

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 14, 2013

Lyle W. Cayce
Clerk

No. 12-50792

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN MICHAEL SHERWOOD,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 4:08-CV-28

Before KING, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

John Michael Sherwood, federal prisoner # 92334-024, moves for leave to proceed in forma pauperis (IFP) on appeal of the district court's denial of his motion to reopen the appeal period pursuant to Rule 4(a)(6) of the Federal Rules of Appellate Procedure. He argues that the district court abused its discretion in denying his motion because he met all of the requirements of Rule 4(a)(6). He asserts that he was transferred to the Winkler County Jail in Kermit, Texas, after the magistrate judge issued a writ of habeas corpus ad testificandum so

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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that he could attend an evidentiary hearing, that he was not served with a copy of the judgment at either his previous address in Illinois or at the jail in Texas, and that the docket sheet did not reflect that the judgment was served on him as required by Federal Rule of Civil Procedure 77(d)(1). Sherwood also contends that the clerk of court sent a copy of the judgment to the attorney appointed to represent him only at the evidentiary hearing and that the attorney failed to give him notice of the judgment or file a notice of appeal on his behalf.

Because Rule 4(a)(6) is permissive and compliance with Rule 4(a)(6) does not require the district court to grant the motion, we review the district court's denial of the motion for an abuse of discretion. *See In re Jones*, 970 F.2d 36, 39 (5th Cir. 1992). Given the totality of the circumstances, we discern no abuse of discretion. Sherwood did not submit proper notice of a change of address to the district court when he was transferred to Texas, even though he had properly changed his address on two previous occasions; the district court also found that he was properly served when the clerk of court sent notice of the judgment to the most recent address that he provided. *See Davis v. King*, 270 F. App'x 355, 356 (5th Cir. 2008); *Hurdsman v. Wackenhut Corrections Corp.*, 218 F.3d 744 (5th Cir. 2000). Because the district court's denial of Sherwood's motion does not rise to the level of an abuse of discretion, Sherwood has not shown that there is a nonfrivolous issue for appeal. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997); *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Accordingly, his motion for leave to proceed IFP on appeal is DENIED and the appeal is DISMISSED AS FRIVOLOUS. *See* 5TH CIR. R. 42.2. Because Sherwood has not shown that he will raise a substantial question on appeal or that he has a particular need for the transcript, his motion for a transcript of the evidentiary hearing at Government expense is also DENIED. *See* 28 U.S.C. § 753(f); *see Harvey v. Andrist*, 754 F.2d 569, 571 (5th Cir. 1985).