

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50225
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THERYL ALEXANDER,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(A-93-CR-19(1))

(October 25, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Theryl Alexander appeals the district court's denial of his motion for an out-of-time appeal, presenting the question whether the district court had jurisdiction to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

consider that motion. Agreeing with the district court's disposition of this matter, we affirm.

I

FACTS AND PROCEEDINGS

Alexander pleaded guilty to possession with intent to distribute cocaine base, a violation of 21 U.S.C. § 841, after entering into a plea agreement with the government wherein he expressly waived the right to appeal his sentence on any ground except an upward departure by the sentencing court. The agreement provided that "[t]he Defendant is also aware that his sentence has not yet been determined by the Court. . . . Realizing the uncertainty in estimating what sentence he will ultimately receive, the Defendant knowingly waives his right to appeal the sentence or to contest it in any post-conviction proceeding[.]"

At the arraignment, the government apprised the district court of the agreement, including Alexander's waiver of his right to appeal his sentence. The court asked Alexander whether he understood the agreement, and Alexander replied that he did. The court also advised Alexander that 20 years of imprisonment was the maximum possible sentence he could receive, then accepted Alexander's guilty plea and eventually sentenced him, on June 11, 1993, to 151 months of imprisonment.

On October 22, 1993, Alexander filed a "motion to file direct appeal out of time." He alleged that, on the day he received a copy of the district court's judgment of conviction, he called his attorney and asked him to file an appeal, but that the attorney

never complied. The magistrate judge denied the motion, concluding that Alexander had waived his right to appeal.

Alexander then appealed the magistrate judge's order to the district court, arguing that "there was no plea agreement; he plead[ed] guilty to the offense because he was guilty, and that he did not waived [sic] his right to appeal." The district court denied Alexander's appeal of the magistrate judge's order, concluding that "there was indeed a Plea Agreement, that the Plea Agreement was signed by Mr. Alexander, and that the Plea Agreement expressly and unambiguously states that Mr. Alexander waived his right to a direct appeal." Alexander filed a timely notice of appeal of the district court's order.

II

ANALYSIS

Rule 4(b), Fed. R. App. P., requires that the notice of appeal by the defendant in a criminal case be filed within 10 days following entry of judgment. The rule provides that on a showing of excusable neglect the district court may grant an additional 30 days within which to file the notice of appeal. To have the opportunity to seek relief by showing excusable neglect, however, the document evincing an intent to appeal must be filed within the ten-plus-thirty day period. See United States v. Awalt, 728 F.2d 704, 705 (5th Cir. 1984). Rule 4(b) is mandatory and jurisdictional; "[c]ourts cannot extend the time period beyond the forty-day time period prescribed by Rule 4(b)." Id.

As Alexander's motion for an out-of-time appeal was not filed

within the ten-plus-thirty day period, the district court was without jurisdiction to entertain his motion. The district court's judgment denying the motion may be affirmed on that ground. See Sojourner T v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992) (court may affirm judgment on any basis supported by the record), cert. denied, 113 S.Ct. 1414 (1993). Accordingly, we need not address the arguments raised by Alexander in support of his appeal of the district court's denial.

In his motion, Alexander alleged that his counsel failed to file a timely appeal despite his expressed desire to do so. In proceedings brought under 28 U.S.C. § 2255, we recognize that the failure of counsel to file an appeal timely upon the request of the defendant would constitute ineffective assistance of counsel entitling the defendant to post-conviction relief in the form of an out-of-time appeal. See Barrientos v. United States, 668 F.2d 838, 842 (5th Cir. 1982). Alexander failed to re-urge this argument on appeal; neither does he argue that the district court erred by failing to construe his motion as a § 2255 motion alleging ineffective counsel. Issues not raised on appeal are deemed abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

In his appellate brief, Alexander argues that his attorney erred by allowing him (Alexander) to waive his right to appeal his sentence. He failed, however, to raise this issue in the district court.

"[I]ssues raised for the first time on appeal are not

reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). As a determination whether counsel was ineffective for advising Alexander to execute the waiver necessarily involves the determination of factual matters, we do not review this issue. The judgment of the district court is
AFFIRMED.