

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TONY L. SUTTON,

Defendant.

ORDER

06-C-109-C
97-CR-0053-C-01

Defendant Tony L. Sutton has filed a notice of appeal from the April 18 and June 14, 2006 orders denying his § 2255 motion. Accompanying the notice of appeal is a motion for a certificate of appealability and a “renewed” motion to proceed in forma pauperis. As a preliminary matter, a brief explanation is necessary why defendant has titled his request for leave to proceed on appeal as a “renewed” motion. During the criminal proceedings in this case, the magistrate judge determined that defendant was financially eligible for court-appointed counsel. Later, Michael Barrett, a non-appointed lawyer who assisted defendant with his § 2255 motion, asked that defendant be allowed to proceed in forma pauperis for the purpose of obtaining appointed counsel under the Criminal Justice Act to prosecute his

§ 2255 motion. In an order entered on March 3, 2006, I reserved a ruling on that motion “until the matter has proceeded further and I can make a determination whether appointment of counsel would be in the interest of justice.” Subsequently, I determined that defendant’s § 2255 motion was without merit. Although the record contains no formal disposition of the motion later, it is implicit in the order dismissing the § 2255 motion that defendant’s first motion for leave to proceed in forma pauperis has been denied. In his renewed motion, defendant makes it clear that he is seeking waiver of the filing fee for an appeal and that he “no longer wishes to have CJA counsel appointed.”

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 appointed counsel during the criminal proceedings against him and 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).

"[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding." Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000). 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).

Defendant’s § 2255 motion had a unique history. He filed one § 2255 motion on March 1, 2006. This motion was untimely, given that the one-year period for filing such a motion would have expired in November 2000 and defendant could not show any basis for equitably tolling the running of the one-year filing period. In light of my determination that defendant had filed an earlier motion attacking his sentence, the 2006 motion might have been denied as a successive motion. However, that motion had not been ruled on at the time defendant filed the possibly successive motion, making it questionable whether it really was successive. Whether it was or was not is essentially immaterial, as it was denied.

After explaining why defendant’s March 2006 motion could not go forward, I took up the motion that defendant had filed on March 1, 1999, in which he asked the court to set aside his guilty plea for ineffectiveness of trial counsel. This motion had never been ruled on, for reasons that do not appear in the record, but may be linked to my ruling on February 23, 1999 that defendant would not be permitted to use the re-sentencing hearing ordered by the court of appeals as a forum to develop his motion to withdraw his plea of guilty. In the February order, I told defendant that he was free to file a motion pursuant to 28 U.S.C.

§ 2255 if he wished to contest the validity of his plea. I did not anticipate that he would file such a motion before he filed his notice of appeal.

I construed defendant's March 1, 1999 motion as one brought pursuant to 28 U.S.C. § 2255 and considered it on its merits. I denied two of the claims in an order entered on April 18, 2006 and gave defendant the opportunity to file a supplemental affidavit in support of the remaining six claims. After reviewing the supplemental affidavit, I dismissed the six remaining claims in the June 14, 2006 order.

In his motion for a certificate of appealability, defendant asks for certification of the claims raised in his March 1, 1999 and March 1, 2006 § 2255 motions. None of defendant's challenges to his sentence meet the demanding standard for a certificate of appealability. In the April 18 and June 14, 2006 orders denying defendant's § 2255 motion, I explained clearly why his March 1, 2006 § 2255 petition was not timely, why each of the allegations defendant made against his trial counsel in his March 1, 1999 motion did not constitute ineffective counsel and why, in any event, defendant was not prejudiced by his counsel's actions.

Because the issues defendant wishes to raise on appeal are not debatable among reasonable jurists, a court could not resolve the issues differently and the questions are not adequate to deserve encouragement to proceed further, I am declining to issue a certificate of appealability.

Defendant has the right to appeal this order denying him a certificate of appealability.

ORDER

IT IS ORDERED that defendant Tony Sutton's request for leave to proceed in forma pauperis on appeal is GRANTED; his request for a certificate of appealability is DENIED.

Entered this 27th day of July, 2006.

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