

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES FRAZIER,

Defendant.

ORDER

06-cr-221-bbc

On July 11, 2011, defendant James Frazier filed a motion for a reduction of sentence under 18 U.S.C. § 3582, contending that because he was sentenced for possession with intent to distribute cocaine base (crack cocaine) and the guidelines for crimes involving distribution of crack cocaine have been lowered and given retroactive effect, he was entitled to a reduction in his sentence. Defendant's motion was denied on December 5, 2011 because his sentence was determined by his status as a career offender and not by drug quantity and for that reason was not eligible for a reduction. Defendant appealed. His appeal was dismissed by the court of appeals on March 28, 2012.

On June 4, 2012, defendant filed a second motion under § 3582 seeking relief on the same grounds. In an order entered on June 25, 2012, I denied the motion because

defendant is not entitled to file another motion seeking the same relief he sought in a previous motion. Defendant has now filed a notice of appeal of the court's June 25, 2012 order. He has not paid the \$455 fee for filing his notice of appeal, which is required if he is to take an appeal from the denial of a § 3582 motion. 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.

As an initial matter, I note that defendant's appeal appears to be untimely. It was not filed within 14 days of the entry of judgment under Fed. R. App. P. Rule 4(b) and defendant did not include with his notice a motion for an extension of time to file a notice of appeal that was supported by a showing of excusable neglect or good cause for the late filing as Fed. R. App. P. 4 requires. However, district courts do not have authority to deny a defendant's request for leave to proceed in forma pauperis on the ground that the appeal is untimely. That authority rests solely with the court of appeals. Sperow v. Melvin, 153 F.3d 780 (7th Cir. 1998). Therefore, I will consider defendant's request for leave to proceed in forma pauperis on appeal and deny the motion because defendant's appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3).

Defendant's argument on appeal is baseless. Because defendant wants to raise a legally frivolous argument on appeal, I must deny his motion to proceed on appeal in forma pauperis because I certify that his appeal is not taken in good faith .

Under Fed. R. App. P. 24, defendant has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order.

ORDER

IT IS ORDERED that defendant James Frazier's request for leave to proceed in forma pauperis on appeal from the court's June 25, 2012 order is DENIED. I certify that defendant's appeal is not taken in good faith.

Entered this 21st day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge