UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

-against-

DAVID GOTTERUP,

Defendant.
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MEMORANDUM & ORDER

15-CR-498-1 (NGG)

NICHOLAS G. GARAUFIS, United States District Judge.

On June 16, 2016, Defendant David Gotterup entered a guilty plea to one count of conspiracy to commit mail, wire, and bank fraud. (June 16, 2016, Min. Entry (Dkt. 46); see Indictment (Dkt. 1).) Pursuant to the United States Sentencing Guidelines, Defendant's guidelines range was 135 months to 168 months. (Mar. 7, 2017, Sent'g Hr'g Tr. (Dkt. 66) 8:21-25.) On March 7, 2017, the court sentenced Defendant to 180 months' imprisonment, followed by a 60-month term of supervised release. (J. (Dkt. 59).) Defendant subsequently moved for reconsideration of his sentence. (Mot. for Recons. (Dkt. 62).) The court granted Defendant's motion for reconsideration and held another sentencing hearing. (See Apr. 19, 2017, Min. Entry (Dkt. 69); Apr. 19, 2017, Resent'g Hr'g Tr. (Dkt. 89).) At the resentencing hearing, the court sentenced Defendant to 135 months' imprisonment—a term of custody that was 48 months (4 years) lower than that originally imposed by the court—followed by a 60-month term of supervised release. (Am. J. (Dkt. 76).) The Amended Judgment was entered on May 30, 2017, and docketed on June 1, 2017. (See id. at 1.)

On June 16, 2017, Defendant, appearing pro se,[1] filed a notice of appeal. (Not. of Appeal (Dkt. 78).) Defendant's notice of appeal was filed three days after his 14-day period to file a

[1] Defendant was represented by counsel throughout the pendency of his criminal case.

notice of appeal had expired. See Fed. R. App. P. 4(b)(1). Recognizing this infirmity, Defendant moved for an extension of time to file his notice of appeal pursuant to Federal Rule of Appellate Procedure 4(b)(4) (the "Motion").[2] (Mot. for Extension of Time ("Mot.") (Dkt. 79).) Defendant's proffered reason for not filing a timely notice of appeal is "inef[fective] couns[el]." (Id. at 1.) For the following reasons, Defendant's Motion is GRANTED.

I. DISCUSSION

Federal Rule of Appellate Procedure 4(b)(4) permits district courts to grant leave to file late appeals "[u]pon a finding of excusable neglect or good cause." Fed. R. App. P. 4(b)(4). The court first finds that there is not "good cause" to warrant an extension of time here as there is no indication that the need for an extension was "occasioned by something that [was] not within the control of [Defendant]." Fed. R. App. P. 4(a)(4) advisory committee's note to 2002 amendment (stating that "[t]he good cause standard applies in situations in which there is no fault—excusable or otherwise"—and explaining that "[i]f, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek [an extension]").

Whether excusable neglect exists "is at bottom an equitable [decision]." United States v. Hooper, 9 F.3d 257, 259 (2d Cir. 1993) (internal quotation marks omitted). Courts are to consider the following factors in making such a determination: (1) "the danger of prejudice to the [non-movant]"; (2) "the length of the delay and its potential impact upon judicial proceedings"; (3) "the reason for the delay, including whether it was in the reasonable control of the movant"; and (4) "whether the movant acted in good faith." Id. (alteration in original) (citing the factors

[2] Defendant submitted a form motion that cites Federal Rule of Appellate Procedure 4(a)(5). That section of the rule pertains only to appeals in civil cases, however. Motions for extensions of time to file a notice of appeal in a criminal case shall be made pursuant to Federal Rule of Appellate Procedure 4(b)(4). The court construes the Motion as having been made pursuant to Rule 4(b)(4). See Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) ("It is well established that the submissions of a pro se litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest." (internal quotation marks and citation omitted)).

articulated in Pioneer Inv. Servs. Co. v. Brunswick Assocs. LP, 507 U.S. 380 (1993)). The Second Circuit Court of Appeals has clearly stated that "the equities will rarely if ever favor a party who 'fail[s] to follow the clear dictates of a court rule,'" and thus "a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test." Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366-67 (2d Cir. 2003) (quoting Canfield v. Van Atta Buick/GMC Truck, Inc., 127 F.3d 248, 250-51 (2d Cir. 1997) (per curiam)).

Here, the court finds that the prejudice to the non-moving party, the Government, is "negligible," as the delay is minimal. See id. at 366 (noting that "the prejudice to the non-movant will often be negligible, since the Rule requires a . . . motion [for an extension of time] to be filed within thirty days of the last day for filing a timely notice of appeal" (internal citation omitted)). Furthermore, Defendant's notice of appeal was filed only three days late and, accordingly, there is no apparent "impact on judicial proceedings." Hooper, 9 F.3d at 259. Moreover, there is no evidence that Defendant is proceeding in bad faith.

This leaves consideration of the third and perhaps the most critical factor: Defendant's reason for missing the filing deadline. See Duke v. Cty. of Nassau, 63 F. App'x 558, 561 (2d Cir. 2003) (summary order) (holding that the reason for the delay is often the "most prominent factor" under the Pioneer test); Silivanch, 333 F.3d at 366 (explaining that the Second Circuit "focuse[s] on the third factor," i.e. the reason for the delay). For the reasons stated below, the court finds that Defendant has articulated sufficiently convincing reasons for his late filing to warrant the court granting an extension of time.

A. The August 8, 2017, Hearing

The court held a hearing on August 8, 2017 (the "Hearing"), to determine why Defendant delayed in filing his notice of appeal. (See Aug. 8, 2017, Min. Entry.) The Government, Defendant, and Defendant's trial counsel ("Trial Counsel"), Joseph R. Conway and Matin

Emouna, were present at the Hearing. (See id.) The parties provided the following explanation for Defendant's late filing.

Defendant stated that directly after his resentencing hearing, he advised Trial Counsel that he wished to appeal his sentence and directed Mr. Conway to file a notice of appeal on his behalf. (See Aug. 8, 2017, Hr'g Tr. ("Tr.") 3:12-13 ("[F]rom the time I got resentenced, I advised Mr. Conway that I wanted to file the appeal."); Tr. 10:14-20 (Defendant explaining that on "the day of the second sentencing[,]" he instructed Mr. Conway to file a notice of appeal).) Mr. Conway confirmed that Defendant's representation is consistent with his recollection. (See Tr. 4:6-9 ("[You] sentenced Mr. Gotterup on April 29. He did state his intention to [Trial Counsel] right there after that he would wish to appeal.").)[3] Mr. Conway advised the court at the Hearing that he explained to his client that he could not file a notice of appeal until the Amended Judgment was docketed. (Tr. 4:6-15.) Once the Amended Judgment was docketed on June 1, 2017, Mr. Conway sent an email to Defendant, explaining how the appellate waiver in Defendant's plea agreement operates. (Tr. 4:12-15.) At that point, Defendant expressed his desire to appeal on the grounds of ineffective assistance of counsel. (Tr. 4:16-18.)

This is where Defendant's and Mr. Conway's recollection of the relevant events diverges. Mr. Conway claims that once Defendant indicated his desire to appeal on the grounds of ineffective assistance of counsel, Mr. Conway informed Defendant that "he could file a pro se appeal and ask for new counsel." (Tr. 4:16-19.) Mr. Conway further asserts that he helped Defendant's brother to complete the notice of appeal form, provided his brother with the filing fee instructions, and told him where to file the form. (Tr. 4:20-23.) Regrettably, Defendant's

[3] (See also Tr. 5:14-15 ("[I]t was Mr. Gotterup's desire to appeal from day one."); Tr. 6:3-4 ("His desire has always been to appeal, there is no denying that.").)

brother was late in filing the notice of appeal "due to work reasons and family reasons." (Tr. 8:13-17.)

Defendant, on the other hand, states that he "was always under the impress[ion] that Mr. Conway was filing the appeal and [that] the appeal was in motion." (Tr. 8:20-25.) Defendant believed that the "only delay" was the filing fee that his brother "went and paid." (Id.) Defendant maintains that he "didn't actually know that [he] was filing a pro se motion" until he appeared in court for the Hearing. (Tr. 3:9-15.) "To be completely honest, I thought I was being represented by Mr. Conway in my appeal." (Id.; see also Tr. 3:20-22 ("I was always under the impression that [Mr. Conway] was my attorney during the presentation of the appeal.").)

B. Findings on Excusable Neglect

The court finds that there was excusable neglect justifying Defendant's late filing due to the fact that Defendant reasonably believed that Trial Counsel was handling the filing of his notice of appeal. See, e.g., United States v. James, No. 03-CR-1048 ILG, 2007 WL 3232219, at *3 (E.D.N.Y. Oct. 31, 2007) ("The reason for the delay, that [Defendant] believed that his attorney would file a timely notice of appeal and discovered only after the ten-day period for filing such notice had elapsed that it had not been filed, is a reasonable one, particularly in light of the fact that [Defendant] was incarcerated at the time."); cf. Duke, 63 F. App'x at 561 (affirming district court finding of excusable neglect where "the filing delay was caused by a miscommunication between trial counsel and appellate counsel over who had responsibility for the notice of cross-appeal").

Immediately after Defendant's resentencing hearing, Defendant stated his intention to appeal and instructed Trial Counsel to file a notice of appeal. There is no reason why Trial Counsel could not have filed Defendant's notice of appeal that same day. Mr. Conway's belief that he had to wait to file the notice of appeal until the Amended Judgment was docketed is

incorrect. Federal Rule of Appellate Procedure 4(b)(2) provides that "[a] notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The Supreme Court has expressly held that Rule 4(b)(2) applies "to a notice of appeal filed after a sentence has been announce[d] and before the judgment imposing the sentence is entered on the docket" (internal quotation marks omitted). Manrique v. United States, 137 S. Ct. 1266, 1273 (2017). Accordingly, nothing precluded Mr. Conway from following his client's directive and filing the notice of appeal just after the resentencing hearing.

Mr. Conway's later attempts to shift responsibility for the filing to Defendant understandably confused Defendant. Mr. Conway represents that after the Amended Judgment was docketed, he told Defendant that he would need to file his notice of appeal pro se. (See Tr. 12:15-19.) Defendant avers that Mr. Conway "never said anything about a pro se representation." (Tr. 12:22-13:1.) Even assuming that Mr. Conway's version of the facts is true, Mr. Conway's actions thereafter proved to be inconsistent with his directive that Defendant should proceed pro se. First, by Mr. Conway's own account, Mr. Conway invited Defendant's brother to his law office to help him fill out the notice of appeal form. (Tr. 4:20-23; 6:22-25.) It is not as though Mr. Conway extricated himself from the filing entirely. As such, Defendant's belief that his brother "wasn't filing a notice of appeal" and was merely "pick[ing] up paperwork [from Mr. Conway] to drop off at the court," was entirely reasonable. (Tr. 15:4-9.)

Second, after the Amended Judgment was entered, Mr. Conway continued to represent Defendant with respect to the restitution portion of his case. At the Hearing, Mr. Conway appeared to argue that his representation ended when the Amended Judgment was docketed on June 1, 2017 (see Tr. 11:8-14); however, the Government represents that, as late as June 23, 2017, Mr. Conway was still acting as counsel for Defendant. (See Aug. 8, 2017, Ltr. from Gov't

(Dkt. 90) (explaining that on June 23, 2017, Mr. Conway provided Defendant's consent to the Government's restitution request).) Mr. Conway does not dispute the Government's representation. (See Aug. 9, 2017, Ltr. from J. Conway (Dkt. 91).) Mr. Conway misled the court by stating that once the Amended Judgment was filed, his "services to [Defendant] were over." (Tr. 10:22-11:14.) In reality, Mr. Conway continued to represent Defendant with respect to one aspect of Defendant's case—the Government's restitution request—but declined to represent Defendant with respect to another aspect of that same case—the filing a notice of appeal. This splitting of hairs understandably confused Defendant. It is entirely reasonable for a defendant to think that an attorney handling one aspect of the case is handling the case in its entirety.

Mr. Conway seeks to justify his refusal to file the notice of appeal by stating that his retainer agreement with Defendant did not contemplate appellate action. (See Tr. 6:16-21, 8:6-12, 11:8-14.) He also claims that he did not file the notice of appeal because of the grounds upon which Defendant wished to appeal—i.e. ineffective assistance of counsel. (Tr. 4:16-19.) Mr. Conway appears to suggest that he was precluded from filing a notice of appeal because he could not represent Defendant at the appellate level, as Defendant sought to argue that he was ineffective. This is simply not the case. As the court stated at the Hearing, filing a notice of appeal does not require trial counsel to continue on as counsel before the Court of Appeals: "It only requires to leave the door open for an appeal. If . . . you didn't want to represent [Defendant] in the Court of Appeals, you could have advise[d] him and he would either find another lawyer to retain or he could seek CJA representation in the Court of Appeals, or some other representation by the Federal Defenders I suppose if he qualified." (Tr. 11:15-24.) Moreover, a client's potential complaint as to the quality of his representation does not abrogate his attorney's obligation to protect the client's right to appeal.

There is no question that Trial Counsel could have and should have filed a notice of appeal on behalf of Defendant. Filing such a document would have been a perfunctory task for Mr. Conway. Instead, Mr. Conway abandoned his client and left the task of filing a notice of appeal to his incarcerated client and Defendant's brother who, importantly, is not an attorney. (See Tr. 15:10-13 (Defendant indicating to the court that his brother is not a lawyer).) Mr. Conway previously instructed the court that he served three judges on this court and was an Assistant United States Attorney in the Eastern District of New York for fifteen years. (See Apr. 19, 2017, Resent'g Hr'g Tr. 24:18-25.) During his time at the United States Attorney's Office for the Eastern District of New York, he served as Chief of the Long Island Criminal Division. He has been a member of the Criminal Justice Act panel in this district since January 2005. As such, he quite obviously aware of trial counsel's obligation to protect the appellate rights of a criminal defendant by timely filing a notice of appeal.

Based on Mr. Conway's conduct, Defendant has a plausible claim of malpractice against his attorney. Cf. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (noting in the context of an ineffective assistance of counsel claim that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable"); id. ("[A] defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes."). Plainly stated, Mr. Conway's refusal to file Defendant's notice of appeal is inexcusable as a matter of ethics and professionalism. As such, the court intends to refer this matter to the Committee on Grievances pursuant to Local Rule 1.5(f) as well as the Presiding Justice of the Appellate Division of the New York Supreme Court for the Second Judicial Department.

II. CONCLUSION

Defendant's motion for an extension of time (Dkt. 79) is GRANTED. The Clerk of Court is respectfully DIRECTED to mail a copy of this Order to pro se Defendant.

SO ORDERED.

/s Nicholas G. Garaufis

NICHOLAS G. GARAUFIS
United States District Judge

Dated: Brooklyn, New York
August 11, 2017