

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30246
Summary Calendar

CHARLES KENNETH WALLACE,
a/k/a Charles Red Wallace,

Plaintiff-Appellant,

versus

RICHARD P. IEYOUB,
Attorney General, and
RICHARD STALDER, Warden,
Wade Correctional Center,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA 94 0427 D

(November 14, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

The district court denied Charles K. Wallace habeas corpus relief and dismissed his petition. Wallace served a motion seeking relief from the judgment within 10 days after the entry of judgment. Wallace's motion therefore was a motion pursuant to FED. R. CIV. P. 59(e). *See Fellows v. Colonial Sav. & Loan Ass'n*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(*In re Fellows*), 19 F.3d 245, 246 (5th Cir. 1994); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668-69 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 930 (1986). At the conclusion of that motion, Wallace requested, "in the alternative a stay of the order-judgment aforesaid according to law; and a certificate of probable cause to issue[.]" The clerk of the district court construed this pleading as a notice of appeal, and the district judge granted Wallace a certificate of probable cause (CPC) for an appeal.

"This Court must examine the basis of its jurisdiction, on its own motion, if necessary." *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). A document in which a would-be appellant expresses his desire to appeal only if postjudgment relief is denied is insufficient to serve as a notice of appeal, as it does not "`clearly evince[] the party's intent to appeal.'" *Id.* at 660-61 (citation omitted).

Wallace did not clearly express his desire to appeal. He requested a CPC as an alternative to postjudgment relief. His request for a CPC therefore is not an effective notice of appeal.

The district judge, however, granted Wallace a CPC during the 30-day period during which Wallace could have filed an effective notice of appeal. See FED. R. APP. P. 4(a)(1). In the CPC, the district judge averred that Wallace had filed a notice of appeal.

"Unique circumstances" may excuse a would-be appellant from his failure to file a timely notice of appeal "`where counsel

fails to file a notice of appeal within the prescribed time based on its good faith reliance on a mistaken assurance or statement of the district court.'" *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 985 (5th Cir. 1992)(citation omitted). The district court must make an "'affirmative representation' or 'specific assurance' that a party's notice of appeal was proper." *Id.* (citation omitted). In *Prudential-Bache*, the Court found "unique circumstances" when the appellants had filed a notice of appeal before the actual entry of an order denying postjudgment relief, but the appellants' copy of the order was marked "entered" on the date they filed their notice of appeal. *Id.* at 985. This Court also found "unique circumstances" when a district court improperly treated objections to a magistrate judge's report as a notice of appeal. *Brown v. Wackenhut Corp.*, No. 93-8516, slip op. at 1-2 (5th Cir. Oct. 29, 1993) (unpublished; copy attached).

Wallace's case presents "unique circumstances." By stating that Wallace had filed a notice of appeal and granting CPC, the district judge excused Wallace from filing a timely and effective notice of appeal. Wallace could not have been expected to file a notice of appeal after the district judge granted him a CPC.

Although the district court's action excused Wallace from filing a timely notice of appeal, it does not make Wallace's constructive notice of appeal immediately effective. The record does not reflect that the district court has ruled on Wallace's Rule 59(e) motion.

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A notice of appeal filed after announcement or entry of the judgment but before disposition of [a motion under FED. R. CIV. P. 59(e)] is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding.

FED. R. APP. P. 4(a)(4). Accordingly, we hereby REMAND Wallace's case and direct the district court to consider Wallace's Rule 59(e) motion. See *Burt v. Ware*, 14 F.3d 256, 260-61 (5th Cir. 1994).