

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

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

01-CR-0064-C-01

v.

REGINALD T. COLE,

Defendant.

Defendant Reginald T. Cole has moved for reconsideration of the order entered in this case on June 11, 2003. In that order, I denied defendant's motion to correct his sentence pursuant to Fed. R. Crim. P. 36, explaining that this rule did not give a sentencing court the authority to adjust a sentence, only to correct clerical errors. I explained also that defendant cannot use 28 U.S.C. § 2255 as a means of modifying his sentence because the time for filing such a motion has expired. Defendant continues to argue that he is entitled to an adjustment of his federal sentence because the court did not apply the sentencing guidelines properly in calculating his sentence in 2001. Unfortunately for defendant, he has

no authority to support his argument.

As I told defendant in the earlier order, it is too late for him to file a motion to reduce or vacate his sentence pursuant to 28 U.S.C. § 2255. Such a motion must be filed within one year of the time his sentence became final. Defendant was sentenced in this court on November 21, 2001. He did not appeal his sentence so it became final for purposes of § 2255 ten days after he was sentenced, on or about January 22, 2002. He did not file his present motion until more than a year later, thereby missing the filing deadline.

Even if defendant did have a vehicle for raising his claim, he faces the bigger problem that his claim has no merit. Defendant contends that he was entitled to credit for his undischarged sentences of imprisonment, pursuant to U.S.S.G. § 5G1.3, but this section applies only to sentences that a defendant is serving when he is sentenced on a new matter. For example, the section applies when a defendant commits a federal offense while serving a term of imprisonment or after sentencing for such a term of imprisonment but before starting service of the term (in which case the new federal sentence must run consecutively to the undischarged term) or when the undischarged term of imprisonment resulted from an offense that has been taken into account in determining the offense level for the new federal offense (in which case the federal sentence must run concurrently with the undischarged term of imprisonment). In any other situation involving an undischarged sentence of imprisonment, the court may impose a sentence that runs concurrently, partially

concurrently or consecutively to the prior undischarged term “to achieve a reasonable punishment for the instant offense.” U.S.S.G. § 5G1.3(c).

When defendant was sentenced in this court, he had been charged in state court with the same conduct charged in this case but he had not been convicted or sentenced for the state law charges. Thus, there was no undischarged term of imprisonment to consider when fashioning defendant’s sentence. He did have undischarged terms in Minnesota for which he was on parole. However, any charges for violating that parole term were dismissed after defendant was turned over to federal authorities for prosecution in this case. Had they not been, U.S.S.G. § 5G1.3(a) would require that his present sentence run consecutively to those sentences.

Defendant seems to think that amendments to the sentencing guidelines proposed by the sentencing commission give sentencing courts the authority to adjust sentences for any period of imprisonment already served on some undischarged term if the court determines that the Bureau of Prisons will not give the defendant sentence credit. Congress has not yet approved such a grant of authority but even if it had, defendant would not be eligible for it because he was not serving an undischarged term of imprisonment when he was sentenced in this court in November 2001.

ORDER

IT IS ORDERED that defendant Reginald T. Cole's motion for reconsideration of the order entered on June 11, 2003, denying his motion for an adjustment of his sentence pursuant to Fed. R. Crim. P. is DENIED as untimely.

Entered this 7th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge