

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 01-178-1
v.	:	
	:	CIVIL ACTION
NATHANIEL WILLIAMS	:	NO. 04-4816

MEMORANDUM

Bartle, J.

January 31, 2005

The threshold question before us is whether petitioner's motion under 28 U.S.C. § 2255 was timely.

This court sentenced petitioner to 43 years in prison in September, 2001 as a result of his guilty pleas to multiple counts of conspiracy to interfere with interstate commerce by robbery, interference with interstate commerce by robbery, and brandishing a firearm during a crime of violence. The United States Supreme Court denied his petition for certiorari on October 6, 2003. Petitioner signed his motion for relief under 28 U.S.C. § 2255 on October 8, 2004, and it was filed with this court six days later. Even giving petitioner the benefit of the October 8, 2004 date, he did not file his motion within one year from "the date on which the judgment of conviction becomes final." Thus, his motion is untimely under subsection (1) of the 6th paragraph of 28 U.S.C. § 2255.

Petitioner, however, argues that he filed within one year of

the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;

Subsection (3) of the 6th paragraph of 28 U.S.C. § 2255.

In support, his papers cite the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), a case arising out of the state of Washington. The Supreme Court held that in accordance with Apprendi v. New Jersey, 530 U.S. 466 (2000) a court may not sentence a criminal defendant to a term of imprisonment beyond the statutory maximum, that is, beyond a sentence that can be imposed "solely on the basis of facts [other than a prior conviction] reflected in the jury verdict or admitted by the defendant." Blakely, 124 S. Ct. at 2537. The Blakely decision, however, does not help petitioner because he was sentenced under the Federal Sentencing Guidelines. Blakely specifically states it does not apply to them. See id. at 2538 n.9.

As a pro se petitioner, we "hold his documents to a less stringent standard than those drafted by attorneys." United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002). Thus, we will treat his motion as having encompassed the Supreme Court's recent decision in United States v. Booker, 125 S. Ct. 738 (2005), which held the Federal Sentencing Guidelines unconstitutional insofar as they are mandatory. From now on, courts must simply consider them as a factor in making sentencing decisions.

The Supreme Court in Booker clearly recognized for federal criminal defendants a new right as that term is used under subsection (3) of the 6th paragraph of § 2255, which pertains to the one-year time frame in which a petitioner can bring such a motion after recognition of the new right. Thus, the timeliness of petitioner's § 2255 motion depends on the second part of that subsection, that is, whether this newly recognized right not to be sentenced under the mandatory Federal Sentencing Guidelines is "made retroactively applicable to cases on collateral review." While a new right to be cognizable must be recognized by the Supreme Court, the lower federal courts may determine the issue of retroactivity with respect to a petitioner's first § 2255 motion. United States v. Swinton, 333 F.3d 481, 485-87 (3d Cir. 2003).¹ This is petitioner's first such motion.

Our Court of Appeals explained in Swinton that the newly recognized constitutional right under Apprendi v. New Jersey, 530 U.S. 466 (2000) was not retroactive. In that case, the Supreme Court ruled that, other than a prior conviction, any sentencing enhancement beyond the statutory maximum must be based upon facts found by a jury beyond a reasonable doubt. Booker is

1. We note, however, that where the issue of retroactivity is evaluated on a second or successive petition brought under paragraph 8 of § 2255 based upon a new rule of law, the new rule is retroactively applicable to cases on collateral review only where the Supreme Court has expressly held that it is. Tyler v. Cain, 533 U.S. 656, 662 (2001); Swinton, 333 F.3d at 486.

similar to Apprendi. In Booker, Justice Stevens' opinion for the Court ended with the following:

Accordingly we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Booker, 125 S. Ct. at 756.

We can see no reason why the analysis in Swinton concerning Apprendi should not apply equally to Booker and compel the conclusion that Booker is likewise not retroactive. Since, in our view, Booker is not retroactive on collateral attack, petitioner has not met the requirements of subsection (3) of the 6th paragraph of § 2255.

Accordingly, the motion of petitioner under 28 U.S.C. § 2255 will be denied.

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ORDER

AND NOW, this 31st day of January, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

- (1) the motion of Nathaniel Williams for relief under 28 U.S.C. § 2255 is DENIED; and
- (2) no certificate of appealability is issued.

BY THE COURT:

/s/ Harvey Bartle III

J.