

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1710
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH MICHAEL LANFRANCA,
a/k/a Joe Luca,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:93-CV-148-K (4:88-CR-54-K)

- - - - -
(May 18, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Ralph Lanfranca argues, without citation, that the district court decided his § 2255 motion prematurely because the court received his motion to withdraw the § 2255 motion on June 8th, one day before it rendered its decision on the underlying motion.

Because there is no specific procedure described in the Rules Governing § 2255 Proceedings respecting voluntary withdrawal of applications made thereunder, Rule 12 of the Rules Governing § 2255 Proceedings authorizes a district court to

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

"proceed in any lawful manner not inconsistent with these rules, or any applicable statute," and to apply either the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to such motions. Fed. R. Civ. P. 41(a)(1) provides for the voluntary dismissal of a civil action before service by the adverse party of an answer or of a motion for summary judgment. Rule 41(a)(1). Thereafter, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Rule 41(a)(2). This Court reviews dismissals on motions under Rule 41(a)(2) for abuse of discretion. Kramer v. Butler, 845 F.2d 1291, 1294 (5th Cir.), cert. denied, 488 U.S. 865 (1988). To obtain a reversal the defendant must demonstrate "serious prejudice." United States v. Brito-Hernandez, 996 F.2d 80, 83 (5th Cir. 1993) (internal quotations and citations omitted).

In Estep v. United States, 251 F.2d 579, 582 (5th Cir. 1958), this Court determined that the district court did not abuse its discretion in refusing to allow the withdrawal of a § 2255 motion because the withdrawal motion was made immediately prior to the hearing on the § 2255 application. See also Potts v. Zant, 638 F.2d 727, 742 (5th Cir. Unit B) (petitioner may not as a matter of right voluntarily withdraw § 2254 petition without procedural prejudice at any time prior to the filing of responsive pleadings), cert. denied, 454 U.S. 877 (1981).

The record reflects that the district court received the motion to withdraw on June 22nd, eleven days after it ruled on

the § 2255 motion, and, accordingly, the withdrawal motion was properly denied as moot; assuming arguendo, that the June 8th date is correct, the motion was filed (1) over three months after the § 2255 filing, (2) over one month after the Government responded, and (3) only one day before the court ruled on the motion Lanfranca sought to withdraw. Given the tardiness of the filing, the district court's denial does not constitute an abuse of its discretion, nor has Lanfranca demonstrated "serious prejudice"; he is entitled to bring a second § 2255 motion, albeit subject to possible dismissal pursuant to Rule 9(b) as an abuse of the § 2255 procedure. See Kramer, 845 F.2d at 1294-95 (district court's denial of motion to dismiss § 2254 petition was not an abuse of discretion even if petitioner were forced to raise claim in federal habeas petition which may be subject to dismissal for abuse of writ).

AFFIRMED.