

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

FEB 25 1988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FILBERT ALFONSO ROMERO,
Defendant-Appellant.

ROBERT L. HOECKER
Clerk

No. 87-1358
(D.C. No. 86-CR373)
(D. N.M.)

ORDER AND JUDGMENT

Before MOORE and TACHA, Circuit Judges, and BRIMMER, Chief Judge.*

*Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8. The cause is therefore ordered submitted without oral argument.

Defendant-appellant was charged by indictment with being an accessory after the fact. Following a jury trial, he was found guilty of the lesser offense of misprison of a felony.

On February 20, 1987, defendant was sentenced to a term of three years imprisonment, with all but six months of confinement

suspended. Further, the district court directed that defendant be placed on probation for two and one-half years subject to a special condition of probation that defendant pay restitution to the victim. The judgment was entered on the docket on February 23, 1987.

On March 3, 1987, the district court entered, sua sponte, an amended judgment and commitment which clarified certain provisions of the sentence. Defendant's notice of appeal was filed March 13, 1987.

The threshold question is whether this court has appellate jurisdiction. The record shows that defendant's notice of appeal from the judgment of conviction and sentence imposed February 20, 1987, was not filed within the appeal period prescribed by Fed. R. App. P. 4(b).

It is well established that a timely notice of appeal is both mandatory and jurisdictional. Robinson v. United States, 345 F.2d 1006, 1007 (10th Cir. 1965).

Possibly, counsel's time calculations for filing a proper notice of appeal were adversely affected by the sua sponte amendment of the judgment and commitment.

Under the circumstances, we conclude that this matter should be remanded to the district court in order to allow defendant a fair opportunity to make an application for an extension of time pursuant to Rule 4(b). See United States v. Lucas, 597 F.2d 243, 245 (10th Cir. 1979). If the district court grants an extension of time, this appeal will be automatically reinstated upon the

receipt by the clerk of this court of the record of the proceedings on remand.

The matter is REMANDED, and the appeal is DISMISSED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM