

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

KONG ZHEN CHEN	:	CRIMINAL ACTION
Petitioner,	:	NO. 01-787
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	

NEWCOMER, S.J.

July 27, 2005

MEMORANDUM AND ORDER

Presently before the Court is Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. For the reasons set forth below, said Motion is denied. An appropriate order follows.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 29, 2001, Yi Kai Li asked Mei Zhu Zheng, Petitioner's girlfriend, if he could borrow \$1,000 to continue gambling after he lost money at the Tropicana Casino in Atlantic City, New Jersey. (Tr. 4/16/02 at 13). Zheng then contacted Petitioner who then met Li at the casino and asked Li to follow him to his apartment for the money. (Tr. 14/16/02 at 15). Once at Petitioner's apartment, Petitioner informed Li he would not loan him \$1,000 because of \$18,600 in previous debt which has gone unpaid; Li denied owing any money. (Tr. 4/16/02 at 17). Petitioner contacted Li's son and stated that if he did not receive the amount in dispute by 10:00 p.m. the next day, he would take Li to New York where he would be beaten to death or

something worse would happen. (Tr. 4/16/02 at 25). In Petitioner's apartment, Petitioner repeatedly hit Li in front of co-defendants, Zheng and Lin. (Tr. 4/16/02 at 27-29).

Late on November 30, 2001, FBI agents accompanied Li's son to meet Petitioner on the Atlantic City boardwalk. (Tr. 4/17/02 at 72-73, 116). At approximately 3:00 a.m. on December 1, 2001, Petitioner, Lin, and Zheng were arrested by the FBI. (Tr. 4/17/02 at 73-76, 117-118).

On April 3, 2003, this Court entered judgment against Petitioner for all four counts with which the Government charged him: conspiracy to commit hostage taking and hostage taking in violation of 18 U.S.C. § 1203 (Counts One and Two) and conspiracy to communicate and communication in interstate commerce a demand for ransom for the release of a kidnapped person in violation of 18 U.S.C. §§ 875(a) and 371 (Counts Three and Four). Zheng was acquitted on all counts, and Lin was found guilty of counts one and two only. This Court sentenced Petitioner to 168 months imprisonment, a term of supervised release of five years, a fine of \$500, and a special assessment of \$400.

On April 7, 2003, Petitioner directly appealed his conviction, and the Court of Appeals affirmed the judgment of this Court. On May 5, 2005, Petitioner initiated a collateral attack by filing a motion under 28 U.S.C. § 2255 based on the Supreme Court's recent decision in United States v. Booker, 125

S.Ct. 738 (2005) and alleging ineffectiveness of counsel.

II. DISCUSSION

A. Booker Does Not Apply Retroactively on Collateral Attack.

The Booker holding no longer requiring the strict application of the Federal Sentencing Guidelines does not apply retroactively on collateral attack. See Lloyd v. United States, No. 04-3549, 2005 U.S. App. LEXIS 8699, at *1 (3d Cir. May 17, 2005)(concluding that Booker does not apply retroactively to initial motions under § 2255 where judgment was final as of January 12, 2005, the date Booker issued). While Petitioner's § 2255 Motion was timely filed, he may not raise a Booker claim in this Motion because he failed to raise it on direct appeal.

In Petitioner's Reply to the Government's Answer, he alleged he did not raise Booker as a substantive claim, but as an ineffectiveness of counsel claim. Clearly, Petitioner's counsel could not have raised Booker before it was decided. Additionally, the Third Circuit has found Apprendi inapplicable to sentence reduction arguments because it is unrelated to modifications made to the Federal Sentencing Guidelines. See United States v. McBride 283 F.3d 612, 616 (3d Cir. 2002). Therefore, counsel was not ineffective with respect to Booker for the same reasons articulated below.

B. Counsel Has Not Violated Petitioner's Sixth Amendment Right to Effective Assistance of Counsel.

Petitioner has not met his burden of proof under the two-step analysis set forth in Strickland v. Washington. 466 U.S. 668 (1984). In order to overturn Petitioner's conviction on ineffective assistance of counsel grounds, he must prove by a preponderance of evidence (1) counsel's deficient performance—below an objectively reasonable standard and (2) sufficient prejudice prevented a reliable result. See id. at 702. Petitioner raises the following grounds for his ineffective assistance of counsel claim: (1) failure to sever Petitioner's case from co-defendant, Zheng; (2) introducing evidence of good character when Petitioner had conviction for a crime of violence; (3) opening door for Government introduction of evidence that Petitioner was a loan shark; and (4) lack of proper curative instruction for prior bad acts. Because Petitioner cannot satisfy Strickland for any of the above-mentioned grounds, his conviction may not be overturned as a result of ineffective assistance of counsel.

1. Petitioner's Counsel Did Not Provide Ineffective Assistance For Failure to Sever Petitioner's Case From Mei Zhu Zheng's Case.

In order to prove his counsel's ineffective assistance, Petitioner must display that counsel's decision not to file a motion to sever Petitioner and Zheng's cases deviated from objectively reasonable assistance of counsel. See Strickland,

466 U.S. at 687. Petitioner counsel's decision not to file a motion to sever can be classified as a strategic choice because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 694. If this Court alternatively found Petitioner overcame this strong presumption in favor of counsel's objective reasonableness, he still cannot meet the second element of Strickland, that his attorney's conduct resulted in a sufficient prejudice which prevented a reliable result.

Petitioner's primary concern with his attorney's decision not to file a motion to sever pertains to prejudice which may result from prior domestic issues between Petitioner and co-defendant, girlfriend brought to light at trial. However, this Court stated in its instructions to the jury, "You may not consider evidence that a defendant may have committed an act at one time or on one occasion to determine that a defendant acted in conformity with that act in this case." (Tr. 4/18/02 at 72). Therefore, even if prejudice resulted from Zheng's defense, this Court properly instructed the jury to ignore such evidence for the purposes of Petitioner's criminal liability. Moreover, pursuant to FED R. Civ. P. 21, it is within the Court's "discretion to sever parties or claims that have been improperly joined." Klimaski v. Parexel Int'l, No. 05-298, 2005 U.S. Dist. LEXIS 6403, at *6 (E. D. Pa. April 4, 2005). Accordingly,

because motions to sever are granted at the Court's discretion and granting such a motion would not deprive a reliable result, trial counsel's strategic decision not to file a motion to sever does not rise to ineffective assistance.

2. Petitioner's Counsel Did Not Provide Ineffective Assistance For Introducing Evidence of Petitioner's Good Character.

Petitioner's attorney was permitted by the Federal Rules of Evidence to introduce evidence of his good character. See FED R. EVID. 404(a)(1). Petitioner's prior assault conviction provided by Zheng's attorney at cross-examination (Tr. 4/18/02 at 44) was admissible for purposes of establishing Zheng's motive and intent provided the Court instructs the jury on its duty to consider such character evidence with all other evidence to determine whether the Government has proven its charge beyond a reasonable doubt. See United States v. Chen, No. 03-1982, slip. op. at 7-8 (3d Cir. July 16, 2004); FED R. EVID. 404(b); United States v. Spangler, 838 F.2d 85, 86-87 (3d Cir. 1988). As the Court of Appeals for the Third Circuit has already found, the character evidence introduced by Petitioner's counsel was properly admitted by this Court. See United States v. Chen, No. 03-1982, slip. Op. at 6 (3d Cir. July 16, 2004). After revisiting this issue *de novo*, the Court agrees with the Third Circuit's ruling.

3. Petitioner's Counsel Did Not Provide Ineffective Assistance When She Introduced Evidence that Petitioner was a 'Loan Shark'

In addressing Petitioner's claim that his counsel was ineffective for initiating testimony about his 'loan shark' business, such a subject was inevitable on cross-examination because the Li, the first witness, testified on direct examination that Petitioner charged him interest rates of ten percent per day thereby establishing behavior consistent with the 'loan shark' business (Tr. 4/16/02 at 8). Therefore, the strategic decision of Petitioner's counsel to bring up the 'loan shark' issue on direct examination falls squarely within an objectively reasonable standard and did not additionally prejudice the outcome of this case.

4. Petitioner's Counsel Did Not Provide Ineffective Assistance For Lack of Proper Curative Instruction For Prior Bad Acts.

With respect to Petitioner's claim for lack of proper curative instruction for prior bad acts, this Court need not issue curative instructions in the absence of error. See Brown v. Payton, 125 S. Ct. 1432, 1441 (2005). Because this Court properly instructed the jury on the controlling laws of evidence, curative instruction is irrelevant. Accordingly, because Petitioner's ineffective assistance of counsel claims are without merit and because Booker does not apply retroactively on collateral attack, the instant § 2255 Motion must be denied.

An appropriate order follows.

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O R D E R

AND NOW, this 27th day of July, 2005, upon consideration of Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. 120), the Government's Response, and Chen's Reply, it is hereby ORDERED that said Motion is DENIED. It is further ORDERED that a certificate of appealability shall not issue.

AND IT IS SO ORDERED.

S/ Clarence C. Newcomer
United States District Judge