

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARTHUR T. CONNER,

Defendant.

ORDER

12-cv-8-bbc
07-cr-31-bbc

In an order entered on November 16, 2012, dkt. #47, I construed defendant Arthur Conner's letter of inquiry about his case as a motion for an extension of time in which to appeal the denial of his motion for post conviction relief and gave him until December 16, 2012 in which to file it. Defendant filed his notice of appeal on December 6, 2012, along with a motion for reconsideration of the denial of a certificate of appealability. On December 7, 2012, he filed a motion seeking an order directing his post conviction counsel to turn over her file materials to him.

I. Motion for reconsideration of certificate of appealability

I will deny the motion for reconsideration because I continue to believe that reasonable jurists would not dispute this court's resolution of the issue of counsel's effectiveness. Defendant contests his counsel's trial decisions, saying that she failed to

present an adequate defense, failed to impeach the government's witness with his prior inconsistent statements and failed to recall a police officer for impeachment purposes. Even if one could disagree with counsel's choices in hindsight, her representation of defendant was not even close to being ineffective, particularly given the evidence she had to work with. As for defendant's argument that she failed to investigate a witness, Vernon Hughes, who could have exculpated defendant, this is a nonstarter. The evidence is clear that neither defendant nor his counsel knew where Vernon Hughes was between the time of the drug distribution and trial or even had an idea where he might be. (Defendant was not even so sure that Hughes had been present at the transaction.) It is not ineffectiveness for a lawyer to decide not to send an investigator out to look for someone who has disappeared, has a good reason to be avoiding law enforcement officers and may not even have relevant information.

2. Motion for order directing counsel to turn over materials

Defendant asks the court to order the lawyer appointed to represent him on his post conviction motion to turn over copies of discovery, evidentiary hearing material and the transcripts of the hearing. I will grant the motion so far as it relates to turning over any discovery material that she uncovered and any other materials in her possession that would be helpful for defendant. However, counsel would not have copies of the transcripts. I will order preparation of the transcripts at government expense, to be sent to defendant directly by the court reporters under 28 U.S.C. § 753(f). Although I do not believe that the appeal can succeed, it is not frivolous and the transcript is needed to allow the court of appeals to

decide the issues raised.

3. Notice of appeal

Defendant's notice of appeal was not accompanied by the \$455 fee for filing an appeal. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I construe it as including a request for leave to proceed in forma pauperis on appeal under 28 U.S.C. § 1915.

According to § 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 appointed counsel during the criminal proceedings and in this proceeding. I do not intend to certify that the appeal is not taken in good faith. Defendant's challenge to his sentence is not wholly frivolous.

ORDER

IT IS ORDERED that defendant Arthur T. Conner's motion for reconsideration of the denial of his request for a certificate of appealability is DENIED; his motion for an order directing his post conviction counsel to turn over materials is GRANTED as set forth in this order; and his request for leave to proceed in forma pauperis on appeal is GRANTED.

FURTHER, IT IS ORDERED that the court reporter is to transmit a copy of the transcript of the evidentiary hearing held on defendant's motion for post conviction relief to

defendant at the Waupun Correctional Institution, P.O. Box 351, Waupun, WI 53963.

Entered this 17th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge