

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 8, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GILBERTO PINON-AYON,

Defendant - Appellant.

No. 13-8090
(D.C. Nos. 2:12-CV-00017-ABJ &
1:09-CR-00210-ABJ-2)

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO** and **TYMKOVICH**, Circuit Judges.

This is an appeal from the denial of 28 U.S.C. § 2255 relief. The appeal is dismissed because the notice of appeal was untimely.

Judgment was entered on April 11, 2013. On August 8, 2013, the district court received a letter from the defendant, in which he asked for a status update on his pending § 2255 motion. He also asked for an updated the docket sheet. The district court sent him the civil docket sheet on August 8. On November 1, 2013, the court received another letter from the defendant. In this letter he states that he noticed that his notice of appeal had not been docketed and that he gave his notice of appeal to prison authorities on or about May 29, 2013. In response, the district court sent the defendant a copy of both the civil and criminal docket sheets. The defendant filed his notice of appeal on November

21, 2013, more than seven months after the district court entered judgment and more than three months after the district court first sent him a copy of its docket.

In response to this court's jurisdictional show cause order, the defendant argues that he did not receive a copy of the order denying his § 2255 motion until August 21, 2013. This contradicts his statement in his second letter to the court in which he contends that he gave a notice of appeal to prison authorities to mail on or about May 29, 2013. He asks the court to equitably toll the time limits in which to appeal. He attached an affidavit to his response in which he swears that he placed his notice of appeal in the mail within 60 days of having received the judgment.

In a civil case, in which the United States is a party, a notice of appeal must be filed within 60 days of entry of the judgment being appealed. *See* 28 U.S.C. § 2107(b) (a notice of appeal in a civil matter must be filed within 60 days of entry of judgment); Fed. R. App. P. 4(a)(1)(B) (same). A timely notice of appeal in a civil case is both mandatory and jurisdictional. *See Bowles v. Russell*, 551 U.S. 205, 209, 213 (2007). This court may not equitably toll the time to appeal. *See Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (“Courts have ‘no authority to create equitable exceptions to jurisdictional requirements.’”) (quoting *Bowles*, 551 U.S. at 214).

Only the district court may reopen the time to appeal. *See* Fed. R. App. P. 4(a)(6). Rule 4(a)(6) allows the district court to reopen the time to appeal for a party who has not received a copy of the district court order within 21 days of entry of the judgment. The motion to reopen must be filed in the district court no later than within 180 days after the judgment is entered or within 14 days after the date the moving party receives notice of

the judgment. *See* Fed. R. App. P. 4(a)(6)(B). *See also* 28 U.S.C. § 2107(c) (allowing the district court to reopen the time to appeal under the same circumstances as set out in Rule 4(a)(6)). Here the last day to file a Rule 4(a)(6) motion in the district court was October 8, 2013 – 180 days from April 11, 2013. The defendant was sent a copy of the district court docket in August, long before the 180-day deadline expired.

The time limit set forth in Rule 4(a)(6) is mandatory and may not be waived. *See Clark v. Lavallie*, 204 F.3d 1038, 1040 (10th Cir. 2000); *Poreley-El v. Milyard*, 365 Fed. Appx. 912, 916 (10th Cir. 2010) (unpublished) (applying *Clark* to determine that the district court abused its discretion in granting the appellant’s untimely Rule 4(a)(6) motion). *See also* Fed. R. App. P. 26(b) (“the court may not enlarge the time for filing a notice of appeal ... except as specifically provided by law.”).

Because the notice of appeal was filed well beyond the 60 days required by Fed. R. App. P. 4(a)(1)(B) and 28 U.S.C. § 2107(b), this court lacks jurisdiction. Accordingly, this appeal is **DISMISSED**.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Ellen Rich Reiter
Jurisdictional Attorney