IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

03-C-0508-C
01-CR-0104-C-01

v.

SARAH L. POLACEK,

Defendant.

- -

Defendant Sarah L. Polacek has filed two motions with the court: a motion for correction "pursuant to the 2002 amendment to the United States Sentencing Guidelines § 3B1.2," which she filed on October 3, 2003, and a motion for a certificate of appealability so that she may appeal the denial of the motion she filed on September 16, 2003, seeking a reduction of her sentence. Before I can address the first motion, I must determine whether it is a "second motion" within the meaning of 28 U.S.C. § 2255. If it is, then I cannot consider the new motion unless and until defendant can obtain certification from the court of appeals that the new motion contains either newly discovered evidence that would establish her actual innocence or a new rule of constitutional law made retroactive to cases

on collateral review by the Supreme Court. Id.

At the outset, it is necessary to determine exactly what kind of motion defendant filed on September 16, 2003. In that motion, defendant argued that her post-conviction efforts at rehabilitation supported a downward departure under § 3E1.1(g) of the sentencing guidelines, taken together with § 5K2.13, which permits downward departures for defendants who commit crimes while suffering from diminished mental capacity. In filing this motion, defendant seems to have believed that a court can re-sentence a defendant whenever new information warrants a reconsideration of the previously imposed sentence. As I explained to defendant, a court loses any authority to reconsider a sentence once it has imposed the sentence, with two exceptions, neither of which applied to her case.

I did not construe defendant's motion as raising a challenge to her sentence. Nothing in the motion suggested that defendant was arguing that she had been sentenced incorrectly or that her attorney had provided ineffective assistance. Moreover, defendant would have been barred from raising any challenge to her sentence because she chose not to pursue the appeal her attorney filed on her behalf. Having made that choice, defendant could not argue that she had good cause for her failure to appeal the court's refusal to give her a downward departure for diminished mental capacity. Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) (defendant may not argue issue in post-conviction motion that she could have raised on direct appeal unless she can show both good cause for her failure to raise it and actual

prejudice from failure).

Asking to be re-sentenced on the basis of new information (the post-conviction rehabilitative efforts) is not the same as asking for a reduction or vacation of sentence pursuant to § 2255. Defendant was not arguing that her sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose the sentence or that the sentence was in excess of the maximum authorized by law. Therefore, I conclude that defendant's September 16 motion was not a collateral attack within the meaning of § 2255. This is consistent with the result reached in United States v. Smith, 241 F.3d 546 (7th Cir. 2001), in which the court of appeals considered a motion for post-conviction relief filed after the defendant had moved for re-sentencing under 18 U.S.C. § 3582(c)(2), a statute that authorizes a court to reduce a defendant's term of imprisonment if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994*o*." Although defendant did not file her first motion under § 3582(c)(2), her motion is more similar to one filed under that section than it is to one filed under § 2255. Cf. United States v. Evans, 224 F.3d 670, 673 (7th Cir. 2000) ("any motion filed after the expiration of the time for direct appeal, and invoking grounds mentioned in § 2255 ¶ 1, is a collateral attack for purposes of ¶ 8"). Defendant may proceed with her motion for a "correction" of her sentence without obtaining certification from the court of

appeals. As will be seen, however, this conclusion is no victory for defendant.

In her present motion, defendant argues that she is entitled to a correction (reduction) of her present sentence because the sentencing guidelines commission amended the guideline for § 3B1.2, relating to role in the offense, in 2002 after she had been sentenced. She asserts that she is entitled to be re-sentenced and considered for a two-level downward adjustment for her minor role in the offense. Although defendant does not cite 18 U.S.C. § 3582(c)(2), I am assuming that it is the statute under which she brings her motion.

There are a number of problems with defendant's argument. First, it makes no sense for her to argue that she was denied a two-level downward adjustment for her minor role in the offense when she received such an adjustment. Second, the commission's 2002 amendment of § 3B1.2 has no application to defendant's case. The commission added "Application of Rule Adjustment in Certain Drug Cases" to § 3B1.2 to permit courts to apply a § 3B1.2 adjustment in "a case in which the court applied § 2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in § 2D1.1(a)(3)." Defendant's base offense was only 30, computed on the basis of the drugs for which she was held responsible. Therefore, § 2D1.2(a)(3) would never have come into play even if defendant had been sentenced after November 1, 2002. Third, the amendment of § 3B1.2 is not an amendment that authorizes

re-sentencing of a defendant under § 3582(c)(2) because it is not listed in subsection (c) of U.S.S.G. § 1B1.10. See U.S.S.G. § 1B1.10(a) ("If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.")

Defendant's request for a correction of her sentence will be denied. I turn then to her request for a certificate of appealability, which she thinks she needs in order to appeal the denial of her first motion. Because she did not bring her motion under § 2255, she does not need a certificate of appealability. However, there remains the question of categorizing her appeal. I can find no guidance on this in any of the court of appeals' decisions. The best answer seems to be to treat it as an appeal from a motion in a criminal case, requiring the usual filing fee. (I would apply the same analysis if defendant decides to appeal from the denial of her second motion, except that I would treat it as an appeal from the denial of a motion brought pursuant to 18 U.S.C. § 3582(c)(2), because defendant argues that the amendment of a sentencing guideline entitles her to re-sentencing. The fact that the motion had no substantive merit would not change this analysis.)

Defendant has not asked for leave to proceed on appeal in forma pauperis. However, she had appointed counsel when she was tried here. Pursuant to Fed. R. App. P. 24(a)(3), she may proceed on appeal in forma pauperis without further authorization unless the court

certifies that the appeal is not taken in good faith, which I do now. Defendant has shown no arguable basis for holding that her post-conviction efforts at rehabilitation entitle her to re-sentencing.

Defendant may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days of receiving a copy of this order. If she does so, she must include a copy of an affidavit showing her inability to pay the cost of her appeal or to give security for fees and costs (see Form 4 of Appendix of Forms, Federal Civil Judicial Procedure and Rules, (Thomson West 2003 ed.) and a copy of this order. Even if the court of appeals grants defendant's motion, she remains responsible for the full cost of her appeal, which is $105.00.

ORDER

IT IS ORDERED that defendant Sarah L. Polacek's motion for correction of sentence is DENIED; her request for a certificate of appealability is DENIED as unnecessary; and I certify that her appeal of the order entered on September 25, 2003, is not taken in good faith.

Entered this 27th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge