IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

04-C-566-C
03-CR-63-C-01

v.

TOMMY LOVE,

Defendant.

- -

Defendant Tommy Love has filed a notice of appeal and a request for a certificate of appealability from the denial of his motion brought pursuant to 28 U.S.C. § 2255. He has not paid the $255 fee for filing his notice of appeal which is required 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. However, 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).

Starting with defendant's request for a certificate of appealability, I conclude that he does not qualify for such a certificate. Defendant states that he is appealing my ruling that he is not entitled to direct application of the ruling in United States v. Booker, 04-104 (U.S. Jan. 12, 2005). He suggests that under Griffith v. Kentucky, 479 U.S. 314 (1987), he qualifies for resentencing under the rule announced in Booker because his direct appeal was pending in the Court of Appeals for the Seventh Circuit when the Supreme Court rendered its decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), and when the court of appeals for this circuit decided United States v. Booker, 375 F.3d 508 (7th Cir. 2004).

Defendant's challenge is without legal merit. It is not enough for him to assert that his direct appeal was pending when Blakely was decided and when the Court of Appeals for the Seventh Circuit decided Booker. (In fact, defendant's appeal was decided on June 30, 2004. It was not pending when the court decided Booker on July 9, 2004.) Citing Griffith, the Supreme Court explained clearly in its Booker decision that its disposition was to be applied to "all cases [then] on direct review." A direct appeal is "final" when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filling a certiorari petition expires." Gildon v. Bowen, 384 F.3d 883, 885 (7th Cir. 2004) (citing Clay v. United States, 537 U.S. 522, 527 (2003)). Defendant Love did not petition for a writ of certiorari following the court of appeals' affirmation of his conviction on June 30, 2004. The time in which he could have petitioned for a writ of certiorari expired 90 days later, on September 28, 2004. Thus, his direct appeal was not pending when the Supreme Court decided Booker in January 2005. Blakely may have signaled the end of mandatory sentencing guidelines, but it did not establish that point. Therefore, it is immaterial whether defendant's appeal was pending when it was decided.

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. He himself cited Griffith v. Kentucky for the proposition that new rules of law established by the Supreme Court are applicable to cases pending on direct appeal at the time of the Supreme Court's decision. Nevertheless, he attempts to advance an argument unsupported by Griffith or any other case that this rule applies to him because his conviction was on direct appeal at the time Booker was decided by a lower court. Defendant may honestly believe in his position, but his belief has no basis in law or fact. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000) (good faith is objective concept). 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 Tommy Love's requests 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 3rd day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge