

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

OCT 21 1991

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MICHAEL E. MCCARTHY,
Defendant-Appellant.

No. 91-3178
(D.C. No. 84-20044-02)
(D. Kansas)

ORDER AND JUDGMENT*

Before LOGAN, MOORE and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant Michael E. McCarthy appeals the district court's denial of his motion to be provided a free copy of trial transcripts in this case, in which he was convicted of armed robbery of a federally insured credit union in violation of 18 U.S.C. § 2113(a) and (d). His conviction was affirmed by this

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

court. United States v. McCarthy, No. 84-2257 (10th Cir. July 24, 1985), cert. denied, 474 U.S. 952 (1985). Appellant asserts that the district court was biased against him and sealed portions of the trial court transcript. The district court's order denies having sealed any such records.¹ The district court found the assertions of judicial bias, prejudice and impartiality to be "bald" and frivolous.

Appellant's motion is simply entitled "Motion to Obtain Court Documents." However, because it contains allegations that the district court was biased and prejudiced, we construe the motion as both a request for a trial transcript and a § 2255 motion to vacate sentence.

Although an indigent defendant taking a direct appeal of his conviction is entitled to a transcript, it seems quite apparent from the record² and the issues decided by this court in affirming the conviction that a transcript was provided during the direct appeal and that appellant's counsel had full access to it. An

¹ Perhaps the confusion on sealing is because the presentence report is always sealed. See 10th Cir. R. 11.2(e) ("Presentence reports are confidential. . . . the district court clerk shall separate it from other portions of the record and enclose it in an envelope clearly marked 'Presentence Report--'Sealed.'"); D. Kan. Rule 305 (presentence reports are confidential court documents). The presentence report, of course, has nothing to do with the trial transcript appellant seeks.

² The district court docket, which is part of the record in this appeal, includes two entries made on October 18, 1984, that show that a two-volume transcript of the trial was received. A later entry verifies payment to the court reporter for a transcript for defendant McCarthy. The record also includes a letter to appellant from his trial and appellate counsel stating that the transcripts are on file with the district court and that counsel does not have them in his possession. This statement suggests that appellant's counsel did have the transcripts earlier.

indigent prisoner is entitled to a free transcript to support collateral proceedings under 28 U.S.C. § 2255 "if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." 28 U.S.C. § 753(f); cf. Jackson v. Turner, 442 F.2d 1303, 1305 (10th Cir. 1971) ("the rule in this circuit with respect to federal habeas corpus proceedings is that petitioners who seek a transcript . . . must do more than allege conclusory allegations").

We agree with the district court that the motion contains nothing more than a conclusory allegation of bias and prejudice, and appellant has not established a need for a transcript at government expense. Hence we must AFFIRM the district court's order denying the transcript.

The mandate shall issue forthwith.

Entered for the Court

James K. Logan
Circuit Judge