

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

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

09-cr-61-bbc

DERRICK D. SYKES,

Defendant.

Defendant Derrick D. Sykes has moved pursuant to Fed. R. Civ. P. 59(e) to alter or amend the order entered in this case on April 15, 2011, construing his motion 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” as a motion for post conviction relief under 28 U.S.C. § 2255 and denying it as untimely.

In his motion for reconsideration, defendant asserts the court erred when it construed defendant’s motion as one under 28 U.S.C. § 2255 without first notifying him that it was going to do so. In most instances before addressing a re-characterized motion, the court does advise defendant that it is re-characterizing the motion and warning defendant that it will count as his first § 2255 motion. Castro v. United States, 124 S. Ct. 786, 792 (2004). This notice is important because defendants only have one opportunity to file a § 2255 motion without receiving permission from the Court of Appeals for the Seventh Circuit for a second

filing. See 28 U.S.C. § 2255 ¶ 8. In defendant's case, giving him notice of the re-characterization would have made no difference as his time limit for filing a § 2255 motion expired on November 5, 2010.

Defendant also asserts in his motion that his counsel failed to file a notice of appeal as to the two-level enhancement for the firearm imposed upon him at sentencing. This argument fails as well because defendant failed to file a § 2255 motion asserting this allegation within the time limit for doing so.

ORDER

IT IS ORDERED that defendant's motion to alter or amend judgment under Fed. R. Civ. P. 59(e) is DENIED.

Entered this 6th day of May, 2011.

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