

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN A. RADERMACHER,

Defendant.  
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ORDER

05-CR-0039-C-01

Defendant John A. Radermacher has filed a motion for postconviction relief under 28 U.S.C. § 2255, contending that his attorney failed to file an appeal from the thirty-year sentence imposed on defendant on April 5, 2006. In an affidavit attached to his “memorandum and brief in support” of his postconviction motion, defendant avers that he asked his attorney to file such an appeal “right after the sentencing” and that counsel produced “a sheet of paper indicating that a appeal would be taken and had [defendant] sign the paper.” Affid. attached to dkt. #393 at next to last unnumbered page.

If defendant’s counsel agrees that defendant asked him to file an appeal of defendant’s sentence and he failed or refused to do so, defendant’s sentence will be vacated and re-imposed and his time for appealing will start to run from the date of the imposition

of the new sentence. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (lawyer that disregards specific instruction to file notice of appeal acts in professionally unreasonable manner). If counsel denies that defendant asked him to take an appeal, it will be necessary to hold an evidentiary hearing to determine the facts of the matter. In that event, counsel will be appointed to represent defendant. If the fact is that defendant did not make a request of counsel, the inquiry will turn to whether defendant's trial counsel consulted with him about taking a plea, and if he did not, whether such a failure constitutes deficient performance under the particular circumstances of defendant's case. Id. at 478.

Before proceeding with this motion, defendant should consider whether it is in his best interests to go forward. At his sentencing, defendant's offense level was 42; without a three-level downward adjustment for acceptance of responsibility, his offense level would have been 45 and his guideline sentencing range would have been life. Defendant does not contend that the court erred in calculating his guidelines but maintains that his counsel failed to present mitigating evidence at his sentence that would have persuaded the court to give him a downward departure. He suggests that such mitigating evidence can include addiction to drugs, role in the offense, age, extraordinary family situation, cultural heritage, sociological factors and the possibility that his criminal history overstated his propensity to commit future crimes. He does not identify any facts in his case that might support a departure for one of these reasons but merely criticizes his attorney for failing to interview

his family members and teachers to obtain such facts.

Unless defendant knows something about his own circumstances that was not revealed in the presentence report, it is unlikely that he can convince the court of appeals that it was ineffective assistance for his trial counsel not to argue for a downward departure at sentencing. Thus, even if defendant succeeds in showing that his attorney denied him an appeal, he has almost no chance whatsoever of prevailing on that appeal. If he fails, then he faces the possibility that the government will interpret his attack on his sentence as an indication that he has not accepted responsibility for his criminal actions and will withdraw its recommendation for a three-level downward adjustment for acceptance of responsibility. Without the government's recommendation for such an adjustment, his offense level will be at least 43 and his guideline sentencing range will be life. To someone as young as defendant, the difference between thirty years and life may seem insignificant at this point; it will not seem insignificant when he is in his late forties and nearing the end of his thirty-year sentence.

Defendant is entitled to pursue his motion for postconviction relief. If he decides to do so, the motion will be handled with dispatch and with care. Because the stakes are high, however, I will give him until February 16, 2007, in which to advise the court that he understands the decision he is making and wishes to proceed.

ORDER

IT IS ORDERED that defendant John A. Radermacher has until February 16, 2007, in which to advise the court and the government that he wishes to pursue a motion for postconviction relief. If he fails to advise the court by that date, I will assume that he is withdrawing his motion.

If defendant says that he wishes to go forward with his motion, the government may have until March 9, 2007, in which to respond to the motion. Defendant may have until March 20, 2007, in which to file a reply.

Entered this 29th day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge