

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50343
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RANDY DWAYNE WELLS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-88-CR-4
- - - - -

June 27, 1995

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

PER CURIAM:*

A criminal defendant has 10 days from the entry of an order to file a notice of appeal. Fed. R. App. P. 4(b). The district court may grant an additional 30 days in which to file a notice of appeal upon a finding that failure to file during the original ten-day period resulted from "excusable neglect." Id.; United States v. Awalt, 728 F.2d 704, 705 (5th Cir. 1984). The filing of an untimely notice of appeal within the 30-day extension

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

period is customarily treated as a motion for determination whether excusable neglect entitled the defendant to an extension of time to appeal. United States v. Golding, 739 F.2d 183, 184 (5th Cir. 1984). The excusable-neglect standard is a strict one and is reviewed only for an abuse of discretion. Latham v. Wells Fargo Bank, 987 F.2d 1199, 1202 (5th Cir. 1993).

The district court's denial of Wells's § 3582(c)(2) motion was entered on April 28, 1994, extending the period to file a timely notice of appeal to May 9, 1994. Wells filed his notice of appeal on May 20, 1994, within the 30-day extension period.

Wells does not argue that the district court abused its discretion by designating the wrong period for showing good cause, but instead, continues his argument that he was in "Special Housing" from March 1994 until his transfer to F.C.I. La Tuna, which was complete on August 4, 1994.

Although possibly incorrect, the district court's statement in its September 16th order that "the defendant must show good cause for the time period of May 9 to May 20" does not establish abuse of discretion. In the same order, the district court found that Wells did "not establish 'good cause' for his late filing of his Notice of Appeal." In its order denying Wells' motion for reconsideration, the district court indicated that it considered the correct period in its "excusable neglect" determination in the statement, "[t]he defendant still does not indicate why he failed to file his Notice of Appeal on or before May 9, 1994."

In his two responses to the district court's order to show cause, in his motion for reconsideration, and to this court,

Wells never demonstrated excusable neglect for his failure to file a timely notice of appeal. Wells was aware of the time constraints of filing an appeal and the requirements of showing excusable neglect evidenced by his untimely direct appeal. The district court did not abuse its discretion in finding no excusable neglect for Wells' untimely notice of appeal.

DISMISSED.

Appellee's motion to strike Appellant's reply brief is DENIED.