

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DOUGLAS CAMPBELL,

Defendant.

OPINION AND ORDER

95-cr-63-bbc

Defendant Douglas Campbell has filed a motion for relief from judgment under three possible sources of jurisdiction: Fed. R. Civ. P. 60(b), Fed. R. Crim. P. 33 and Writ of Error Audita Querela, 28 U.S.C. § 1651. None of these provide him any basis on which to bring yet another baseless attack against the sentence imposed upon him in March 1996.

Defendant's claims under Fed. R. Civ. P. 60(b) and the writ of error audita querela can be dismissed peremptorily. They are simply efforts by defendant to circumvent the Antiterrorism and Effective Death Penalty Act; in reality, the motions are the equivalent of post conviction motions because they are filed in the sentencing court and challenge defendant's sentence. Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004) (prisoners cannot avoid effect of Antiterrorism and Effective Death Penalty Act by inventive

captioning). Defendant filed a previous motion labeled as a motion for post conviction relief in 2000, dkt. #585, 00-cv-275-bbc, and he has filed additional motions with labels such as “motion to alter or amend,” dkt. #601, 95-cr-63-bbc; “motion for evidentiary hearing,” dkt. #614, 00-cr-63-bbc; and “motion to eliminate enhancements and reduce sentence,” dkt. #620, 95-cr-63-bbc, all of which were denied because they were subsequent motions seeking reversal of his sentence and they had not been authorized by the court of appeals. He has not filed any certificate from the Court of Appeals for the Seventh Circuit to allow him to pursue his motion for relief from judgment under either Rule 60 or writ of error audita querela.

Motions for new trials are not barred by the filing of a previous motion for post conviction relief *if* they are timely and truly based upon new evidence. United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000) (“genuine claim of newly discovered evidence tending to show innocence is not within § 2255 ¶ 1 and therefore does not require prior appellate approval, even if the prisoner has litigated and lost a collateral attack under § 2255”). Defendant’s alleged new evidence relates to two of the four prior convictions that qualified him as an Armed Career Criminal under 18 U.S.C. § 924(e) when he was sentenced in this court in 1996. He has submitted copies of what appear to be filings by an assistant criminal district attorney in the District Court of Victoria County, Texas, to the effect that on the two prior convictions, he was sentenced in 1988 to Deferred Adjudication Probation

for a term of ten years and that the ten years expired in each case on October 3, 1998. (Defendant has also submitted what appears to be a copy of a decision for the Court of Appeals for the Fifth Circuit issued on June 14, 2011, denying on two grounds defendant's petition challenging his 1996 conviction and sentence in this court under 28 U.S.C. § 2241. The court of appeals held first that defendant had not made the showing he must make if he is to bring a § 2241 petition, which is that his § 2255 remedy was "inadequate or ineffective to test the legality of his conviction." § 2255(e). Second, the court indicated that defendant's claim was without merit. "[T]o the extent that [defendant] alleges that he is actually innocent of being a career offender, this court has held that a claim of actual innocence of a career offender enhancement is not a claim of actual innocence of the crime of conviction and thus, does not warrant review under § 2241." Campbell v. Maye, No. 10-50955 (5th Cir. June 14, 2011).)

Ordinarily, to proceed on a Rule 33 motion, a defendant must show that the evidence on which he is relying is truly new evidence, but defendant Campbell has an additional and fatal problem. His motion is untimely under Rule 33, which allows a defendant only three years from the pronouncement of guilt in which to file the motion. Defendant was found guilty on October 27, 1996, more than 15 years before he filed this Rule 33 motion. Therefore, his motion must be denied. It is not necessary to reach the question whether the motion is simply another way to avoid the consequences of the Antiterrorism and Death

Penalty Act.

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. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). In this case, no certificate will issue because defendant has not made the necessary showing.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Douglas Campbell's motions for relief under Fed. R. Civ. P. 60(b) and Writ of Error Audita Querela are construed as motions brought under 28 U.S.C. § 2255 and are denied. The motions are repeat versions of earlier motions for § 2255 relief and defendant has not obtained permission to file them from the Court of

Appeals for the Seventh Circuit, as required under § 2255(h). Defendant's motion brought under Fed. R. Crim P. 33 is DENIED as untimely. No certificate of appealability shall issue.

Further, IT IS ORDERED that if defendant files any further documents in this case, the clerk of court is directed to refer them to me before filing. If I determine that the document includes a challenge to defendant's conviction or sentence and is not accompanied by an order of a panel of the Court of Appeals for the Seventh Circuit permitting the filing, I will place the document in the file of this case and make no response to it.

Entered this 16th day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge