

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERARDO VALTIERRA,

Defendant.

ORDER

13-cv-499-bbc

06-cr-126-bbc

On July 10, 2013, defendant Gerardo Valtierra filed a motion for post conviction relief under 28 U.S.C. § 2255, alleging that he was denied the effective assistance of counsel. In an order entered on July 16, 2013, the court denied the motion after finding that it was untimely and therefore barred by the governing one-year statute of limitations. See 28 U.S.C. § 2255(f). Defendant then filed a motion for reconsideration in which he stated that because he was raising a claim under Alleyne v. United States, 113 S. Ct. 420 (2013), his motion was timely. Because defendant's Alleyne claim was not apparent in his original motion, I granted the motion for reconsideration and set it for briefing. On September 23, 2013, after reviewing defendant's motion and the government's response, I denied the motion because defendant had no factual basis for a claim under Alleyne. In his case, the jury had made the determination of the minimum amounts of drugs for which he was held responsible, which is what is required under Alleyne.

On December 17, 2013, defendant filed a motion under Fed. R. App. P. 4, for an extension of time to file an appeal from the court's September 23, 2013 order. In his motion, defendant explained that he was unable to file a timely appeal because he was in transit to a different prison facility when the court's September 23 order issued and he did not have access to his legal materials until November 1, 2013. In an order entered on December 31, 2013, I denied defendant's motion both because it was untimely and because defendant had failed to show excusable neglect or good cause as required under Fed. R. App. P. 4.

On January 27, 2014, defendant filed a motion to alter or amend the court's December 31, 2013 order, pointing out correctly that the court erred in calculating an extension of time to file an appeal under Fed. R. App. P. 4. When the United States is a party to a civil proceeding, the losing litigant has 60 days to appeal. Fed. R. App. P. 4(a)(1)(B). Lawuany v. United States, 669 F.3d 864 (7th Cir. 2012). Defendant's time to appeal expired no later than November 22, 2013 and his motion for an extension of time to file an appeal expired on December 22, 2013. Defendant filed his notice on December 17, 2013, which was within the thirty-day extended deadline for purposes of Fed. R. App. P. 4(a)(5). In an order entered on February 5, 2014, the court granted defendant's motion for an extension of time in which to file his appeal and gave defendant until March 4, 2014, in which to submit an affidavit of indigency so that the court could determine if he is eligible to proceed on appeal in forma pauperis.

Defendant has now filed a motion to proceed in forma pauperis accompanied by an affidavit of indigency. From my review of the affidavit, I am satisfied that defendant qualifies for in forma pauperis status on appeal. In addition, 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. A reasonable person could suppose that it has some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000).

ORDER

Defendant's motion to proceed on appeal in forma pauperis is GRANTED.

Entered this 4th day of March, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge