

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

DEVEN RACE,)	
)	
Movant,)	
)	
vs.)	Case No. 09-00138-CV-W-FJG
)	Crim. No. 07-00307-02-CR-W-FJG
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER

Pending before this Court is movant's corrected motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, filed on March 6, 2009 (Doc. # 3). The Court finds that it has jurisdiction over this matter.

Movant was charged with three counts in an indictment: (1) aiding and abetting interstate carjacking, in violation of 18 U.S.C. §§ 2110 and 2; (2) using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924 (c)(1) (A) and 2; and (3) felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). On May 28, 2008, following a jury trial, movant was convicted of being a felon in possession of a firearm and acquitted of the other two charges. The Court sentenced movant to 120 months' imprisonment for Count Three. Movant did not appeal the conviction or sentence.

In his petition for relief, movant asserts two bases for relief:

1. The evidence was insufficient to support his conviction; and
2. His counsel was ineffective for failing to file a notice of appeal.

JUDGMENT

The Court has reviewed movant's petition (Doc. # 3), respondent's response (Doc. # 5), and the record in movant's criminal case, and finds that movant's allegations are meritorious in part. Movant claims that his attorney failed to file a notice of appeal as he

requested. In response, the Government agrees with movant that the judgment should be vacated for defense counsel's failure to file a notice of appeal. The Government also attached an affidavit from defendant's attorney, Mr. Ronald Partee, in which he confirms that his client asked him to file an appeal, but that the notice of appeal he prepared was not submitted properly on the ECF/CM system due to user error. The Government requests that this Court vacate its previous judgment, and enter a new judgment in the criminal case so that defendant will be provided with a new 10-day period in which to file a notice of appeal.

Movant's other ground for relief involves a challenge to the sufficiency of evidence. The Government requests that the Court dismiss without prejudice movant's claim regarding the sufficiency of the evidence because that claim can and should be raised on direct appeal. The Court agrees with the Government's position for the reasons stated in its response.

Accordingly, movant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. #3), is hereby **GRANTED IN PART** and **DENIED IN PART**. The Court **VACATES** the Court's Judgment entered on October 15, 2008 (Doc. # 85) in United States v. Deven W. Race, No. 07-00307-01-CR-W-FJG. The Court reinstates the Judgment and Commitment in the criminal case as it was entered on October 15, 2008 effective as of the date of this Order, and the 10-day period to file an appeal shall commence from the date of this Order. Because movant's ground for relief concerning the sufficiency of evidence should be brought in his direct appeal, the Court **DISMISSES WITHOUT PREJUDICE** this ground.

Further, the Clerk of the Court is directed to mail movant a copy of this Order by certified mail, return receipt requested.

No evidentiary hearing will be held in this matter because the issues raised are resolvable by the record.

Date: 05/11/09
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
Chief United States District Judge