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United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 3, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FLOYD PRESTON MILLER, III,

Defendant - Appellant.

No. 24-7046

(D.C. Nos. 6:21-CV-00216-RAW &
6:17-CR-00075-RAW-1)
(E.D. Okla.)

ORDER

This matter is before the court upon the opening of this appeal and a review of the district court docket, which review has revealed a potential jurisdictional defect. Specifically, appellant Floyd Miller, III's notice of appeal appears untimely. As a result, the court is considering this matter for summary dismissal. *See* 10th Cir. R. 27.3(B).

Mr. Miller's notice of appeal [ECF No. 93] appears to indicate that he wishes to appeal the judgment entered by the district court on December 15, 2023 [ECF No. 91]. It appears Mr. Miller filed his notice of appeal on May 23, 2024. [ECF No. 93].

It appears that Mr. Miller's notice of appeal was due, at the latest, on or before February 13, 2024 (i.e., sixty (60) days after December 15, 2023). *See* Fed. R. App. P. 4(a)(1)(B) (notice of appeal in a civil case must be filed within 60 days after entry of the judgment or order appealed from when at least one party is a federal actor).

As noted above, Mr. Miller did not file his notice of appeal until May 23, 2024. [ECF No. 93]. The court notes that the envelope containing the notice of appeal appears to have been postmarked on May 15, 2024. However, even assuming that the notice of appeal should be considered filed on May 15, 2024 under the so-called prison mailbox rule, *see* Fed. R. App. P. 4(c), it still appears untimely.

The court further notes that Mr. Miller's notice of appeal describes circumstances that might justify the filing—in the district court—of a motion under Federal Rule of Appellate Procedure 4(a)(5) and/or Federal Rule of Appellate Procedure 4(a)(6). Only the district court—and not this court—has authority to extend or reopen the time to appeal. *Alva v. Teen Help*, 469 F.3d 946, 950 (10th Cir. 2006) (only the district court can extend the time to file a notice of appeal, and only under limited circumstances). To date, Mr. Miller has filed neither a Rule 4(a)(5) motion nor a Rule 4(a)(6) motion.

Filing a timely notice of appeal is “mandatory and jurisdictional.” *Bowles v. Russell*, 551 U.S. 205, 207 (2007). “This Court can exercise jurisdiction only if a notice of appeal is timely filed.” *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006). As a result, this appeal appears untimely and the court is considering it for summary dismissal. *See* 10th Cir. R. 27.3(B).

On or before June 24, 2024, Mr. Miller may file a memorandum brief setting forth any basis in law or fact for the court to consider this appeal timely filed. Mr. Miller may file only one response to this order, and his responding memorandum brief shall comply with the requirements of Tenth Circuit Rule 27.3(B). If Mr. Miller does not file a

memorandum brief on or before June 24, 2024, the court may dismiss this appeal without any additional notice. *See* 10th Cir. R. 42.1.

Briefing on the merits in this appeal is suspended pending further order of this court. *See* 10th Cir. R. 27.3(C).

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal line extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

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FILED
United States Court of Appeals
Tenth Circuit

June 27, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FLOYD PRESTON MILLER, III,

Defendant - Appellant.

No. 24-7046
(D.C. No. 6:21-CV-00216-RAW)
(E.D. Okla.)

ORDER

Before **HARTZ, BACHARACH**, and **ROSSMAN**, Circuit Judges.

This appeal is before us sua sponte to consider the court's jurisdiction over this appeal. *See Hill v. Vanderbilt Cap. Advisors, LLC*, 702 F.3d 1220, 1223 (10th Cir. 2012) (this court has "an independent duty to examine [its] own jurisdiction").

The district court entered judgment against appellant Floyd Preston Miller, III on December 15, 2023. Mr. Miller did not file his notice of appeal until—at the earliest—May 15, 2024, after the 60-day filing deadline had expired.

We entered a show cause order that required Mr. Miller to explain why appellate jurisdiction was present in this appeal. Upon consideration of Mr. Miller's response to the show cause order, the district court docket, and the applicable law, we conclude we lack jurisdiction for the reasons articulated below.