

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

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

03-C-0364-C

00-CR-0092-C-01

v.

FILIMON SANDOVAL-GOMEZ,

Defendant.

Defendant Filimon Sandoval-Gomez has filed a notice of appeal from the denial of his motion brought pursuant to 28 U.S.C. § 2255. He has not paid the \$255 fee for filing his notice of appeal or requested a certificate of appealability, which is required if he is to take an appeal from the denial of a § 2255 motion. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I construe defendant's notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915 and a request for a certificate of appealability. Defendant's request for leave to proceed in forma pauperis on appeal will be denied for the same reason that I decline to issue a certificate of appealability,

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-

appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization “unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed. . . .” Defendant is not entitled to proceed on appeal in forma pauperis because I am declining to issue a certificate of appealability.

A certificate of appealability shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2). Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that “are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). Although defendant has not submitted a statement of the issues he wishes to raise on appeal or even asked expressly for a certificate of appealability, I will assume he wishes to appeal the ruling that he failed to show that his trial representation was constitutionally ineffective.

Defendant's challenge is without merit. I explained clearly in the order denying defendant's § 2255 motion why defendant's counsel's performance was not defective and why, in any event, defendant was not prejudiced by his counsel's failure to use an audiotape of defendant's deportation hearing at trial to show that defendant had not been told at the hearing that he could not reenter the United States. Even if no one told defendant that he

could not reenter, there was ample evidence to prove that defendant knew his reentry was illegal. Moreover, the law in the Seventh Circuit is now established that the government need not prove intent on the part of a defendant in order to prove a violation of 8 U.S.C. § 1326.

Because the issue defendant wishes to raise on appeal is not debatable among reasonable jurists, a court could not resolve the issue differently and the question is not adequate to deserve encouragement to proceed further, I am declining to issue a certificate of appealability.

Defendant has the right to appeal this order denying him a certificate of appealability.

ORDER

IT IS ORDERED that defendant Filimon Sandoval-Gomez's implicit requests for leave to proceed in forma pauperis on appeal and for a certificate of appealability are DENIED.

Entered this 10th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge