

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

UNITED STATES OF AMERICA,
Plaintiff,

ORDER
96-CR-0010-C

v.

GORDON O. HOFF, SR.,
Defendant.

Defendant Gordon O. Hoff, Sr., has filed a request for a certificate of appealability and a notice of appeal from the court's April 6, 2005 order dismissing his Rule 60(b) motion on the ground that it is a motion attacking defendant's sentence and must be brought pursuant to 28 U.S.C. § 2255 after he receives certification to file a successive petition from the Court of Appeals for the Seventh Circuit. Defendant has not paid the \$255 fee for filing his notice of appeal, although he is required to do so 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 court-appointed counsel. Therefore, he can proceed on appeal unless I find that his appeal is taken in bad faith.

The standard for determining whether an appeal is taken in bad faith is less demanding than the standard for deciding whether to issue a certificate of appealability. Walker v. O’Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). A certificate of appealability shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 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).

I conclude that defendant does not qualify for such a certificate. He states that he is appealing the ruling that his Rule 60(b) motion was an attack on his sentence and must be brought pursuant to 28 U.S.C. § 2255. However, it is not reasonably debatable that defendant’s purported Rule 60 motion is not an attack on his sentence. Because the issue

defendant wishes to raise on appeal is not debatable among reasonable jurists, a court could not resolve the issues differently and the question is not adequate to deserve encouragement to proceed further, I decline to issue a certificate of appealability.

I turn then to defendant's request for leave to proceed in forma pauperis on appeal. Even applying the lower standard applicable to this request, I conclude that defendant is not proceeding in good faith. No reasonable jurist could believe that defendant's appeal has merit. Accordingly, I must certify that defendant's appeal is not taken in good faith and that he cannot proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that defendant Gordon O. Hoff, Sr.'s request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Further, IT IS ORDERED that defendant's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for

a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

Entered this 27th day of April, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge