

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

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

08-cr-164-bbc  
10-cv-295-bbc

v.

TREVOR RYAN,

Defendant.  
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Defendant Trevor Ryan has filed a motion for reconsideration and notice of appeal of the court's June 15, 2010 denial of his post conviction motion brought under 28 U.S.C. § 2255. From a review of the two documents and the court's docket, it appears that the notice of appeal was dated and filed before the motion for reconsideration. Because the filing of the notice of appeal preceded the filing of the motion for reconsideration, it deprives this court of jurisdiction over defendant's case. Once the notice of appeal is filed, the court of appeals has jurisdiction and this court cannot act. Therefore, I cannot give any consideration to defendant's motion for reconsideration. I will note however that if I were to act on it, I would deny it because nothing in the motion for reconsideration convinces me

that it was error to deny defendant's § 2255 motion as untimely.

Defendant does not ask in the notice of appeal for a certificate of appealability but he makes a request for one in his motion for reconsideration. However, defendant has not submitted the filing fee of \$455 or asked for a determination that he be permitted to proceed in forma pauperis. Therefore, it is necessary to decide whether a certificate of appealability should issue and whether defendant is entitled to proceed in forma pauperis.

Defendant is financially eligible to proceed on appeal in forma pauperis. Although he had retained counsel for his criminal proceeding, I find from the presentence report and the fact that he forfeited most of his property of value that he is now eligible for appointed counsel. Therefore, he can proceed on appeal unless I find that his appeal is taken in bad faith, which I do. Defendant alleged that his § 2255 motion is timely because the one-year limitation period was tolled while he was in transit following his sentencing and that his filing of a defective motion on February 17, 2010, stopped the time from running from then until the motion was ruled on in June. As I explained, this challenge is without merit. No reasonable judge would come to a different decision. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000). Therefore, I will deny him leave to proceed on appeal in forma pauperis.

As to the certificate of appealability, it is to issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Defendant has not shown that he is entitled to a proceed on appeal in forma pauperis;

therefore he is not entitled to the issuance of a certificate of appealability, which requires a higher showing of potential merit. Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000) ("[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding.") Therefore, I will deny the request for a certificate of appealability as well.

#### ORDER

IT IS ORDERED that defendant Trevor Ryan's requests for leave to proceed in forma pauperis on appeal and for a certificate of appealability are DENIED.

Entered this 6th day of July, 2010.

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