

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

UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

12-cv-269-bbc
08-cr-87-bbc

v.

COREY J. THOMAS,

Defendant.

Defendant Corey J. Thomas filed a motion entitled Motion for New Trial on May 17, 2011. At the time I told him that a criminal defendant could not bring a motion for a new trial under Fed. R. Crim. P. 33, because any motion challenging any aspect of a defendant's criminal trial had to be brought as a motion for post conviction relief under 28 U.S.C. § 2255. May 18, 2011 Order, dkt. #430 (case 08-cr-87). This was wrong. In fact, a true Rule 33 motion is not treated as a motion for post conviction relief. United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000) (Rule 33 motion that raises genuine claim of newly discovered evidence is not equivalent of § 2255 motion).

In an order entered on June 3, 2011, dkt. #434 (in case 08-cr-87), I explained that

it had been error to say that *no* Rule 33 motion could be brought independently of a § 2255 motion. However, it was not error to say that the Rule 33 motion defendant had filed had to be considered as a § 2255 motion because defendant had not raised a genuine claim of newly discovered evidence in his motion. Id. at 2.

In the May 18 order, I warned defendant that he would have only one chance to move for post conviction relief and should raise all his claims in his re-characterized § 2255 motion. Despite this warning, he made it clear in his May 27, 2011 filing that he did not want to file a § 2255 motion at that time. I told him in the June 3, 2011 order that I understood from this that he considered the motion filed on May 17, 2011 to have been withdrawn and I reminded him that he had until May 23, 2012 (one year after the Supreme Court denied his petition for a writ of certiorari) in which to file his § 2255 motion. Order, dkt. #434 at 4.

Apparently, defendant did not consider his May 17, 2011 motion for a new trial to have been withdrawn because he took an appeal from the denial of the motion on October 11, 2011. That appeal is pending.

On April 11, 2012, defendant filed a motion in this court for post conviction relief under § 2255, raising three claims of ineffective assistance of counsel and one claim of government coercion of a witness. The filing is timely; the question is whether it is a second or successive motion that the court may not consider unless defendant obtains permission

for its filing from a panel of the Court of Appeals for the Seventh Circuit. If the court of appeals agrees with my determination that defendant's May 17, 2011 motion for a new trial was actually a § 2255 motion, then, unless defendant can obtain permission from the court of appeals for filing his new § 2255 motion, his recently filed motion under § 2255(h) cannot be considered.

It is possible that defendant can avoid this result by asking the court of appeals for permission to withdraw his appeal of the May 19, 2011 order. If the court of appeals allows him to withdraw the appeal, defendant can then combine the claims raised in his May 17 filing with the claims he wishes to raise in his newly filed § 2255 motion and have all of them considered together, first by this court and then, if he loses at this level, by the court of appeals. I repeat, however, that if he does not withdraw his appeal, I will have to dismiss his § 2255 motion.

ORDER

IT IS ORDERED that defendant Corey J. Thomas may have until April 27, 2012 in which to advise this court how he wishes to proceed in this matter. If he says that he will try to withdraw his May 17, 2011 motion, I will hold his April 11, 2012 motion for post conviction relief for possible further consideration. If he says that he does not want to try to withdraw his appeal, I will have to deny his new motion as barred under 28 U.S.C. §

2255(h).

Entered this 16th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge