IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

Vs. No. 02-40005-01-SAC

CARLOS ALONSO MORENO,

Defendant.

ORDER

By order of the Tenth Circuit filed November 5, 2004, this case was partially remanded to this court for a determination of whether the defendant's failure to comply with the filing requirements of Rule 4(b)(1)(A)(i) was due to excusable neglect or good cause. On remand, the district court directed the defendant to file a statement of reasons showing excusable neglect or good cause as those terms have been defined and applied in *Stutson v. United States*, 516 U.S 193, 195 (1996), and *United States v. Torres*, 372 F.3d 1159, 1161-64 (10th Cir. 2004).

The defendant timely filed a *pro se* statement of reasons in which the defendant specifically asserts:

> On September 21, 2004, at my appeal hearing before the court, I asked my attorney, Edward M. Collazo, to file an appeal based on judgement entered by court and attorney failed to do so. This demands presumption of prejudice.

> Mr. Edward M. Collazo, attorney, did not file an appeal, as per defendants request, and this led to defendants failure to comply with the filing requirements of Fed. R. App. P. (4)(b)(1)(A);. It is the government's responsibility to provide effective counsel who acts as an advocate for the defendant and when it doesn't, it is considered ineffective counsel.
>
> I declare under penalty of perjury that the foregoing is true and correct. Executed on 10th of November, 2004.

(Dk. 93). The government did not file any response.

The court then entered an order that discussed the excusable neglect standard as construed and applied by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), and the Tenth Circuit in *United States v. Torres*, 372 F.3d 1159, 1161-64 (10th Cir. 2004). Applying the standard to the facts of record, the court concluded:

> The defendant filed his *pro se* notice of appeal ten days past the ten-day deadline but within the thirty-day permissible extension period. The length of this delay is relatively short, and its potential impact on the judicial proceedings is negligible. The government does not articulate any prejudice. The record presently offers no basis for questioning good faith. In explanation of the delay, the defendant writes that he told his appointed counsel after the sentencing hearing to file a notice of appeal and that his counsel failed to do so. To evaluate this alleged reason, the court needs to hear from the counsel who represented the defendant at the resentencing hearing on September 21, 2004.

(Dk. 95, pp. 2-3). The court directed the defense counsel who appeared at the resentencing hearing to furnish the court with an affidavit explaining why a notice of appeal was not timely filed after the amended judgment of September 30, 2004.

The court gave the defendant an additional thirty days after the filing of counsel's affidavit to submit a response and/or affidavit.

The defense counsel has filed the requested affidavit (Dk. 97), and the defendant has filed nothing in response. Counsel avers that he talked with the defendant three times: a week before the resentencing, the day of resentencing, and three days after the resentencing. At the first meeting, defense counsel said that the defendant appeared to "have a good understanding of his case" and raised his concern over the two-level firearm enhancement. Defense counsel explained the plea agreement as providing that the government would not advocate this enhancement but that the court retained the final discretion to apply the enhancement in the sentencing. Defense counsel explained the court's prior ruling in favor of this enhancement and its reasoning. "After explaining all of the items mentioned above and reasoning of the Court for the enhancement, I felt that Mr. Moreno understood, and we proceeded to sentencing." "I did not feel this was an issue any longer." (Dk. 97, p. 2). With regards to the defendant asking him to file a notice of appeal, Mr. Collazo averred:

> I have no recollection of Mr. Moreno ever specifically telling me he wanted to appeal this or any other issue relating to his case. I also do not have any recollection of me asking him specifically if he wanted to appeal. I do however, know that the firearm enhancement was of concern to Mr. Moreno. At the time, during my meetings with Mr. Moreno, I did not feel he

> wished to appeal. However, now in retrospect, and considering his level of education as listed in the plea agreement, I should have been clearer and specifically inquired of Mr. Moreno about his intent to appeal.

Id. The court insured that the defendant received a copy of his counsel's affidavit by having the clerk serve the affidavit at both the Texas correctional facility where he had been incarcerated and the Kansas facility where the defendant was being housed during the time of his resentencing. The defendant has not filed a response to counsel's affidavit nor requested a hearing on this matter.

In its prior order, the court observed that the factors of prejudice, length of delay and good faith favored a finding of excusable neglect. Because "'fault in the delay remains a very important factor–perhaps the most important single factor–in determining whether neglect is excusable,'" *United States v. Torres*, 372 F.3d at 1163 (quoting *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995)), the court, however, stayed its finding until the parties had an opportunity to make a record on the reason for the delay. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. at 382-84, the Court held that an attorney's inadvertent failure can constitute excusable neglect. Interpreting the plain meaning of the phrase "excusable neglect," the Court concluded, "Congress plainly contemplated that the courts would be permitted, [when] appropriate, to accept late

filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id*. at 388.

The court finds that the reason for the defendant's delay in filing the notice of appeal was not his counsel's inadvertence, mistake or carelessness in following through on the defendant's request. In his motion, the defendant asserts without explanation or elaboration that at the resentencing hearing he asked his appointed counsel to file an appeal. (Dk. 93). The motion is silent as to any efforts taken by the defendant to insure that his counsel filed the appeal. In his notice of appeal, the defendant also included the bare assertion: "I informed my legal counsel of my desire to appeal the judgement by district court and he did not file a motion on my behalf." (Dk. 86). This cursory and blanket assertion of blame is not a credible reason for the delay. "A defendant has the burden of establishing sufficient reason for the failure to comply with the filing requirements." *United States v. Chavez*, 17 Fed. Appx. 847, *849, 2001 WL 950272, **2 (10th Cir. 2001) (citing *United States v. Lucas*, 597 F.2d 243, 245 (10th Cir. 1979)).

Not only does he not recall the defendant ever telling him to file a notice of appeal, but defense counsel does not recall asking the defendant

specifically about wanting to file an appeal.[1] Counsel never had the impression that the defendant wanted to take an appeal. Counsel's understanding of the defendant's wishes was based not only on what was said at resentencing but also on what was said three days later in another conversation. The notice of appeal was filed almost a month after this last conversation with counsel, and there is nothing of record to indicate the defendant ever attempted later to communicate with his appointed counsel about an appeal. The court finds that defense counsel did not file an appeal because the defendant never requested this from counsel. Thus, the defendant has not carried his burden of proving a sufficiently credible and persuasive reason for the delay to meet the requirement of excusable neglect.

IT IS THEREFORE THE FINDING OF THIS COURT that the defendant's failure to comply with the filing requirements of Fed. R. App. P. 4(b)(1)(A)(i) was not due to excusable neglect.

IT IS FURTHER ORDERED that the clerk of the district court shall supplement the preliminary appellate record by transmitting to the Tenth Circuit copies of all documents filed and this order entered as a result of the partial remand.

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[1]The court fully advised the defendant at resentencing of his right to appeal his sentence and his right to request the clerk of the court to prepare and file a notice of appeal on his behalf.

Dated this ___ day of February, 2005, Topeka, Kansas.

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Sam A. Crow, U.S. District Senior Judge