

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 15, 2010

Lyle W. Cayce
Clerk

No. 10-50033

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN SIMMONS,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:08-CR-337-7

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

John Simmons pleaded guilty to distribution of 50 grams of more of methamphetamine and aiding and abetting. He was sentenced to 151 months of imprisonment and four years of supervised release. Over six months after the entry of judgment, Simmons, acting pro se, moved for an extension of time to file an appeal, filed a notice of appeal, and moved for the appointment of appellate counsel. The district court denied Simmons's motion for an extension of time because it was not filed within 30 days of the expiration of his appeal period, as

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

required by FED. R. APP. P. 4(b)(4). The district court dismissed Simmons's motion for appointment of counsel. Counsel who had been appointed to represent Simmons in the district court thereafter moved to withdraw, and the district court granted counsel's motion.

Simmons now moves this court for the appointment of counsel. We may dismiss an appeal when considering an interlocutory motion if the appeal "is frivolous and entirely without merit." 5TH CIR. R. 42.2. Simmons did not file a notice of appeal within the limitations period under FED. R. APP. P. 4(b)(1)(A), and his motion for an extension of time to file an appeal was filed beyond the time limitations set forth under FED. R. APP. P. 4(b)(4). Simmons is not entitled to have the untimeliness of his notice of appeal disregarded. *See United States v. Leijano-Cruz*, 473 F.3d 571, 574 (5th Cir.2006). Because the instant appeal is without arguable merit, Simmons's motion for appointment of counsel is DENIED, and the appeal is DISMISSED as frivolous. *See* 5TH CIR. R. 42.2.