CV 229)

August 9, 1995

Before DAVIS, JONES and DeMOSS, Circuit Judges.

PER CURIAM:¹

Russell appeals the dismissal of his § 1983 case. We affirm.

I.

In August 1990, Texas state prisoner Cecil Lee Russell and two other inmates got into a fight while they were assigned to a hoe squad in a field. All three inmates were charged with disciplinary infractions. Based on evidence that Russell chased one of the other inmates with a hoe, Russell was found guilty of the major offense of fighting with a weapon and sentenced to fifteen days

¹ 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

solitary confinement. The other two inmates' charges were reduced to minor infractions and they were permitted to return to general population.

Russell filed a civil rights complaint, 42 U.S.C. § 1983, alleging Eighth Amendment, due process, and equal protection claims. The parties consented to a trial by magistrate judge. The magistrate judge granted the defendants' motion to dismiss the due process claim, and, following a bench trial, entered judgment for the defendants on the Eighth Amendment and equal protection claims.

Russell filed a motion for a new trial. The district court denied the motion and Russell filed a timely notice of appeal from the order denying the post-judgment motion.

The appellees argued that this court did not have jurisdiction over the appeal because Russell's notice of appeal was untimely. The magistrate judge entered judgment on May 5, 1994. Russell filed a motion for a new trial on May 19. The motion was filed within ten days of entry of judgment. See Fed. R. Civ. P. 6(a). However, the date of service rather than the date of filing governs timeliness of a motion for new trial. See Fed. R. Civ. P. 59(a), (b). Russell failed to attach a certificate of service to the motion for a new trial, and the record was silent as to whether the motion was timely served. Because the proper exercise of appellate jurisdiction is dependent on whether the motion was served within ten days, and because this court cannot make this determination on a silent record, the case was remanded to the district court to resolve the question in the first instance. See Fischer v. United

States Dep't of Justice, 759 F.2d 461, 462 (5th Cir. 1985).

On remand the magistrate judge found that Russell failed to serve the defendants with the motion for a new trial. Therefore, because the defendants had been served with process, the motion must be construed as a Fed. R. Civ. P. 60(b) motion. See Fischer, 759 F.2d at 465-66. A Rule 60(b) motion does not toll the period for filing a notice of appeal. See Fed. R. Civ. P. 4(a)(4). Because Russell did not file a notice of appeal within thirty days of the entry of judgment, this court does not have jurisdiction over the underlying judgment. Russell did file a timely notice of appeal from the denial of the post-judgment motion, therefore this court has jurisdiction to review the denial of the post-judgment order.

II.

Russell argues that the district court improperly denied his post-judgment motion. See appellant's brief, 11-13. This court reviews the denial of a Rule 60(b) motion for an abuse of discretion. Latham v. Wells Fargo Bank, N.A., 987 F.2d 1199, 1203 (5th Cir. 1993).

In his post-judgment motion Russell attacked the credibility of the adverse witnesses. He also asserted that he wanted to present additional evidence to support his case. The district court denied the motion because the new facts alleged were known to Russell at the time of trial and any attempts to discredit the defense witnesses should have been made during the trial.

The magistrate judge did not abuse his discretion by denying

the post-judgment motion. All of the evidence which Russell sought to present through his motion was known to him at the time of trial, and Russell has not demonstrated an adequate reason for failing to present his case at trial. See Brown v. Petrolite Corp., 965 F.2d 38, 50 (5th Cir. 1992) (no abuse of discretion to deny Rule 60(b) motion based on "new evidence" which plaintiff could have discovered earlier through the exercise of due diligence).

AFFIRMED.