

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KALLEN E. DORSETT, JR.	:	
	:	
v.	:	No. 5:12-cr-00401
	:	
UNITED STATES OF AMERICA	:	

OPINION

Motion to Reopen Appeal Pursuant to Fed. R. App. P. 4(a)(6), ECF No. 121 – Granted

Joseph F. Leeson, Jr.
United States District Judge

March 14, 2019

This action was returned from the Third Circuit Court of Appeals for this Court to consider the notice of appeal filed by Kallen E. Dorsett, Jr., as a Rule 4(a)(6) motion. Because Dorsett has satisfied the three conditions of the Rule, the motion to reopen the time to appeal is granted.

I. BACKGROUND

On December 3, 2012, Dorsett entered a guilty plea to drug distribution and firearms charges. A provision in the written Guilty Plea Agreement contained a waiver of Dorsett’s right to collaterally attack his conviction and sentence. Dorsett was sentenced to a term of imprisonment on July 1, 2014. Thereafter, Dorsett filed a timely Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. On March 29, 2018, this Court¹ denied and dismissed the § 2255 motion, denying Dorsett’s ineffective assistance of counsel claims for lack of merit, and dismissing all other claims based on his collateral-review waiver.

¹ On October 11, 2017, this case was reassigned to the Undersigned.

On July 11, 2018, Dorsett filed a notice of appeal. By Order dated January 10, 2019, the Third Circuit Court of Appeals construed the notice of appeal as a motion pursuant to Federal Rule of Appellate Procedure 4(a)(6). *See* Order, C.A. No. 18-2587, ECF No. 120. The notice of appeal was forwarded to this Court to determine whether it meets the criteria for relief as a Rule 4(a)(6) motion. *See id.*

II. ANALYSIS

Pursuant to Rule 4(a)(1)(B), Dorsett had sixty (60) days from March 29, 2018, to file a notice of appeal. Because his notice of appeal was not filed until July 11, 2018, one hundred four (104) days later, it was untimely. This is a jurisdictional defect that cannot be overcome unless Dorsett satisfies the criteria of Rule 4(a)(6). *See Bowles v. Russell*, 551 U.S. 205, 208-09 (2007) (holding that the time for taking an appeal is “mandatory and jurisdictional”). Rule 4(a)(6) allows the district court to reopen the time to file an appeal if three conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Fed. R. App. P. 4(a)(6). *See also* 28 U.S.C. § 2107.

First, Dorsett states, “under the penalty of perjury,” that he was not made aware of the Court’s decision until July 11, 2018, because he had been in the “special housing unit and in transit.” *See* Mot., ECF No. 121. This allegation is supported by Dorsett’s notice of change of address, *see* ECF No. 114, which had been filed less than two weeks earlier, on June 29, 2018,

listing the United States Penitentiary in Atlanta as his new place of confinement.² See *Mundy v. Phila. Sheriff Dep't*, No. 96-7925, 1997 U.S. Dist. LEXIS 10403, at *1 (E.D. Pa. July 21, 1997) (granting the Rule 4(a)(6) motion because the prisoner represented that he did not receive a copy of the order until three months after it was issued “because state authorities were transferring him from one correctional institution to another”). Moreover, no evidence has been offered to rebut Dorsett’s allegation that he did not receive notice of the March 29, 2018 decision until July 11, 2018. See *United States v. Hockensmith*, No. 1:CV-09-0309, 2010 U.S. Dist. LEXIS 30707, at *4-5 (M.D. Pa. Mar. 30, 2010) (concluding that the movant’s allegation that he did not receive the court’s order satisfied the requirements of Rule 4(a)(6)). The first condition of Rule 4(a)(6) is satisfied. See *Moody v. Conroy*, No. 10-2525, 2018 U.S. Dist. LEXIS 92799, at *6 (E.D. Pa. June 1, 2018) (holding that where there was no suggestion the prisoner was to blame for not receiving the order, he satisfied the first condition of Rule 4(a)(6) even though service was completed when the clerk mailed the order to his last known address).

Second, Dorsett’s notice of appeal, which the Third Circuit Court of Appeals has construed as a motion pursuant to Federal Rule of Appellate Procedure 4(a)(6), was filed on July 11, 2018, the same day he received notice of the March 29, 2018 decision. The motion was therefore filed within one hundred eighty days after the Opinion and Order were entered, and also within fourteen days of Dorsett receiving notice of the decision. The second condition is satisfied.

Third, there is no reason to believe that any party would be prejudiced by reopening the time to appeal. Dorsett, who wants to file an appeal, clearly would not be prejudiced if the motion is granted. Also, there is no evidence that the Government, which did not respond to the

² Dorsett was previously incarcerated in the Federal Correctional Institution in Gilmer, which is where the clerk mailed copies of the Opinion and Order dated March 29, 2018.

Rule 4(a)(6) motion, will be prejudiced if the time to appeal is reopened. *See Riviere v. United States*, No. 2000-116, 2011 U.S. Dist. LEXIS 66728, at *5 (D.V.I. June 22, 2011) (explaining that under the third condition of Rule 4(a)(6) “[a] party is prejudiced where it suffers ‘some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal’” (quoting Fed. R. App. P. 4, Committee Note to 1991 amendment)); *Hockensmith*, 2010 U.S. Dist. LEXIS 30707, at *4-5 (finding no reason to believe that the government would be prejudiced by reopening the time to file an appeal). The third condition is satisfied.

III. CONCLUSION

Dorsett has satisfied the three conditions of Rule 4(a)(6); therefore, his motion to reopen the time to file an appeal is granted.

A separate Order follows.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KALLEN E. DORSETT, JR. :

v. :

UNITED STATES OF AMERICA :

No. 5:12-cr-00401

ORDER

AND NOW, this 14th day of March, 2019, for the reasons set forth in the Opinion issued this date, **IT IS ORDERED THAT**:

1. Dorsett's motion to reopen the time to appeal pursuant to Rule 4(a)(6), ECF No. 121, is **GRANTED**.

2. Dorsett's time to file an appeal is reopened for a period of fourteen (14) days from the date of this Order.

3. The Clerk of Court is directed to send a copy of this Order and the Opinion issued this date to the Third Circuit Court of Appeals, C.A. No. 18-2587.

BY THE COURT:

/s/ Joseph F. Leeson, Jr.
JOSEPH F. LEESON, JR.
United States District Judge