

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

COREY J. THOMAS,

Defendant.

ORDER

08-cr-87-bbc

Defendant Corey J. Thomas filed a “Motion for New Trial Under Fed. R. Crim. P. 33(b) Based on Newly Discovered Evidence” on May 17, 2011. In an order entered on May 19, 2011, I construed the motion as one brought under § 2255 and gave defendant until June 27, 2011 in which to advise the court whether he wanted to withdraw the motion or proceed with it. Defendant has written back, saying that he does not want to file a motion for post conviction relief under 28 U.S.C. § 2255 at this time, and that he wants the court to reconsider his motion for a new trial.

If defendant’s Rule 33(b) motion is a valid one, it would have been error to have said in the May 19 order that it must be recharacterized as a § 2255 motion. United States v. Evans, 224 F.3d 670 (7th Cir. 2000) (any post judgment motion in criminal proceeding that

fits description of § 2255 ¶ 1 is motion under § 2255, unless it is genuine claim of newly discovered evidence tending to show innocence). On re-examination of defendant's original motion, however, I am persuaded that it was not an error to construe his motion as I did. The motion should have been captioned as a § 2255 motion because it is not a genuine claim of newly discovered evidence.

Defendant's evidence is a declaration by a co-defendant, Jarrell A. Murray, who says under penalty of perjury that neither defendant nor a co-defendant, Prince Beck, was part of the group that robbed US Bank on May 21, 2008, but that Murray and the other men who did rob the bank decided to name them as part of the group to avoid implicating the actual participants, who were their good friends. Defendant has also submitted evidence that he believes shows that the United States Attorney should have known that key witnesses Lamar Liggons and Michael Simmons were not credible witnesses, that the prosecutor prompted Simmons to identify defendant before Simmons had a chance to say anything and that the prosecutor allowed Liggons to read reports about Simmons, enabling Liggons to know whom to implicate when testifying. Defendant argues that the United States Attorney's actions violate his constitutional right to a fair trial.

The only part of defendant's Rule 33 motion that actually relates to newly discovered evidence is the Murray declaration. It is not a recantation of testimony given at trial because Murray did not testify at defendant's trial. It is not a genuine claim of new evidence; all

Murray is saying is that he and others named defendant and Beck as participants because they did want to name the real perpetrators of the robbery. He does not say who those men might be, which deprives the statement of any plausibility. More to the point, neither he nor defendant explains why his naming defendant and Beck as participants would have made any difference to their being charged, tried and convicted. Murray was out of state when the government collected the information that led to the charges and when Lamar Liggons pleaded guilty to the robbery. The government introduced ample evidence at trial to prove defendant guilty of the US Bank robbery: defendant's fingerprints on the package of disposable gloves that was found in the getaway van and on the inside of the getaway van as well; a video showing defendant at the Badger Bus station in Madison a few hours after the robbery buying one-way bus tickets to Chicago for co-defendant Liggons and Liggons's girlfriend; defendant's purchase of a car for cash the day after the robbery; Beck's girlfriend's testimony that defendant was present at her residence along with the other co-defendants early in the morning before the robbery; and the testimony of Liggons and Simmons about the planning and implementation of the robbery. Murray's declaration may be new evidence but it is not evidence of the kind that would require a hearing, let alone a new trial.

The rest of defendant's motion is directed to alleged violations of defendant's constitutional right to a fair trial and rest on factual matters that defendant either knew or could have known at the time of his trial. Matters such as these cannot be considered on

a Rule 33 motion. Evans, 224 F.3d at 674 (“A defendant whose argument is not that newly discovered evidence supports a claim of innocence, but instead that he has new evidence of a constitutional violation or other ground of collateral attack, is making a motion under § 2255.”). I conclude that defendant has not made a genuine claim of newly discovered evidence.

In the May 19 order characterizing defendant’s motion as a post conviction motion brought under 28 U.S.C. § 2255, I told defendant that he had until June 27, 2011 in which to advise the court whether he wanted to withdraw his motion or proceed with it as recharacterized. He made it clear in his May 27, 2011 filing that he does not want to file a § 2255 motion at this time. Therefore, I will consider the motion filed on May 17, 2011 withdrawn. Defendant’s petition for a writ of certiorari was denied by the United States Supreme Court on May 23, 2011, so he has a year from then in which to file a § 2255 motion.

ORDER

IT IS ORDERED that defendant Corey J. Thomas’s motion for a new trial under Rule

33 is DENIED and withdrawn.

Entered this 3d day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge