

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

WALTER BURNLEY,

Defendant.

ORDER

09-cv-547-bbc

06-cr-141-jcs

On September 3, 2009, defendant filed a motion for post conviction relief under 28 U.S.C. § 2255, challenging the effectiveness of both his trial and appellate counsel. In an order dated December 18, 2009, I denied the motion and determined that no certificate of appealability would issue. On June 22, 2010, defendant moved for an extension of time to file a certificate of appealability. Dkt. #14. That motion was denied on June 22, 2010, #dkt. 15, because I had already made a determination that no reasonable jurist would believe that defendant's motion had any merit. In the June 22 order, I advised defendant that pursuant to Fed. R. App. P. 22, he could request that a circuit judge issue the certificate.

On July 26, 2010, defendant sent the court of appeals a request for a certificate of appealability from this court's December 18, 2009 order and December 21, 2009 judgment denying his motion under 28 U.S.C. § 2255. The court of appeals has forwarded the document to this court.

Defendant has not filed a notice of appeal or paid the required \$455 fee for appeal. I will construe his application for a certificate of appealability as including a notice of appeal and a request for leave to proceed in forma pauperis on appeal under 28 U.S.C. § 1915.

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court may proceed on appeal in forma pauperis without further authorization "unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed." Defendant had court-appointed counsel during the criminal proceedings against him and I do not intend to certify that his appeal is not taken in good faith. Defendant's challenge to his sentence is not wholly frivolous. A reasonable person could suppose that it has some merit. Cf., Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000). Therefore, I will grant him leave to proceed on appeal in forma pauperis.

As to defendant's request for a certificate of appealability, I denied that request in the order denying his § 2255 motion, dkt. #12, because he had not made a substantive showing of a denial of a constitutional right. I am sending defendant's application for a certificate

of appealability along with a copy of this order to the court of appeals so that it may determine whether a certificate of appealability shall issue under Fed. R. App. P. 22(b).

ORDER

Defendant Walter Burnley's request to proceed in forma pauperis on appeal is GRANTED. His request for a certificate of appealability is DENIED.

Entered this 25th day of August, 2010.

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