

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

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

v.

07-cr-149-bbc

ELIZABETH CIRVES,

Defendant.  
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Defendant Elizabeth Cirves has filed several documents and a motion to compel discovery under Fed. R. Civ. P. 37(a)(2). She alleges that her trial counsel, Greg Dutch, has refused to confer with her and to turn over discovery materials and transcripts. It appears that she wants these materials to expand the record of her motion for post conviction relief under 28 U.S.C. § 2255 that is pending in the Court of Appeals for the Seventh Circuit. The motion is before the court for decision.

Before getting to the motion, a brief review of the case and defendant's filings is warranted. Defendant was sentenced in this court on March 26, 2008; she was resentenced 20 months later, on October 21, 2009, after the government moved for a reduction in her sentence under Fed. R. Crim. P. 35(b). On June 19, 2012, she moved for post conviction relief under § 2255, contending that her sentence was illegal under United States v. DePierre, 131 S. Ct. 2225 (2011). Dkt. #62. Her motion was denied because it was

untimely and it did not state any claim on which she might be able to prevail. It was untimely because her time for filing such a motion had expired on October 31, 2010, one year and ten days after entry of the amended judgment and commitment order for her resentencing, and she had not alleged that she could take advantage of any of the exceptions to the one-year filing rule set out in 28 U.S.C. § 2255(f).

In addition, defendant had not stated any viable claim under DePierre, a case in which the Supreme Court held that the term “base cocaine” encompasses any kind of cocaine in its base form: freebase, crack or coca paste. Id. at 2322. Defendant was charged with two counts of possessing controlled substances with intent to deliver, one count involved cocaine base; the second involved powder cocaine. She pleaded guilty to the count involving cocaine base, but the powder cocaine was taken into account in sentencing. The probation office calculated the amount of each form of cocaine and then applied the marijuana equivalent to obtain a total drug quantity for sentencing purposes. Nothing in defendant’s case turned on whether the term “base cocaine” was properly interpreted, so as to make DePierre applicable.

After her motion for relief under § 2255 was denied, defendant appealed. Her appeal is pending in the Court of Appeals for the Seventh Circuit. (Case no. 12-3166). She seems to think that she needs certain discovery from her former defense counsel in order to prosecute her appeal. To the extent that she needs copies of any transcripts, 28 U.S.C. § 753(f), the law allows her to ask the court to make those available to her free of charge. However, a request for transcripts at government expense will not be granted unless the

person making the request can show that the appeal is not frivolous and that the transcript is needed to decide the issue presented by the appeal. Id. Defendant has not made such a request, but it is unlikely she would succeed if she did try. As I have explained, her § 2255 motion is “legally frivolous” on two grounds: it is untimely and it has no legal merit. In addition, it is questionable whether the transcript is needed, because the Statement of Reasons attached to the Judgment and Commitment Order explains how the drug amount was determined for sentencing purposes.

As to other forms of discovery, defendant says she thought she could bring a post conviction motion based on the holding in DePierre and then expand the motion to include other matters she wants to raise, such as claims of ineffectiveness of trial counsel, her coerced confession and her inadequate plea hearing. Dkt. #99 at 1. Defendant misunderstands the nature of a post conviction motion and the restrictions on appellate courts. In our system, parties may not bring up new issues on appeal that they did not raise at the trial court level. In the federal system, the district court is the trial court, where the issues are identified, the record can be developed and findings of fact can be made. Dissatisfied litigants can appeal from an adverse district court decision, but they cannot appeal any matter that they did not take up with the district court while their case was pending in that court. If they try to do so, the court of appeals will decline to hear the new matter, because the relevant facts were never developed at the district court level.

Moreover, as I have explained to defendant, the statutes set firm deadlines for the filing of motions attacking a sentence, with limited exceptions that are of no help to

defendant. 28 U.S.C. § 2255(f). These deadlines are not ones that courts can ignore or choose not to apply; they are binding on the courts as well as litigants. Defendant had one year after her resentencing became final in which to move for post conviction relief; when she missed that deadline, she lost her opportunity to challenge her conviction and sentence. (One exception to this rule exists, but it does not apply to defendant. In In re Davenport, 147 F.3d 605 (7th Cir. 1998), the court of appeals allowed a prisoner to use 28 U.S.C. § 2241 to attack his sentence under 28 U.S.C. § 2241 when he had been convicted of a crime that the Supreme Court had since held not to be a crime and he had not had a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.)

Because defendant has not shown that she is entitled to discovery under the federal rules, her motion will be denied. I will remind her also that Greg Dutch's representation of her ended when she was sentenced. Although he represented her again when she was resentenced, that was on a separate appointment that ended with her resentencing.

No doubt defendant feels frustrated by the roadblocks that prevent her from obtaining the kind of judicial relief she wants. It is a frustration shared by many other defendants who find it difficult to follow the technical requirements for obtaining a review of her conviction.

#### ORDER

IT IS ORDERED that defendant Elizabeth Cirves's motion to compel discovery under

Fed. R. Civ. P. 37(a)(2) is DENIED because defendant has no case pending in this court and she has not shown that she needs any discovery materials for her appeal.

Entered this 28th day of March, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge