

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACK ERVAN III.,

Defendant.

ORDER

04-C-0240-C
99-CR-0106-C-03

Defendant Jack Ervan III has filed a notice of appeal and a request for a certificate of appealability 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 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. 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 was found eligible for court-appointed

counsel.

In this case, a reasonable person could not suppose that the appeal has some merit, as is required in order for the appeal to be taken in good faith. In dismissing defendant's § 2255 motion, I explained clearly that his § 2255 motion was untimely and that his segregation status and frequent transfers to new institutions were not the kind of extraordinary circumstances that would warrant equitable tolling of the one year statute of limitations. Defendant does not argue that this decision is erroneous. Instead, he argues that he is entitled to relief from his sentence. This is not the issue. Because defendant missed the deadline for filing his § 2255 motion in this court, he cannot simply bypass this court and argue his § 2255 claims in the court of appeals. He is limited to challenging the decision that his § 2255 motion is untimely, which he has not done. Therefore, I am certifying that the appeal is not taken in good faith.

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). As noted above, defendant supports his request for a certificate of appealability with a lengthy memorandum outlining

why his trial counsel was constitutionally ineffective. Because these arguments cannot be raised on appeal and because the question whether defendant's § 2255 motion is timely is not a question that implicates defendant's constitutional rights, I cannot find that defendant has made a substantial showing of the denial of a constitutional right. Therefore, I decline to issue a certificate of appealability.

ORDER

IT IS ORDERED that defendant Jack Ervan's request for a certificate of appealability is DENIED. FURTHER, IT IS CERTIFIED that defendant's appeal is not taken in good faith.

Entered this 28th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge

