

UNITED STATES COURT OF APPEALS March 1, 2012
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD ENNIS, a/k/a Pops,

Defendant - Appellant.

Nos. 12-8007 & 12-8008
(D.C. Nos. 2:10-CR-00118-NDF-2 &
2:10-CR-00134-WFD-1)

ORDER

Before **BRISCOE**, Chief Judge, **HARTZ** and **HOLMES**, Circuit Judges.

This matter is before the court on the government's motion to dismiss.

Upon consideration thereof, the government's motion is **GRANTED**.

In a criminal appeal, the defendant's notice of appeal is to be filed within 14 days of entry of judgment. *See* Fed. R. App. P. 4(b)(1)(A). This rule is an "inflexible claim-processing rule[], which unlike a jurisdictional rule, may be forfeited if not properly raised by the government." *United States v. Garduno*, 506 F.3d 1287, 1291 (10th Cir. 2007) (internal quotation omitted). Here, the notice of appeal was filed more than one year after entry of judgment.

The government properly raised the timeliness issue in its motion to dismiss. *Id.* at 1292 (although the government did not raise the timeliness issue

until its response brief, it was timely; “There is no provision in the Federal Rules of Criminal Procedure or the Federal Rules of Appellate Procedure requiring earlier objection to a late notice of appeal.”)

The defendant argues that the unique circumstances exception should be applied here. This argument is without merit. This court has not yet determined whether the unique circumstances exception applies in criminal cases. *Id.* (“This court has recognized a unique circumstances exception may be available in the context of an appeal in a civil case, but has not addressed the doctrine’s applicability in the criminal context.”). Even if the exception were available, it would not be applicable here. In order to qualify for the unique circumstances exception, the party must have “performed an act which, if properly done, would postpone the deadline for filing his appeal **and** has received specific assurance by a judicial officer that this act has been properly done.” *Id.* (quoting *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989)) (emphasis added). Here, the defendant received no assurance from the district court regarding timeliness.

“Because the government timely objected to [the defendant’s] late notice of appeal, this court is bound to dismiss the appeal.” *Garduno*, 506 F.3d at 1292.

However, in light of the defendant’s allegations in his notice of appeal that he asked counsel to file an appeal, it is appropriate to remand to the district court to determine whether the notice of appeal should be construed as a 28 U.S.C. § 2255 motion. The issue of whether defense counsel failed to file a notice of

appeal in spite of the defendant's request to do so is an appropriate subject for a § 2255 proceeding.

This appeal is **DISMISSED** and the matter is **REMANDED** to the district court for further proceedings consistent with this order.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk



Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney