

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

UNITED STATES OF AMERICA,

ORDER

Plaintiff,

10-cv-632-bbc

07-cr-003-jcs

v.

ARTHUR T. CONNER,

Defendant.

Defendant Arthur T. Conner has filed a motion for post conviction relief under 28 U.S.C. § 2255 and for appointment of counsel. On October 12, 2007, defendant was convicted by Judge Shabaz of one count of distributing 5 grams or more of cocaine base and sentenced to a term of life imprisonment. On October 17, 2007, defendant appealed. On October 22, 2009 the court of appeals affirmed defendant's conviction but remanded the case for resentencing in light of Kimbrough v. United States, 552 U.S. 85 (2007). On January 5, 2010, because Judge Shabaz was on medical leave, defendant's case was reassigned to me. At resentencing I sentenced defendant to a term of imprisonment of 300 months. Defendant appealed and his appeal is still pending.

Absent extraordinary circumstances, the district court should not consider § 2255 motions while a direct appeal is pending. United States v. Robinson, 8 F.3d 398 (7th Cir. 1993). Defendant has not alleged any extraordinary circumstances that require consideration of his § 2255 motion while his appeal is pending. Therefore, I will dismiss defendant's 28 U.S.C. § 2255 motion without prejudice because it is premature.

I am aware that 28 U.S.C. § 2244(a) would prevent the court from entertaining a second motion by defendant under 28 U.S.C. § 2255 if I had decided the legality of his detention in this motion. Because the motion is denied as premature and not on the merits, defendant may file a new § 2255 motion after his appeal is decided. Such a motion would not be "second or successive" motion under 28 U.S.C. 2244(a). O'Connor v. United States, 133 F. 3d 548, 694 (7th Cir.1998) (when § 2255 petition is returned to petitioner on ground that no collateral attack could be begun while appeal pending, it does not count as petition; petitioner may file new motion after appeal decided without obtaining permission from the court of appeals).

ORDER

IT IS ORDERED that defendant Arthur Conner's motion for post conviction relief

under 28 U.S.C. § 2255 and his motion to appoint counsel are DENIED without prejudice as premature.

Entered this 26th day of October, 2010.

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