

No. _____

In The
Supreme Court of the United States

GARLIN RAYMOND FARRIS,
a/k/a G,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-4142

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GARLIN RAYMOND FARRIS, a/k/a G,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:18-cr-00099-RJC-DCK-1)

Submitted: January 26, 2021

Decided: February 3, 2021

Before WILKINSON and WYNN, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Michael W. Patrick, LAW OFFICE OF MICHAEL W. PATRICK, Chapel Hill, North Carolina, for Appellant. R. Andrew Murray, United States Attorney, Charlotte, North Carolina, Amy E. Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Garlin Raymond Farris appeals his jury conviction for various drug offenses and resulting 288-month sentence. He argues that the district court abused its discretion in denying his motion for extension of time to file a Fed. R. Crim. P. 33 motion for new trial and that the district court clearly erred in applying an offense level enhancement for his role in the offense under U.S. Sentencing Guidelines Manual § 3B1.1(b) (2018). We affirm.

Farris challenges the district court's denial of his motion for extension of time to file a Rule 33 motion for new trial based on ineffective assistance of counsel and the dismissal of his Rule 33 motion. The district court premised its denial on the determination that Farris failed to establish excusable neglect under Fed. R. Crim. P. 45(b)(1)(B). We review this determination for abuse of discretion. *See United States v. Cates*, 716 F.3d 445, 448 (7th Cir. 2013) (stating that review of excusable neglect determination under Fed. R. Crim. P. 45(b)(1)(B) is for abuse of discretion); *see also United States v. Breit*, 754 F.2d 526, 528-29 (4th Cir. 1985) (applying abuse of discretion standard to assess claim that criminal defendant's delay in filing notice of appeal was excusable neglect).

In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), the Supreme Court set forth the factors to be considered when determining whether a late filing is due to excusable neglect: "the danger of prejudice [to the opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." The determination of whether

neglect is excusable “is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Id.* Moreover, [t]he *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import.” *United States v. Munoz*, 605 F.3d 359, 372 (6th Cir. 2010) (internal quotation marks omitted); *see also Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 534 (4th Cir. 1996) (holding in a civil case that “[t]he most important of the factors identified in *Pioneer* for determining whether neglect is excusable is the reason for the [delay]” (internal quotation marks omitted)).

Here, Farris’ motion was filed seven months after the time period in Rule 33 expired and nearly five months after the post-verdict substitution of counsel. Farris offered no excuse for the delay other than a threadbare assertion of excusable neglect. Given that the “critical” factor in the inquiry—the reason for Farris’ delay—weighs against him, Farris has not established that the district court abused its discretion by concluding that he failed to establish his delay was excusable. *Munoz*, 605 F.3d at 372.

Next, Farris challenges the district court’s imposition of the three-level enhancement under § 3B1.1(b) for his role in the offense. We review the district court’s application of the enhancement under § 3B1.1(b) for clear error. *See United States v. Steffen*, 741 F.3d 411, 414 (4th Cir. 2013). The enhancement applies if a defendant managed or supervised—but was not an organizer or leader of—participants in a criminal activity that involved at least five people or was “otherwise extensive.” USSG § 3B1.1(b) & cmt. n.2; *see United States v. Wolf*, 860 F.3d 175, 198 (4th Cir. 2017). Managing or supervising even one participant is sufficient for application of the

enhancement. *See Steffen*, 741 F.3d at 415-16. We conclude that the district court did not err in determining that Farris exercised sufficient control over participants in the conspiracy for the enhancement to apply.

Finally, Farris, who is represented by counsel, seeks to file a pro se supplemental brief. However, “an appellant who is represented by counsel has no right to file pro se briefs or raise additional substantive issues in an appeal.” *United States v. Cohen*, 888 F.3d 667, 682 (4th Cir. 2018). We therefore deny Farris’ motion to file a supplemental pro se brief.

We affirm the district court’s judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: March 29, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4142
(3:18-cr-00099-RJC-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GARLIN RAYMOND FARRIS, a/k/a G

Defendant - Appellant

O R D E R

The court denies the petition for rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Further, the court denies the motion to relieve counsel and the motion to file extended papers.

Entered at the direction of the panel: Judge Wilkinson, Judge Wynn, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:18-CR-00099-RJC-DCK

USA)
)
v.) ORDER
)
GARLIN RAYMOND FARRIS)
)

THIS MATTER is before the Court on the defendant's Motion to Extend the Time to File a Motion for a New Trial Pursuant to Rule 33, (Doc. No. 97); his Motion for New Trial Pursuant to Rule 33, (Doc. No. 98); and the government's response in opposition, (Doc. No. 101).

The defendant was found guilty of three drug trafficking offenses by a jury on April 4, 2019. (Doc. No. 61: Verdict). His appointed trial counsel filed a Renewed Motion for Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure on April 8, 2019. (Doc. No. 64). The defendant sent a letter to the Court on June 18, 2019, informing counsel that her services were no longer desired based on her alleged "completely ineffective" assistance, which documented specific complaints about her decisions during the trial. (Doc. No. 67). Current counsel was appointed on July 2, 2019, to replace trial counsel after a hearing. On August 22, 2019, counsel moved to adopt trial counsel's timely filed Renewed Motion for Judgment of Acquittal filed. (Doc. No. 79). The Court granted the motion to adopt, but denied the motion for acquittal on September 6, 2019. (Doc. No. 82: Order).

On October 11, 2019, the Court scheduled the case for a sentencing hearing on November 18, 2019. Counsel moved to continue sentencing until mid-January 2020 to research and address issues raised by the defendant, including the filing of a motion for new trial, (Doc. No. 95), which the Court granted, (Doc. No. 96: Order). On November 27, 2019, counsel filed the instant motions seeking an extension of time based on excusable neglect to file a motion for new trial alleging ineffective assistance by trial counsel. (Doc. Nos. 97, 98). The government objects to the new trial motion as untimely, not warranted by excusable neglect, and lacking merit. (Doc. No. 101).

Rule 33(a) of the Federal Rules of Criminal Procedure allows a court to vacate a judgment and grant a new trial if the interest of justice so requires. However, a motion based on grounds other than newly discovered evidence must be filed within fourteen days of the verdict or finding of guilty. Fed. R. Crim. P. 33(b)(2). The Fourth Circuit has definitively stated that a motion for new trial based on ineffective assistance of counsel must be brought within the time limits in Rule 33. United States v. Smith, 62 F.3d 641, 648, 650-51 (4th Cir. 1995). The appellate court continues to apply Smith to affirm the denial of untimely Rule 33 motions. See e.g. United States v. Burgess, --- F. App'x ---, at *1 (4th Cir. Dec. 19, 2019) (“The motion, therefore, was untimely, and we affirm the district court’s denial on the ground that it lacked jurisdiction to hear the motion.”); United States v. Gooding, 594 F. App’x 123, 127 n. 4 (4th Cir. 2014) (motion for new trial based on ineffective assistance “must be filed” within 14 days of verdict); United States v.

Barbee, 524 F. App'x 15, 17 (4th Cir. 2013) ("[T]he time limits set forth in Rule 33 are jurisdictional.").

Here, the defendant admits his motion for new trial under Rule 33 is untimely. (Doc. No. 97: Motion to Extend at 2). Because the government objects on that basis, the Court must deny the Motion to Extend and dismiss the Motion for New Trial as time-barred. Eberhart v. United States, 546 U.S. 12, 17-18 (2005) (finding government waived timeliness objection to Rule 33 motion by not raising it, but holding that "district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked"); see also United States v. Hyman, 884 F.3d 496, 499 (4th Cir. 2017) (under Eberhart, when the government objects to untimely filing, the court's duty to dismiss is mandatory).

Even if the Court were to consider the extending the time under Rule 45(b)(1)(B), it would find that the defendant has not established excusable neglect in this case. The defendant was aware of trial counsel's performance in early April 2019. Prior to that time, he had shown proficiency for informing the Court of his needs and dissatisfaction with prior counsel. (Doc. No. 14 (requesting weekly access to law library); Doc. No. 18 (alleging retained counsel had conflict of interest)). Yet, he did not allege ineffective assistance of trial counsel until June 18, 2019, two months after the time period in Rule 33 expired. (Doc. No. 67). Although the defendant has not met the requirements to seek a new trial under Rule 33, he will have the opportunity to present his claim of ineffective assistance on direct appeal

and, if necessary, on collateral attack under 28 U.S.C. § 2255. Smith, 62 F.3d at 651.

IT IS, THEREFORE, ORDERED that the defendant's Motion to Extend the Time to File a Motion for a New Trial Pursuant to Rule 33, (Doc. No. 97) is **DENIED**, and his Motion for New Trial Pursuant to Rule 33, (Doc. No. 98), is **DISMISSED**.

Signed: January 15, 2020



Robert J. Conrad, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:18-CR-00099-RJC-DCK

USA)
)
 v.)) ORDER
)
 GARLIN RAYMOND FARRIS)
)

THIS MATTER is before the Court on the defendant's pro se Renewed Motion for a New Trial pursuant to Rule 33. (Doc. No. 112).

The defendant alleges his appointed trial counsel was constitutionally ineffective. However, he is currently represented by a different appointed lawyer. (Termination and Appointment of Counsel Oral Order, June 28, 2019). The defendant recently informed a magistrate judge that he did not wish to represent himself and affirmed his desire to be represented by counsel. (Inquiry into the Status of Counsel, Jan. 21, 2020). Local Criminal Rule 47.1(g) requires motions to be filed by counsel unless a defendant has formally waived his right to counsel before a judicial officer.

IT IS, THEREFORE, ORDERED, that the defendant's pro se motion is **DISMISSED**.

The Clerk is directed to certify copies of this order to the defendant, counsel for the defendant, and to the United States Attorney.

Signed: January 30, 2020



Robert J. Conrad, Jr.
United States District Judge

