

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARLAND LIGHTFOOT, JR.,

Defendants.

ORDER

98-CR-113-C-01
02-C-187-C

Defendant has filed a notice of appeal from this court's order of October 13, 2004, denying his recent Fed. R. Civ. P. 60(b) motion. Because the notice is not accompanied by the \$255 fee for filing an appeal, I construe defendant's notice to include a request for leave to proceed in forma pauperis on appeal.

In determining whether plaintiff may appeal in forma pauperis, I must consider whether he is indigent and whether his appeal is taken in good faith. Defendant has not submitted an affidavit of indigency or a trust fund account statement so that I can assess his financial ability to pay the fee. Nevertheless, I must deny him leave to proceed under 28 U.S.C. § 1915 because I am certifying that his appeal is not taken in good faith.

Defendant's Rule 60(b) motion was legally frivolous. He argued that he was entitled

to relief from the order denying his § 2255 motion in light of the United States Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004). However, as I pointed out to defendant, Blakely does not apply to the constitutionality of the federal sentencing scheme under which he was sentenced and, even if it did, there has been no determination that Blakely has retroactive application to cases that were not pending when it was decided. An appeal from defendant's legally frivolous Rule 60(b) motion is necessarily in bad faith.

ORDER

IT IS ORDERED that defendant's request for leave to proceed in forma pauperis on appeal from this court's order of October 13, 2004, denying his motion brought pursuant to Fed. R. Civ. P. 60 is DENIED. I certify that defendant's appeal is not taken in good faith.

If plaintiff intends to challenge this court's certification that his appeal is not taken in good faith, he has 30 days from the date he receives this order in which to file with the court of appeals a motion for leave to proceed in forma pauperis on appeal. His motion

must be accompanied by a copy of the affidavit prescribed in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

Entered this 29th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge