

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY PHILLIPS, JR.,

Defendant.

ORDER

03-CR-0040-C

Defendant Gregory Phillips, Jr. has filed a “Motion to Open Time for Appeal,” in which he asks the court to give him additional time to file an appeal of the judgment and conviction entered on August 20, 2003. Defendant says that he asked his attorney to file an appeal but his attorney failed to do so. Although Fed. R. Crim. P. 4(b)(4) does not permit the court to give defendant an extension of time for appeal because more than 30 days have run since the time for filing an appeal expired, defendant may challenge his conviction and sentence by filing a motion pursuant to 28 U.S.C. § 2255. If he can show that he asked his attorney to appeal and his attorney either refused or failed to do so, he will have established the cause and prejudice necessary to raise issues on a collateral motion that he could have raised on appeal. Costellanos v. United States, 26 F.3d 717, 718 (7th Cir. 1996) (defendant whose counsel

failed to appeal after defendant asked him to need not prove that he would have prevailed on appeal had one been taken; counsel's failure is per se violation of Sixth Amendment).

If defendant wishes to pursue a challenge to his conviction or sentence or both, he will have to file a motion pursuant to 28 U.S.C. § 2255 on the form enclosed with this order, setting forth the reasons why he thinks he was illegally convicted or sentenced. In addition, he will have to submit an affidavit either sworn or signed under penalty of perjury, in which he states whether he asked his attorney to take an appeal and, if so, what steps he took to consult with his attorney about the appeal. If the affidavit suggests the likelihood that counsel failed to carry out his responsibility to defendant to take an appeal, I will set the matter for an evidentiary hearing to determine whether this is true in fact. If I find that defendant was denied his right to an appeal, I will proceed to consider the § 2255 motion on its merits.

Defendant should be aware that he will have only one chance to file a § 2255 motion, unless he should discover new evidence sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense he is challenging or the Supreme Court should establish a new rule of constitutional law that is retroactive and would invalidate his conviction and sentence. Since it is highly unlikely that he will have a second chance to file, he should include in this motion every challenge he has to his conviction and sentence and he should be aware that he has a limited time in which to file. Paragraph 6 of § 2255 allows him just one year from the date on which his judgment of conviction

became final.

ORDER

IT IS ORDERED that defendant Gregory Phillips's motion to open time for appeal is DENIED as beyond the court's authority to grant.

Entered this 9th day of January, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge