

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

EMETERIO VELAZQUEZ,

Defendant.

ORDER

12-cr-62-bbc

Defendant Emeterio Velezquez pleaded guilty to one count of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1) and was sentenced on September 25, 2013 to a term of imprisonment of 240 months. He did not appeal his conviction.

Now, five months later, defendant has filed a motion for extension of time to file his direct appeal. Defendant states that he asked his trial counsel to file an appeal but he failed to do so. He also alleges that the interpreter lied during the translation at his sentencing hearing and had he known the correct translation of what his lawyer said to the court on his behalf, he would have objected. Defendant does not explain why it took him 5 months to discover that his counsel failed to file a notice of appeal.

Unfortunately for defendant, this court cannot give him the extension of time he is requesting, even if he could show excusable neglect or good cause. He has waited too long

to file the motion for extension. Under Fed. R. App. P. 4(b)(4), a district court may “extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b) and upon a finding of excusable neglect or good cause.” The judgment and commitment order was entered on October 1, 2013, so the 14-day period that defendant had in which to take an appeal expired on October 15, 2013. Fed. R. Crim. P. 4(b)(1). Under Fed. R. Crim. P. 4(b)(4), defendant had 30 days after the time for filing his appeal had expired or until November 14, 2013 to which to move for an extension of time to file an appeal. Because defendant’s motion was not filed by November 14, 2013, this court has not authority to grant him an extension.

This does not mean that defendant has no remedies. If he wishes to pursue the claims alleged in his motion, he may do so by filing a motion under 28 U.S.C. § 2255. Ordinarily, issues that were not raised on direct appeal may not be litigated in a § 2255 motion, but this rule does not apply to allegations of ineffective counsel. Massaro v. United States, 538 U.S. 500, 509 (2003). The Court noted that “in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance.” Id. at 504. This is primarily because the trial record is rarely developed for the object of litigating such a claim and it would not reflect actions that take place outside the courtroom.

I will not change defendant’s motion for an extension of time to a motion for post conviction relief under 28 U.S.C. § 2255 at this time. Instead, I will give defendant an opportunity to withdraw his present motion and submit a motion labeled properly as a motion for vacation of sentence under § 2255. Castro v. United States, 124 S. Ct. 786

(2003); United States v. Evans, 224 F.3d at 675; Henderson v. United States, 264 F.3d 709 (7th Cir. 2001).

If defendant chooses not to withdraw the present motion, then I will construe it as a motion brought under § 2255. Defendant should be aware that in that instance, the present motion will be the only § 2255 motion he can file. He will not have another chance to file a § 2255 motion without the advance permission of the court of appeals. If defendant thinks he has additional grounds to assert, he should withdraw his motion and amend it to include every § 2255 claim he believes he has. I am including the court's standard form for a 28 U.S.C. § 2255 motion, should the defendant choose to use it. Defendant should keep in mind the time limits that apply to the filing of motions for § 2255 relief. Defendant was sentenced on September 25, 2013. His judgment of conviction was entered on October 1, 2013. Therefore, his conviction became final under 28 U.S.C. § 2255 ¶ 6(1) 10 days later when the period for taking a direct appeal under Fed. R. App. P. 4(b)(1)(A)(I) expired, which would have been October 11, 2013. Therefore, defendant has one year from October 11, 2013, or until October 11, 2014 in which to file a motion for relief under 28 U.S.C. § 2255.

ORDER

IT IS ORDERED that defendant Emeterio Velazquez's motion for an extension of time in which to file a direct appeal is DENIED.

FURTHER, IT IS ORDERED that defendant may have until April 30, 2014, in which

to advise the court whether he wishes to withdraw his motion or proceed with it. If he chooses to proceed, he is either to attach a rewritten motion, setting out *all* his challenges to his sentence or advise the court that his only challenges are the ones set out in his present motion.

If defendant does not respond to this order by April 30, 2014, the court will consider his motion to have been withdrawn.

Entered this 25th day of March, 2014.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge