

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 99-0238
	:	
DARRYL LAMONT FRANKLIN	:	
	:	

MEMORANDUM

STENGEL, J.

February 23, 2005

Darryl Lamont Franklin filed a *pro se* motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”). For the following reasons, I will deny the motion without prejudice to Mr. Franklin’s moving in the United States Court of Appeals for the Third Circuit for an order authorizing the District Court to consider his second or successive application under 28 U.S.C. § 2255.

PROCEDURAL HISTORY

Mr. Franklin was convicted by a jury on September 2, 1999 of conspiracy to commit Hobbs Act robbery, interference with commerce by robbery, brandishing a firearm during and in relation to a crime of violence, and possession of a firearm by a convicted felon. In February 2000, Mr. Franklin was sentenced by Judge VanAntwerpen to two hundred five (205) months’ incarceration.¹ Upon appeal, the Court of Appeals for the Third Circuit affirmed the sentence

¹Mr. Franklin’s total offense level for sentencing guideline purposes was determined to be 28, with a criminal history category of III. This yielded a guideline sentencing range of 97 to 121 months. Count 3 of the indictment carried a mandatory minimum of 84 months which was required to run consecutive to the other counts. The presentence report also suggested a 2-level guideline enhancement for obstructing justice. Judge VanAntwerpen found that based on other factors, i.e., Mr. Franklin’s false testimony, his two refusals to give a blood sample despite a search warrant, his attempt to fabricate evidence, and the highly violent nature of the crime, he “would have been inclined to depart upward substantially were it not for the full amount of the additional consecutive sentence mandated by defendant’s employment of a firearm in violation of 18 U.S.C. § 924(c).” United States v. Franklin, 2000 U.S. Dist. LEXIS 1782, *39-40 (E.D. Pa. February 14, 2000). Judge VanAntwerpen did not include that enhancement in sentencing Mr. Franklin. Id.

and conviction. See United States v. Franklin, 248 F.3d 1131 (3d Cir. 2000).

In 2002, Mr. Franklin filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence. This motion was denied by Judge VanAntwerpen on April 26, 2002. On May 19, 2003, the Court of Appeals denied Mr. Franklin's request for a certificate of appealability.

On August 4, 2004, Mr. Franklin filed this *pro se* motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b). In this motion, he asks "whether the impact of the United States Supreme Court's decision in Blakely v. Washington requires relief from judgment?"

FACTUAL BACKGROUND

The facts of this case are taken directly from the opinion of Judge VanAntwerpen which outlined his rulings regarding Mr. Franklin's pretrial motions:

On the afternoon of April 14, 1999, the defendant and another person entered Talisman's Jewelry Store at 12th Street and Green Street, Reading, Berks County, Pennsylvania for the purpose of robbing money and jewelry from the store. Danny Cafoncelli, a store employee, was struck in the head, handcuffed at gunpoint, and thrown down a flight of cellar stairs in the basement of the store. While the defendant was in the store, he pointed a gun at another employee, Louis Cafoncelli, who is the father of Danny Cafoncelli. At that point, Louis Cafoncelli drew a 9mm revolver which he carries. There was an extended struggle during which the defendant was shot. The defendant ultimately fled from the store. The government alleges that approximately \$30,000 in cash, jewelry, a handgun and a rifle were taken during the robbery.

The Reading Police responded to the jewelry store robbery. Officer Fizz and other officers interviewed Louis Cafoncelli who gave a brief description and said that one of the perpetrators may have been shot. While this interview was taking place, Officer Fizz was informed by a bystander that nearby St. Joseph's Hospital was treating a gunshot victim. Officer Fizz immediately responded to the hospital. In the meantime, Louis Cafoncelli was driven to another hospital.

Officer Fizz arrived at the hospital and entered the emergency room where the defendant was on a gurney receiving treatment. The defendant was in pain. On

the floor next to the gurney were bloody articles of clothing which had been cut-up in the process of removing them from the defendant. Officer Fizz asked the defendant what had happened. The defendant told Officer Fizz he had been robbed but he was unable to say where the robbery took place. The defendant gave the false name of Lamont Williams to both Officer Fizz and the hospital. After talking to the defendant, Officer Fizz left him and went outside to confer with another uniformed officer. At that point, the defendant was not under arrest and no police officer was present. Officer Fizz and the other officer learned from hospital security personnel that jewelry had been found outside the hospital in a trash can. At that point, detectives from the Criminal Investigation Division were summoned to the hospital.

Detective Detrick arrived at the hospital in about ten minutes and conferred with the officers present. At that point, the defendant was placed under arrest and a guard was posted at his bedside. At the time of the arrest, Officer Fizz collected the bloody cut-up articles of clothing from the floor because he knew that the hospital would throw them out if he did not take action. Detective Detrick took a photograph of the defendant in the hospital and returned to headquarters where he made an 8-person photographic line-up display. After viewing the photographic line-up display approximately 2 1/2 hours later at police headquarters, Louis Cafoncelli identified the defendant as one of the persons who had robbed the jewelry store. Detective Detrick made a xerox copy of the photographic line-up display before returning the individual pictures which were used in it to their respective files. This xerox copy was received at the pretrial hearing as Government Exhibit 1. For the sake of clarity, the color pictures used for the original line-up were reassembled and placed in a photographic line-up similar to the original line-up. This was received at the pretrial hearing as Government Exhibit 2.

On June 10, 1999, F.B.I. Agent Tom Neeson interviewed a Mr. Colter, who was a prison cellmate of the defendant. Colter told the agent that the key to the jewelry store basement door which led to the cellar steps was still in the defendant's clothing retrieved from the floor of the emergency room. Police personnel subsequently found this key in the defendant's sport coat.

United States v. Franklin, 64 F.Supp.2d 435, 436-437 (E.D.Pa. 1999). At the trial, Mr. Franklin took the stand in his own defense against the advice of counsel. He testified that on the day of the robbery he was visiting Reading for the purpose of searching for a job. While he was at a high school, he was shot twice and forced into an automobile. He awoke lying on the ground

near a hospital.

DISCUSSION

Mr. Franklin brings this case pursuant to Fed.R.Civ.P. 60(b), which provides that the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); 3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or 6) any other reason justifying relief from the operation of the judgment. The rule also indicates that "the motion shall be made within a reasonable time," and for the first three subsections, not more than one year after the judgment, order, or proceeding was entered or taken. Here, Mr. Franklin claims relief pursuant to subsections (4), (5), and (6) of the Rule. However, he does not seek to invalidate the judgment of conviction, but to show that the procedure used in sentencing him was invalid. Citing United States v. Blakely, Mr. Franklin argues that because there was no jury verdict to support his sentence, it follows inexorably that he has been denied a right to a jury trial and due process of law. It further follows, he alleges, that he is a victim of a miscarriage of justice.

In those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier *habeas* judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. Pridgen v. Shannon, 380

F.3d 721 (3d Cir. 2004). However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive *habeas* petition.” Id. at 727; *see also United States v. Edwards*, 309 F.3d 110, 113 (3d Cir. 2002) (motion under Fed. R. Civ. P. 60(b) to reconsider a § 2255 petition should be treated as an unauthorized successive § 2255 petition). As further held by the Third Circuit, this principle is consonant with Congress's goal of restricting the availability of relief to *habeas* petitioners. Pridgen v. Shannon, 380 F.3d at 727.

Therefore, before looking at the merits of Mr. Franklin's motion, it must first be determined whether it is, in essence, a second or successive motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. A second or successive motion must be certified as provided in 28 U.S.C. § 2244 by a panel of the appropriate court of appeals to contain: 1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or 2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255.

Here, Mr. Franklin does not raise any challenge under Rule 60(b) to the ruling in his previous *habeas* petition under one of the bases addressed by the rule such as mistake, newly discovered evidence, or fraud. Rather, he re-attempts to challenge the sentence imposed by Judge VanAntwerpen. This motion, under the guise of a Rule 60(b) motion, is actually a successive *habeas* petition, which may not be filed absent the approval of the Court of Appeals. *See* 28 U.S.C. § 2255.

Therefore, I will deny the motion without prejudice to Mr. Franklin's moving in the United States Court of Appeals for the Third Circuit for an order authorizing the District Court to consider his second or successive application under 28 U.S.C. § 2255.

An appropriate Order follows.

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ORDER

STENGEL, J.

AND NOW, this 23rd day of February, 2005, upon consideration of Mr. Franklin's motion for relief from judgment (Document #91), and the Government's response thereto (Document #95), it is hereby **ORDERED** that the motion is **DENIED** without prejudice to Mr. Franklin's moving in the United States Court of Appeals for the Third Circuit for an order authorizing the District Court to consider his second or successive application under 28 U.S.C. § 2255.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.