

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 1:03-cr-08
)	
v.)	
)	
LORNE EUGENE OSBORN,)	<u>ORDER</u>
)	
Defendant.)	
)	

Defendant Lorne Eugene Osborn is serving a 210-month prison sentence imposed by former District Judge David W. McKeague on May 27, 2004, after a jury found defendant guilty of manufacturing more than 100 marijuana plants. 21 U.S.C. § 841(a)(1). On November 17, 2005, defendant filed a *pro se* letter, which was construed as a notice of appeal (docket # 88). The United States Court of Appeals for the Sixth Circuit has assigned to the appeal docket no. 05-2606.

Defendant has now filed three motions in connection with the appeal. First, he has filed a motion for leave to appeal (docket # 90) in which he asks the court to extend the time for the filing of a notice of appeal on account of the alleged neglect of defendant's retained counsel. Second, defendant asks for the appointment of appellate counsel (docket # 91). Finally, defendant seeks leave to proceed *in forma pauperis* on appeal (docket # 92). Since Judge McKeague's elevation to the Court of Appeals, this court has undertaken responsibility to decide post-trial motions in criminal cases formerly assigned to him.

Defendant's motion for an extension of time in which to file an appeal requests relief beyond this court's authority. In a criminal case, a defendant's notice of appeal must be filed in the district court within ten days of the entry of judgment. FED. R. APP. P. 4(b)(1)(A). Appellate Rule 4 empowers the district court, upon a finding of excusable neglect or good cause, to extend the time to file a notice of appeal for a period not to exceed thirty days from the expiration of the time otherwise prescribed in Rule 4(b). FED. R. APP. P. 4(b)(4). The ten-day period for appeal prescribed in Rule 4(b) expired on June 10, 2004, ten days after the entry of judgment. The thirty-day period in which the court could have extended the time to appeal expired on July 12, 2004. This court is powerless to extend the time for appeal after the expiration of the thirty-day period contemplated in appellate Rule 4(b)(4). *See United States v. Tarrant*, 158 F.3d 946 (6th Cir. 1998) (District court has the discretion to consider a motion to extend time "if and only if it is filed within thirty days after the ten-day deadline, or forty days from the date of the entry of judgment."). As defendant filed nothing in this court until well over one year had elapsed, this court lacks authority under appellate Rule 4 to grant the relief requested.

Defendant's motion for appointment of counsel is also outside this court's authority. With the lodging of his notice of appeal, whether timely or not, jurisdiction of this matter passed to the Sixth Circuit Court of Appeals. This includes any order appointing or relieving appellate counsel. *See 6TH CIR. R. 101.*

Finally, defendant has moved for leave to appeal *in forma pauperis*. Appellate Rule 24 grants this court authority to allow a criminal defendant to proceed *in forma pauperis*. Upon review of the application to proceed without prepayment of fees, the court determines that defendant lacks the ability to pay or give security for fees and costs. Accordingly:

IT IS ORDERED that defendant's motion for leave to file an out-of-time appeal (docket # 90) be and hereby is DENIED.

IT IS FURTHER ORDERED that defendant's motion for appointment of counsel (docket # 91) is hereby DENIED, without prejudice to defendant's ability to seek the same relief in the Court of Appeals.

IT IS FURTHER ORDERED that defendant's application for leave to proceed *in forma pauperis* on appeal (docket # 92) be and hereby is GRANTED.

Date: January 3, 2005

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE