

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL STARK,

Defendant.

ORDER

09-cr-114-bbc
11-cv-770-bbc

In an order entered on January 4, 2012, I denied defendant Michael Starks' motion for post conviction relief under 28 U.S.C. § 2255. Now defendant has filed a notice of appeal and a request for a certificate of appealability from the denial of his § 2255 motion.

He has not paid the \$455 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 had retained counsel during the criminal proceedings against him but was granted pauper status on appeal, and I am not prepared to certify that his appeal is not taken in good faith. A reasonable person could find that the appeal has some merit. Therefore, I will grant him leave to proceed on appeal in forma pauperis.

As to defendant’s request for a certificate of appealability, under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. I failed to do so in the January 4, 2012 order so I will address the issue now. Such a certificate shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 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). "[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding." Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

ORDER

IT IS ORDERED that defendant Michael Stark's motion to proceed on appeal in forma pauperis on appeal is GRANTED. His request for a certificate of appealability is DENIED.

Entered this 29th day of February, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge