

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

COREY J. THOMAS,

Defendant.

ORDER

12-cv-269-bbc

08-cr-87-bbc

Since the court of appeals affirmed defendant Corey J. Thomas's conviction on December 10, 2010, he has filed a number of post trial motions. On May 17, 2011, he filed a motion for a new trial under Fed. R. Crim. P. 33(b), dkt. #429, arguing that he had newly discovered evidence that required a new trial. On May 19, 2011, I construed the motion as one brought under 28 U.S.C. § 2255 and advised defendant that he had until June 17, 2011, in which to advise the court whether he wanted to withdraw the motion or proceed with it. Order, dkt. #430. Defendant responded, stating that he wanted to proceed with the Rule 33(b) motion and wait to file a motion for post conviction relief. On June 3, 2011, I reviewed defendant's motion and concluded that it was not a genuine claim of newly discovered evidence but rather a motion that should have been captioned as a motion for post conviction relief under 28 U.S.C. § 2255. I denied the motion and declared it withdrawn. Order, dkt. #434.

Defendant then filed a new Rule 33 motion for a new trial, dkt. #440, which I dismissed for his failure to show that he had any new evidence that would require a new trial. Order, dkt. #445. Defendant took an appeal from the denial of his second motion for a new trial; the appeal was denied by the Court of Appeals for the Seventh Circuit on September 10, 2012, in an unpublished decision.

While the appeal from the denial of his Rule 33(b) motion was pending, defendant filed a motion for post conviction relief on April 11, 2012, dkt. #463, raising three claims of ineffective assistance of counsel and one claim of government coercion of a witness. I advised defendant that if the court of appeals were to consider either or both of his motions for a new trial as the equivalent of a motion for relief under 28 U.S.C. § 2255, he could not proceed on the § 2255 motion he had just filed unless he received permission from the court of appeals to file a second successive motion. Order, dkt. #4 (12-cv-269-bbc).

Although the court of appeals has decided defendant's appeal from the denial of his second motion for a new trial under Rule 33(b), it did not say specifically whether, under United States v. Evans, 224 F.3d 670, 672 (7th Cir. 2000), it considered defendant's Rule 33 motion equivalent to a § 2255 motion. Therefore, I will set briefing on two issues: (1) whether defendant's pending motion for post conviction relief requires him to obtain permission for filing from the court of appeals because it is a second motion for post conviction relief and (2) if permission is not necessary, whether defendant can prevail on his three claims of ineffective relief and his one claim of government coercion.

ORDER

IT IS ORDERED that the parties are to brief the two issues raised by the filing of defendant Corey J. Thomas's motion for post conviction relief, as explained above. Defendant has filed a brief in support of his motion for post conviction relief, dkt. #463-2; he has also filed a letter, dkt. #8, in which he argues the difference between his Rule 33 motion and his § 2255 motion. No later than October 22, 2012, defendant is to either advise the court that he wishes to stand on his previously submitted documents or file a supplemental brief on the two issues. The government may have until November 12, 2012, in which to respond. Defendant may have until November 26, 2012, in which to file his reply.

Entered this 25th day of September, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge