

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60440
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO SALDANA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 4:93-CR-21-BS

- - - - -
(November 17, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

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). Rule 4(b), Fed. R. App. P., requires that the notice of appeal in a criminal case be filed within 10 days of entry of the judgment. The district court entered judgment on May 11, 1994. Saldana filed a notice of appeal on June 20, 1994. A timely notice of appeal is a mandatory precondition to the exercise of appellate jurisdiction. United States v. Merrifield, 764 F.2d 436, 437 (5th Cir. 1985).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Saldana's motion for judgment of acquittal or for new trial has no effect on the timeliness of his appeal. Rule 33, Fed. R. Crim. P., provides that motions for new trial based on grounds other than newly discovered evidence, as this motion was, "shall be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period." Rule 29(c), Fed. R. Crim. P., requires that a postverdict motion for judgment of acquittal be made within 10 days after the jury is discharged. The jury rendered its verdict of guilty on February 14, 1994, and was discharged the same day. Saldana did not move for an extension of time in which to file his postverdict motion and did not file and serve it until May 13, 1994, two days after judgment was entered. The time to appeal was not interrupted by the untimely motion. See Rule 4(b).

Rule 4(b), however, allows the district court to grant a criminal defendant an additional 30 days in which to file a notice of appeal upon a showing of excusable neglect. The filing of an untimely notice of appeal within the 30-day period is customarily treated by this Court in criminal cases as a motion for a determination whether excusable neglect entitles the defendant to an extension of time to appeal. United States v. Golding, 739 F.2d 183, 184 (5th Cir. 1984). Saldana has filed his notice of appeal within the 30-day period. We therefore remand the case to the district court for a determination whether the defendant's untimely filing of the notice of appeal was due to excusable neglect.

REMANDED.

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