

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT LEE McNEAL,

Defendant.

ORDER

09-cv-234-bbc

Defendant Robert Lee McNeal has filed a motion for equitable tolling of the post conviction motion he submitted on April 20, 2009, and a motion for appointment of counsel. The motion for equitable tolling must be denied because it is a second motion for post conviction relief and defendant has not obtained authorization from a panel of the Court of Appeals for the Seventh Circuit to file such a motion. The motion for appointment of counsel will be denied as well because defendant cannot proceed on his motion.

Defendant was charged by indictment in this court for escaping from a federal prison in violation of 18 U.S.C. § 751, found guilty on his plea and sentenced as a career offender by the Honorable John C. Shabaz on May 4, 2005. Judge Shabaz found that defendant was over 18; he had three prior convictions for controlled substance offenses and the crime of

which he was convicted was a crime of violence under the law in this circuit. Defendant appealed his sentence to the court of appeals, which remanded the case on one issue: how often defendant should be subjected to drug tests during his term of supervised release.

Defendant did not appeal from his resentencing. Three years later, on April 20, 2009, he moved for post conviction relief, arguing that he could no longer be considered a career offender. Because Judge Shabaz had taken medical leave, the motion was assigned to me. I denied it on June 18, 2009, for several reasons. Defendant moved for relief from this decision in February 2010, arguing that his walkaway escape was not a crime of violence under Begay v. United States, 553 U.S. 137 (2008); that motion, too, was denied. He then filed a notice of appeal that was construed by the court of appeals as an application for a certificate of appealability and denied on the ground that defendant had defaulted his claim by not raising it on direct appeal.

Under 28 U.S.C. § 2255(h), a prisoner cannot file a second or successive motion attacking his sentence unless the motion is first certified by a panel of the court of appeals as containing either newly discovered evidence or, as relevant to defendant, “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” Defendant calls his present motion one for equitable tolling but it is actually a motion for post conviction relief; he wants this court to overturn his sentence. Section § 2255(h) deprives this court of authority to entertain his motion until he has

obtained the necessary certificate from the court of appeals.

ORDER

IT IS ORDERED that defendant Robert Lee McNeal's motion for equitable tolling is construed as a second motion for post conviction relief under 28 U.S.C. § 2255 and DENIED because this court has no authority to consider it. Defendant's motion for the appointment of counsel is DENIED as moot.

Entered this 21st day of February, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge