

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DERRICK D. SYKES,

Defendant.  
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ORDER

09-cr-61-bbc

Defendant pleaded guilty to one count of possession with intent to distribute five grams or more of crack cocaine. He was sentenced on October 22, 2009 to a term of imprisonment of 78 months. When defendant did not file an appeal of his conviction, his conviction became final 10 days after the judgment of conviction had been entered, or approximately November 5, 2009, when his opportunity to file a direct appeal expired. Clay v. United States, 537 U.S. 522 (2003). Defendant had one year from November 5, 2009, or November 5, 2010, in which to file a post conviction motion under 28 U.S.C. § 2255.

Defendant has now filed a document entitled “Defendant’s Constitutional and Jurisdictional Error Defect Nunc Pro Tunc Motion to Avoid [A] Fundamental Miscarriage of Justice - To Void judgment as to the Two Point Enhancement.” In his motion, he

contends that the court erred in imposing a gun enhancement under USSG §2D1.1(b)(1) at sentencing both because the gun possession was not formally charged in an indictment and because he did not have constructive possession of the shotgun.

Defendant's arguments cannot be considered because he had an opportunity to raise them on direct appeal, did not take such an appeal and has failed to show cause and prejudice for his failure. In addition, the time for filing a motion for post conviction relief under 28 U.S.C. § 2255 has expired. Therefore, his motion to void judgment must be denied.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Derrick D. Sykes's "Constitutional and Jurisdictional Error Defect Nunc Pro Tunc Motion to Avoid [A] Fundamental Miscarriage of Justice - To Void judgment as to the Two Point Enhancement" is construed as a motion for post conviction relief under 28 U.S.C. § 2255 and is DENIED as untimely. No certificate of appealability shall issue.

Entered this 15th day of April, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge