

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50433
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ADRIAN KEITH CRAUN,

Defendant-Appellant.

Appeal from United States District Court
for the Western District of Texas
(W-89-CR-145-2)

(March 22, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Adrian Keith Craun pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He received a \$50.00 mandatory assessment and was sentenced to serve 92 months in prison and a term of three years supervised release.

After Craun exhausted his remedies on direct appeal, he filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255. The district court denied his motion on October 18, 1993.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 April 1994, Craun filed a "Motion to Show Cause for Re-Consideration of Notice of Appeal" concerning the denial of his § 2255 motion after he requested an appellate briefing schedule and learned that the Court had no record of his notice of appeal.

Craun asserted that he placed a notice of appeal in the prison mail chute at the federal correctional institution at Milan, Michigan, on October 19, 1993. By order dated April 5, 1994, the district court afforded him thirty days to provide any evidence, including "copies of prison mail logs, affidavits, or any other credible information," that he timely delivered his notice of appeal to prison officials. On April 29, 1994, Craun asserted in response that no such evidence existed because the prison did not provide "such outgoing mailing procedures." He also contended that he could not provide an affidavit because prison policy prohibits inmates from obtaining affidavits from other inmates. On May 25, 1994, after Craun failed to present "any credible evidence," the district court determined that his notice of appeal was untimely. Craun filed a timely notice of appeal from that order.

STANDARD OF REVIEW

Legal conclusions made by a district court are reviewed de novo; findings of fact are reviewed for clear error. United States v. Fitzhugh, 984 F.2d 143, 146 (5th Cir.), cert. denied, 114 S. Ct. 259 (1993). A finding of fact is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Fitzhugh, 984 F.2d at 146 n.12.

DISCUSSION

A notice of appeal in a civil case in which the United States is a party must be filed within 60 days of the date of entry of the judgment or order from which the appeal is taken. Fed. R. App. P. 4(a)(1). "Claims brought under § 2255 are civil actions governed by the sixty-day appeal period" of Rule 4(a)(1). United States v. Buitrago, 919 F.2d 348, 349 (5th Cir. 1990).

"The time limitation for filing a notice of appeal is jurisdictional, and the lack of a timely notice mandates dismissal of the appeal." United States v. Garcia-Machado, 845 F.2d 492, 493 (5th Cir. 1988). A prisoner's pro se notice of appeal is deemed filed when delivered to prison officials for forwarding to the court clerk. Houston v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988).

The district court's judgment denying Craun's § 2255 motion was entered on October 18, 1993. Because Craun is incarcerated, his notice of appeal would have been deemed timely had he delivered the notice to prison personnel on or before December 19, 1993. See Houston, 487 U.S. at 276.

When Craun failed to present evidence indicating the date he delivered his notice of appeal to prison officials, the district court determined that his notice of appeal was untimely. The district court order is ambiguous in that it does not specify whether the notice was deemed untimely because Craun did not submit "evidence" and instead relied upon his unsworn allegations in his pleadings or whether the court found Craun's allegations to be not

credible. If the court based its decision on Craun's credibility regarding the timeliness of his filing and his inability to provide proof of the filing, the court made findings of fact. If the court concluded that Craun failed to comply with its order to produce evidence and therefore, failed to meet his burden of proof, the court made a legal conclusion. In either case, the record supports the district court's decision.

Craun offered only his personal declaration that he timely delivered a notice of appeal to prison personnel. He did not provide the date of his initial inquiry regarding his appellate briefing schedule, and, to date, he has not furnished evidence proving the date he delivered his notice of appeal to prison officials. Moreover, Craun has not produced a copy of the purported notice of appeal. See Oliver v. Commissioner of the Mass. Dept. of Corrections, 30 F.3d 270 (1st Cir. 1994) Craun did not even provide his own affidavit. Arguably, he was unaware that he could have furnished his affidavit as support. However, the district court has no obligation to inform pro se litigants of the evidence they may submit. Cf. Martin v. Harrison County Jail, 975 F.2d 192, 193 (5th Cir. 1992) (district court has no obligation to inform pro se litigants how to properly respond to summary judgment). Craun merely reported that on February 18, 1994, he was informed that the Court had no record of his notice of appeal.

The district court concluded that, absent corroborating evidence indicating the date of delivery to prison officials, Craun's unsworn declaration that he filed a timely notice of appeal

was insufficient to reinstate his appeal. The court allowed Craun an opportunity to provide proof. Cf. Thompson v. Rasberry, 993 F.2d 513, 515 (5th Cir. 1993) (case remanded because district court did not provide opportunity to prove timely filing of objections). As either a finding on credibility or a conclusion that Craun had failed to supply any evidence, the decision was not erroneous.

CONCLUSION

We AFFIRM the district court's order. Because this Court is without jurisdiction to consider Craun's appeal, the issues raised in his brief are not addressed. His appeal is DISMISSED.