

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 : NO. 00-567-1
 : :
 : :
 : CIVIL ACTION
JAMES RUSSELL : NO. 03-5183

MEMORANDUM

Bartle, J.

February 3, 2005

Before the court is petitioner's motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255.

Petitioner pleaded guilty to one count of retaliating against a witness in violation of 18 U.S.C. § 1513(b)(2) and was sentenced to 53 months in prison on August 3, 2001 to run consecutively to a state sentence. On December 19, 2001, the Court of Appeals granted his motion for voluntary dismissal of his appeal. On September 15, 2003, he filed his motion under 28 U.S.C. § 2255. This court dismissed petitioner's § 2255 motion as untimely filed. While not challenging the untimeliness of the motion, the Court of Appeals, on October 26, 2004, vacated our dismissal and remanded on the ground that petitioner was not given an opportunity to excuse the delay. On November 9, 2004, this court entered the following Order:

AND NOW, this 9th day of November, 2004, it is hereby ORDERED that:

(1) movant James Russell may file with this court and serve upon the Government no later than December 9, 2004, a response setting forth the reasons why this court should not

dismiss his motion under 28 U.S.C. § 2255 for being filed too late;

(2) if movant relies on lack of competency, he must attach legible copies of his medical records to whatever response he files; and

(3) the Government may file and serve within 15 days thereafter any responsive brief.

Petitioner filed a response on December 6, 2004 in which he alleged mental incompetency. Attached was a redacted report of Dr. Frederick E. Wawrose dated June 9, 2004. On December 21, 2004, we entered an Order requiring petitioner to produce a full and complete copy of said report on or before January 14, 2005. We further stated, "Failure to do so may result in the dismissal of his motion under 28 U.S.C. § 2255." On January 3, the court received a letter from petitioner, which stated in relevant part that: "The sole purpose of me blocking out several paragraphs within the report is because its [sic] completely irrelevant to the circumstances and confidential information. It contains information that if ingested in the wrong nature could be used against me" Nonetheless, he added, "I have sent to obtain full and complete copies of the report of Dr. Frederick E. Wawrose and as soon as I receive them, I will supply this court with such."

On January 18, 2005 we received from petitioner an undreacted copy of Dr. Wawrose's June 9, 2004 report. Dr. Wawrose, a consulting psychiatrist, had prepared this report pursuant to an order of The Honorable Fredric J. Ammerman, President Judge of the Court of Common Pleas of Clearfield

County, Pennsylvania in connection with state charges against petitioner of aggravated assault, simple assault, harassment, and having a prohibited weapon. As to his ability to understand the criminal proceedings, Dr. Wawrose concluded:

It is my opinion, to a reasonable degree of psychiatric certainty, that:

1. Russell has the capacity to understand the nature of the criminal proceedings against him and the seriousness of the charges.
2. Russell has the ability to assist in his own defense.¹

Wawrose Report, June 9, 2004, 3-4.

Petitioner has recently moved for a psychiatric examination under 18 U.S.C. § 4241, presumably to excuse his tardiness in filing his § 2255 motion. However, in light of Dr. Wawrose's report, there is no

reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a). Accordingly, said motion for psychiatric examination will be denied.

1. Dr. Wawrose also concluded:

3. Russell, at the time of the incident knew right from wrong, that is, that it was wrong to stab someone, but he was not in complete control of his behavior and did not understand the nature and quality of his acts at the time of the alleged offense.

The court finds that petitioner suffered no mental impairment or other impediment which prevented him from filing his § 2255 motion on time. There is simply no basis for invoking tolling principles. The motion is clearly out of time under subsection (1) of the 6th paragraph of § 2255 because it was not filed within one year of "the date on which the judgment of conviction became final."

Even if petitioner's motion were timely because of excusable neglect, his claims are without merit. He first contends that he was not competent to enter a guilty plea. The court colloqued him and observed him closely throughout the guilty plea hearing. He clearly understood the nature of the charges against him, the consequences of his plea, and his waiver of his right against self-incrimination. His plea was knowing, intelligent, and voluntary.

He also claims that his counsel was ineffective. Again, his position is without substance. We note that at his guilty plea hearing he conceded that he had "ample opportunity to discuss [his] case with Mr. Stephen Marley [his attorney]." He also stated he was "satisfied" with Mr. Marley's representation of him. The evidence against the defendant was overwhelming. He admitted his guilt, and he was properly sentenced within the applicable guidelines. There was no deficiency in the performance of petitioner's counsel so as to cause prejudice to petitioner. There is simply no reasonable probability that the result would have been different but for any unprofessional

errors of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

Petitioner also has before us a motion to amend his § 2255 motion to add a claim that his sentence was invalid as a result of the United States Supreme Court's recent decision in United States v. Booker, 125 S. Ct. 738 (2005). In the interest of justice, we will grant that motion. In Booker, the court held the Federal Sentencing Guidelines unconstitutional insofar as they are mandatory. From now on, courts must simply consider them as a factor, along with others, in making sentencing decisions.

Under subsection (3) of the 6th paragraph of 28 U.S.C. § 2255, a motion to vacate, set aside, or correct a sentence is timely if it is 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"

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. Thus, the appropriateness of petitioner's Booker claim 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 must be recognized by the Supreme Court, the lower federal courts may determine the

issue of retroactivity of that new right when raised in a petitioner's first § 2255 motion. United States v. Swinton, 333 F.3d 481, 485-87 (3d Cir. 2003).² This is petitioner's first such motion.

Our Court of Appeals held 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. Following the reasoning in Teague v. Lane, 489 U.S. 288 (1989), the Court of Appeals explained that Apprendi announced a new rule of criminal procedure and that this new rule would not apply retroactively unless it "(1) places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) requires the observance of those procedures that are implicit in the concept of ordered liberty." Swinton, 333 F.3d at 487. The court concluded that neither exception was satisfied. Booker is similar to Apprendi. In Booker, Justice Stevens' opinion for the Court ended with the following:

2. We note, however, that where the issue of retroactivity is evaluated with respect to a second or successive § 2255 motion, the new rule is retroactive to cases on collateral review only where the Supreme Court has expressly held that it is. See ¶ 8 of 28 U.S.C. § 2255; Tyler v. Cain, 533 U.S. 656, 662 (2001); Swinton, 333 F.3d at 486.

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 see no reason why the analysis in Swinton concerning Apprendi should not apply equally to Booker and compel the conclusion that it is likewise not retroactive.

Since Booker, in our view, is not retroactive on collateral attack of a sentence, and since petitioner's other claims are untimely and in any event are without merit, we will deny his motion under 28 U.S.C. § 2255.

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ORDER

AND NOW, this 3rd day of February, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of James Russell "to amend 28 U.S.C. § 2255 motion and/or correct or modify unconstitutional sentence" is GRANTED;

(2) the petition for psychiatric examination pursuant to 18 U.S.C. § 4241 et seq. is DENIED;

(3) the motion under 28 U.S.C. § 2255, as amended, to vacate, set aside, or correct sentence is DENIED; and

(4) no certificate of appealability is issued.

BY THE COURT:

/s/ Harvey Bartle III
J.