FILED: April 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1766
(1:17-cv-00070-IMK)

DONTE PARRISH

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

PROFESSOR BRYAN LAMMON

Amicus Supporting Rehearing Petition

O R D E R

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Harris, Richardson, Quattlebaum, Rushing, and Heytens voted to deny rehearing en banc. Judges King, Gregory, Wynn, Thacker, Benjamin, and Berner voted to grant rehearing en banc.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Nwamaka Anowi, Clerk

NIEMEYER, Circuit Judge, in support of denial of the supplemental petition for rehearing:

The issue in this case does not rise to the level that would justify an en banc rehearing, as it involves a straightforward application of 28 U.S.C. § 2107(c), which establishes a jurisdictional requirement for effecting an appeal, and Federal Rule of Appellate Procedure 4(a)(6), which implements § 2107(c).

When Donte Parrish filed a notice of appeal in this case that was over two months late, the untimeliness of his notice precluded us, as a jurisdictional matter, from considering his appeal. But upon receiving his explanation claiming that he had not timely received a copy of the district court's judgment dismissing his case, we treated his untimely notice of appeal as a motion to reopen the appeal period under Rule 4(a)(6) and remanded the case to the district court for consideration of that motion. *Parrish v. United States*, 827 F. App'x 327, 327 (4th Cir. 2020) (per curiam); 28 U.S.C. § 2107(c) (providing district courts with authority to "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal"); Fed. R. App. P. 4(a)(6) (similarly authorizing a district court to "reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered").

On remand, after concluding that Parrish satisfied the requirements for reopening the time for filing an appeal, the district court entered an order authorizing Parrish to file a notice of appeal within a 14-day window that commenced with the date of the court's order. The order provided, "the Court REOPENS the time for Parrish *to file his appeal* for fourteen (14) days *following the entry of this Order*." (Emphasis added). Despite the clear

language of the district court's order, Parrish never filed an appeal within the time specified. In such circumstances, we were required to dismiss the appeal for lack of jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (holding that a court of appeals was *without jurisdiction* when the appellant failed to file the appeal within 14 days, as required by § 2107(c), and instead filed his appeal 16 days after the district court's reopening order, as the district court itself had authorized). It is thus clear that the texts of § 2107(c) and Rule 4(a)(6) did not permit a resurrection of Parrish's earlier notice of appeal, which was rendered ineffective because it was not only filed late but also filed beyond the period where an extension could have been granted under Federal Rule of Appellate Procedure 4(a)(5). Rather, § 2107(c) and Rule 4(a)(6) authorized the court to reopen the time to file an appeal but *required* that the notice be filed within a specified time, *i.e.*, 14 days after the date *of the reopening order*.

In his opinion dissenting from the denial of en banc rehearing, Judge Gregory laments that applying Rule 4(a)(6) to deny Parrish the right to appeal forecloses "access to our Court" and is most likely to affect the "elderly, unhoused, detained, imprisoned, and differently abled," suggesting that they should not be bound by the rule's requirements. Yet, gracious as such a position is, we are not free to rely on graciousness to bypass jurisdictional requirements established by Congress, including those in § 2107(c). *See Bowles*, 551 U.S. at 214.

Resolution of Parrish's appeal thus involved a straightforward application of § 2107(c) and Rule 4(a)(6), which need not be reviewed en banc.

GREGORY, Circuit Judge, with whom Judges WYNN, THACKER, and BERNER join, dissenting from denial of Appellant's petition for rehearing en banc:

At its core, this case requires us to determine whether access to our Court should be foreclosed for failure to refile a notice of appeal during the newly reopened period following success under Rule 4(a)(6). Section 2107(c) and Rule 4(a)(6) authorize a district court to, in its discretion, reopen the appeal period where the moving party files a motion within the earlier of 180 days of the district court's judgment or 14 days of receiving notice of the judgment; and the court finds that the moving party did not receive notice of the judgment within 21 days of its entry, and that no party would be prejudiced by its grant of the motion. 28 U.S.C. § 2107. The "hail mary" afforded by this rule, as compared to Rule 4(a)(5), is therefore permitted only under exceptional circumstances, rather than following a mere missed deadline or common mistake.

Given the infrequency with which district courts fail to issue notice of their judgments, Rule 4(a)(6) is usually invoked under circumstances where a party relocates, is relocated, or is otherwise unable to receive mail at the address listed with the court. Such relief is therefore most commonly, if not exclusively, sought by pro se litigants who were unable to notice their intent to seek our review during the statutory appeals period, often due to no fault of their own.

Both 28 U.S.C. § 2107(c) and the Federal Rules of Appellate Procedure are silent regarding whether an untimely notice of appeal may be validated by a district court's subsequent grant of a Rule 4(a)(6) motion. They also fall short in answering whether a

single filing may serve as both a motion to reopen the appeal period and a notice of appeal. As our sister circuit acknowledged, guidance from the Advisory Committee on the Federal Rules of Appellate Procedure appears necessary. *See Winters v. Taskila*, 88 F.4th 665, 671 (6th Cir. 2023) (collecting cases and stating that comment from the Advisory Committee "may be a profitable next stage for this debate"). Absent such guidance from the architects of the rules, however, it is no wonder that circuit courts and judges are split regarding the most appropriate course of action under the circumstances. The Fourth Circuit is no exception. Even a cursory review of our prior cases presenting this issue illustrates that our Court's treatment has not been uniform.

The Government contends that this issue will occur less frequently in the future as electronic filings and notifications become more prevalent. However, technological advances are often slow to reach members of our society unable to afford or access the luxuries those advances provide. The elderly, unhoused, detained, imprisoned, and differently abled are a few of the populations who may not be able to consistently access information electronically. Members of those populations and others similarly situated will presumably continue to rely on the protections of Rule 4(a)(6) despite the benefits that the era of electronic filing will unquestionably provide to others. More importantly, the infrequency of the occurrence of an issue does not speak to its significance and is not dispositive in determining whether en banc review should be granted.

Rule 35 of the Federal Rules of Appellate Procedure reserves en banc determinations for those instances necessary to secure uniformity of this Court's case law

or resolve a question of exceptional importance. This case meets both standards. Yet our Court has elected to close its door to litigants who fail to make a futile, likely duplicative filing within the 14 days following the often-hard-fought success of a Rule 4(a)(6) motion. As a result, litigants fortunate enough to obtain Rule 4(a)(6) relief will barely finish celebrating the success of the motion before facing the defeat of dismissal. In opting to require more of those who obtain relief under Rule 4(a)(6) than we do of those who obtain relief pursuant to Rule 4(a)(5), we seem to be requiring more of those who have less.

The Court's decision here demonstrates that even where both parties agree that the majority's jurisdictional conclusion was erroneous, en banc review may be denied where the issue will impact only a few individuals, despite the gravity of the impact on those it affects. I must dissent.