

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DARNELL ROCKETT,

Defendant.

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ORDER

10-cr-201-bbc

Defendant Darnell Rockett has filed a motion for a transcript at government expense, saying that he needs the transcript of his sentencing to determine whether his criminal history category was calculated improperly to include a crime for which he had not yet been convicted, and if so, whether his sentence was valid.

Under 28 U.S.C. § 753, defendant is entitled to a transcript at government expense in order to pursue a motion for post conviction relief under 28 U.S.C. § 2255, *if* the trial judge certifies that the suit is not frivolous and that the transcript is needed to decide the issue presented by the suit. Defendant has not said that he wants the transcript in order to file a § 2255 motion, but if that is what he wants it for, he will have to show why such a motion would not be frivolous. At the present time I can think of no reason why it would not

be.

If defendant intends to challenge his sentence by way of a post conviction motion, he will have an obstacle to overcome because he waived his right to appeal any sentence of 78 months or less as part of his plea agreement. (His sentence was 57 months.) The law makes it clear that a § 2255 motion is not a substitute for direct appeal. Prewitt v. United States, 83 F.3d 812, 816 (7th Cir. 1996) (citing Theodorou v. United States, 887 F.2d 1336, 1339 (7th Cir. 1989)). “An issue not raised on direct appeal is barred from collateral review absent a showing of both *good* cause for failure to raise claims on direct appeal and actual *prejudice* from the failure to raise those claims or if a refusal to consider the issue would lead to a fundamental miscarriage of justice.” Id. (citing Reed v. Farley, 512 U.S. 339, 354 (1994)). Moreover, “a habeas corpus petition is rarely if ever the proper vehicle by which to challenge the application of a Sentencing Guideline where the sentence has become final and the prisoner did not appeal the issue.” Id.

It is unlikely that defendant could show that a refusal to consider the issue he is raising would lead to a fundamental miscarriage of justice. A “fundamental miscarriage of justice” is limited to egregious errors, such as the conviction of an innocent person. McCleskey v. Zant, 499 U.S. 467, 494 (1991). A disagreement about a sentencing guideline range would not constitute that kind of error.

ORDER

IT IS ORDERED that defendant Darnell Rockett's motion for a transcript of his sentencing is DENIED without prejudice for his failure to show that he needs it to file a nonfrivolous motion for post conviction relief.

Entered this 2d day of December, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge