

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

May 13, 2008

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No. 08-10043  
Summary Calendar

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Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JERONIMO BERNAL-GARCIA

Defendant-Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 2:07-CR-77-ALL

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Before STEWART, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:\*

Jeronimo Bernal-Garcia pled guilty to one count of possession with intent to distribute 500 grams or more of methamphetamine and was sentenced to 168 months of imprisonment and five years of supervised release. The district court's judgment was entered on October 10, 2007. On December 13, 2007, Bernal-Garcia filed a pro se motion to file an out-of-time appeal arguing that trial counsel failed to file a timely notice of appeal despite having been asked to do so. He also sought leave to proceed in forma pauperis (IFP) on appeal and the

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

appointment of appellate counsel. The district court denied Bernal-Garcia's motion to file an out-of-time appeal as untimely because it was not filed within thirty days of the expiration of the appeal period as required by FED. R. APP. P. 4(b)(4). Further, because the motion was untimely, the district court determined that Bernal-Garcia was not entitled to proceed IFP or to the appointment of appellate counsel.

Bernal-Garcia filed a timely notice of appeal from the district court's denial of his motion. He also filed motions to proceed IFP on appeal and for the appointment of appellate counsel. The district court granted Bernal-Garcia's IFP motion but denied his motion for the appointment of appellate counsel. Bernal-Garcia now moves this court for leave to proceed IFP on appeal and for the appointment of appellate counsel.

Because the district court has granted Bernal-Garcia's motion to proceed IFP on appeal, the IFP motion before this court is denied as moot. Further, this court can dismiss an appeal during consideration of an interlocutory motion if the appeal "is frivolous and entirely without merit." 5TH CIR. R. 42.2. Bernal-Garcia did not file a notice of appeal within ten days after the entry of the criminal judgment. See FED. R. APP. P. 4(b)(1)(A). His motion to file an out-of-time appeal was filed beyond the time for extending the appeal period under FED. R. APP. P. 4(b)(4). Thus, the district court did not err in enforcing the time limitations set forth in Rule 4(b), and this court may not reverse its decision to do so. See *United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir. 2006). Because the instant appeal is without arguable merit, Bernal-Garcia's motion for the appointment of appellate counsel is denied, and the appeal is dismissed as frivolous. See 5TH CIR. R. 42.2.

APPEAL DISMISSED; MOTIONS DENIED.