

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10907
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT MOYA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:88-CR-262-D-8)

(July 25, 1995)

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

Per curiam:*

Appellant Robert Moya (Moya) challenges the imposition of supervised release upon revocation of his probation. We affirm.

FACTS

On September 29, 1989 Moya pleaded guilty to use of a communication facility to facilitate a drug transaction in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of 18 U.S.C. § 843(b), and making a false income tax return, in violation of 26 U.S.C. § 7206(1). On September 2, 1994, finding that Moya had violated the conditions of his probation, the district court revoked his probation and sentenced him to a term of imprisonment, to be followed by one year of supervised release.

On September 8, 1994, Moya filed a motion to correct his sentence pursuant to FED. R. CRIM. P. 35, challenging the imposition of supervised release. On September 27, 1994, the district court denied Moya's motion to correct the sentence and further found that the court lacked jurisdiction to grant the motion. The district court found that when the court did not act on Moya's motion within seven days of the date of judgment, the district court lost jurisdiction to correct the sentence. On September 30, 1994, Moya filed a notice of appeal to this Court.

TIMELINESS OF NOTICE OF APPEAL

The parties contend that the question of the timeliness of Moya's notice of appeal is governed by FED. R. APP. P. 4(b), which provides that a notice of appeal is timely if filed within 10 days after the disposition of certain post-trial motions. The parties concede that Moya's motion is not explicitly listed in Rule 4(b), but rely on the law regarding Rule 4(b) before its amendment in 1993.

A defendant in a criminal case must file his notice of appeal within 10 days after the entry of the judgment he wishes to appeal. FED. R. APP. P. 4(b). Moya's September 30 notice, more than 10 days after the district court's September 7 judgment was untimely unless

his post-judgment motion interrupted the filing time.

Rule 4(b) provides, in relevant part:

If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

- (1) for judgment of acquittal;
- (2) for arrest of judgment;
- (3) for a new trial on any ground other than newly discovered evidence; or
- (4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment...

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under FED. R. CRIM. P. 35(c), nor does the filing of a motion under FED. R. CRIM. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

Moya's post-judgment motion was not one of those listed in Rule 4(b), but was a motion pursuant to FED. R. CRIM. P. 35(c). That rule provides that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error."

The law in this circuit prior to the 1993 amendments to Rule 4(b) was well settled: a motion for reconsideration is timely filed within the time prescribed for noticing an appeal, and, so filed, tolls the period for filing a notice of appeal until the motion for reconsideration is ruled on by the district court. *United States v. Greenwood*, 974 F.2d 1449, 1466 (5th Cir. 1992), *cert. denied* ___U.S.___, 113 S.Ct. 2354 (1993). We recently considered the effect of the 1993 amendments and determined that the rule survived

the amendments. *United States v. Brewer*, ___F.3d___, 1995 WL 405699 (5th Cir. (Tex.), July 7, 1995).

A motion for reconsideration is any request, however phrased, that a district court reconsider a question decided in the case in order to effect an alteration of the rights adjudicated. *United States v. Greenwood*, 974 F.2d 1449, 1466 (5th Cir. 1992). Moya's motion was one of the species of motions for reconsideration and was filed within 10 days of the order now appealed. He then filed his notice of appeal within 10 days of the disposition of that motion. We therefore find that his notice of appeal was timely filed.

SUPERVISED RELEASE

The question of whether supervised release may be imposed upon revocation of probation in this case is governed by 18 U.S.C. § 3565(a)(2) which provides:

(a) Continuation or Revocation -- If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may...

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

Subchapter A in turn allows for a "term of imprisonment as authorized by subchapter D." Moya contends that this language limits his exposure to imprisonment only, and does not empower the court to impose supervised release, which is authorized under subchapter D, but is not specifically referenced in subchapter A. Subsequent to the initial briefing in this case, we had occasion to consider this argument, and rejected it. In *United States v.*

McCullough, 46 F.3d 400 (5th Cir.), *cert. denied*, 1995 WL 335024 (U.S., June 19, 1995), we held that it is permissible for a district court to impose a term of supervised release upon a defendant after revoking his probation.

We therefore AFFIRM the judgment of the district court.