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

UNITED STATES	:	CRIMINAL NO. 01-457-05
	:	
v.	:	
	:	
CLIFTON JUNIUS	:	CIVIL NO. 04-2905

MEMORANDUM

Giles, C.J. August 11, 2005

I. BACKGROUND

On January 23, 2003, petitioner pled guilty to conspiracy to distribute more than 50 grams of cocaine base ("crack" cocaine) in violation of 21 U.S.C. § 846, and murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. § 848(e). The terms of the plea agreement included a mandatory minimum sentence of 20 years imprisonment, a maximum sentence of life imprisonment or the death penalty, a minimum of 10 years up to a lifetime of supervised release, a maximum fine of $8,250,000, and a $200 special assessment.

On June 26, 2003, the court sentenced petitioner to a term of 40 years imprisonment, 10 years supervised release, a $7,500 fine, and a $200 special assessment.

On November 13, 2003, petitioner filed a notice of appeal from the judgment. Because the appeal was not timely filed, the U.S. Court of Appeals for the Third Circuit dismissed the appeal on March 10, 2004.

On July 1, 2004, petitioner filed the instant Petition to Vacate, Set Aside or Correct a Sentence Pursuant to 28 U.S.C. § 2255. Petitioner claims that 1) his guilty plea was not voluntarily or intelligently made because the government and defense counsel told him that the

government would allow or strongly recommend the mandatory minimum sentence of 20 years. He also claims ineffective assistance of counsel on the grounds that counsel was "off balance" because petitioner faced the death penalty, that counsel allowed petitioner to waive his right to appeal his sentence, and did nothing to mitigate the sentence. Further, petitioner claims that because he cannot appeal, he is being denied of his First Amendment rights. He also seeks relief from his sentence based on the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). Specifically, he claims that Blakely renders his sentence unconstitutional because the sentence was enhanced outside the scope of a jury.

II. DISCUSSION

A. Standard of Review

When considering a petition for relief under 28 U.S.C. § 2255, a court must consider whether "'. . . the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether it. . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" Casper v. Ryan, 822 F.2d 1283, 1288 (3d Cir. 1987) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

B. Standard for Ineffective Assistance of Counsel

The Supreme Court formulated a two-pronged test to determine if an attorney's performance constitutes ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984). To satisfy the requirements of Strickland, a petitioner must show: 1) that counsel's performance was deficient and 2) that counsel's deficient performance prejudiced the defense. Id. To demonstrate deficient performance, petitioner mush establish that counsel's representation fell below an objective standard of reasonableness, "based on the 'facts of the

particular case, viewed as of the time of counsel's conduct.'" Senk v. Zimmerman, 886 F.2d 611, 615 (3d Cir.1989) (quoting Strickland, 466 U.S. at 690 (1984)). To prove that petitioner was prejudiced by counsel's conduct, the convicted defendant must "demonstrate a reasonable probability that, but for the unprofessional errors, the result would have been different." Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir.1992). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

The Strickland test applies to petitioners who challenge the effectiveness of counsel after the entry of a guilty plea. United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997). When such persons enter a plea of guilty on the advice of counsel, the voluntariness of the plea depends on whether there is a reasonable probability that, but for counsel's errors, the defendant would have proceeded to trial instead of pleading guilty. Kauffman, 109 F.3d at 190; Parry # BH-2648 v. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995). **A reasonable probability is one which is "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.**

1. An Evidentiary Hearing Is Not Warranted

In considering a motion made pursuant to 28 U.S.C. 2255, this court must determine whether an evidentiary hearing is warranted. "[T]he question of whether to order such a

hearing is committed to the sound discretion of the court." Government of the Virgin Islands v. Fort, 865 F.2d 59, 62 (3d Cir. 1989). Further, "in exercising that discretion the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." Id. "[T]he crucial inquiry is whether additional facts must be adduced before a fair adjudication of Petitioner's claim can be made." Soto v. United States, 369 F.Supp. 232, 241-42 (E.D. Pa. 1973). The court finds that there is no need for a hearing. The motion and records of the case show conclusively that the prisoner is entitled to no relief. 28 U.S.C. § 2255.

2. Petitioner Knowingly and Intelligently Entered Into the Plea Agreement and Effectively Waived His Right to Appeal

In United States v. Khattak, 273 F.3d 557 (3d Cir. 2001), the Third Circuit ruled that waivers of appeals should be strictly construed. Id. at 563. Waivers of appeals, if entered into knowingly and voluntarily, are valid, unless they would work a miscarriage of justice. Id. The court stated: "Nonetheless, we decline to adopt a blanket rule prohibiting all review of certain otherwise valid waivers of appeals. There may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver." Id. at 562 (citing United States v. Teeter, 257 F.3d 14, 21 (1st Cir. 2001)). The Khattak court endorsed Teeter, which presented four factors for a court to consider before relieving defendant of the waiver:

> **The clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.**

Khattak, 273 F.3d at 563 (citing Teeter, 257 F.3d at 25-26).

. First, petitioner asserts that his guilty plea was not voluntary or intelligently made because the government and defense counsel told him that the government would allow or strongly recommend a sentence of or around the statutory minimum of 20 years. This claim is without merit. The government filed a 5K1.1 motion to allow the court to depart below the sentencing guidelines and impose the statutory minimum term of imprisonment. However, as petitioner understood, the court was not bound by the recommendation, and was not obligated to impose the statutory minimum term of imprisonment. Indeed, the court chose to impose 40 years, a longer term of imprisonment. The plea agreement stated that petitioner could receive no less than 20 years, and could receive as much as life in prison. At the time that the guilty plea was entered, the court asked petitioner if he agreed that the plea agreement included a mandatory minimum sentence of 20 years imprisonment, and a maximum sentence of life imprisonment or the death penalty. Petitioner agreed, and understanding the maximum possible punishment, pled guilty to the counts charged against him.

Second, petitioner asserts that counsel allowed him to waive his right to appeal his 40 year sentence, and that because he cannot appeal the sentence imposed by the court, he is being denied his First Amendment right to petition the court for redress of grievances. These claims are devoid of merit. Petitioner told the court he had discussed the plea agreement with his attorney before signing it, and he understood that he would be unable to withdraw from the plea agreement once the court accepted it. The court explained to petitioner, and the petitioner affirmed his understanding, that entering a guilty plea would

result in a waiver of any claim that the guilty plea process was flawed, and any claim that any court-imposed sentence is not appealable, unless the court imposed a sentence that is contrary to law. Petitioner affirmed that he understood the court could impose a lawful sentence of life imprisonment, that the sentence would not be subject to parole, and could run consecutively, as opposed to concurrently, with the sentence he was serving.

3. Defense Counsel was not Ineffective In Negotiating a Plea Agreement with the Government

Further, petitioner claims that counsel did nothing to mitigate his sentence. There is nothing in the record to support this assertion. Rather, counsel was an effective advocate for his client's interests, and when asked by the court if he was satisfied with his representation, petitioner replied in the affirmative. With the possibility that petitioner could have faced life imprisonment, if not a death sentence, defense counsel negotiated a plea agreement that recommended to the court a minimum sentence of 20 years, to run concurrently with his existing 10 year sentence.

Finally, petitioner asserts counsel was "off-balance" because defendant was facing the death penalty. This accusation is without merit as counsel successfully negotiated a plea agreement that was acceptable to petitioner.

C. Standard under Booker

Petitioner also seeks relief based on the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), which held that the Washington sentencing system, which allowed for enhancements based on judicial fact-finding, violated the Sixth Amendment.

On January 12, 2005, the Supreme Court decided United States v. Booker, 543 U.S. _ _, 125 S.Ct. 738 (2005), which applied the rule of Blakely to the federal Sentencing Reform Act and made the Sentencing Guidelines advisory. Because Booker applies in the federal context, the court will treat petitioners' petition as a request for relief under Booker.

1. Petitioner is not entitled to collateral relief under Booker

In Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005), the Third Circuit held that Booker does not apply retroactively to prisoners "who were in the initial § 2255 motion stage" as of January 12, 2005 when Booker issued. In doing so, it applied Teague v. Lane, 489 U.S. 288 (1989), which held that new rules of criminal procedure "will not be applicable to those cases which have become final before the new rules are announced," unless they fit within specific exceptions. Teague, 489 U.S. at 310. While the Third Circuit found that the rule in Booker qualifies as a new rule of criminal procedure, it determined that it is not a "watershed" rule, and thus, not exempt from the ban on retroactivity under Teague. Lloyd, 407 F.3d at 615. In coming to this conclusion, the Third Circuit joined every other circuit that has addressed the application of Booker to a pending petition for collateral review. See Cirilo-Munoz v. United States, 404 F.3d 527, 533 (1st Cir. 2005); Guzman v. United States, 404 F.3d 139, 141 (2d Cir. 2005); Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005); United States v. Bellamy, ___ F.3d ___, 2005 WL 1406176, *3 (10th Cir. June 16, 2005); and Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005). Because petitioner filed his habeas petition prior to January 12, 2005, he is not eligible for relief pursuant to Booker.

III. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that petitioner's § 2255 motion is DENIED. A certificate of appealability will not issue.

An appropriate order follows.

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ORDER

AND NOW, this 11th day of August 2005, upon consideration of petitioner's Motion Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, it is hereby ORDERED that petitioner's motion is DENIED for the reasons stated in the court's Memorandum. As petitioner has not made a substantial showing of a violation of a constitutional right, a certificate of appealability shall not issue.

BY THE COURT:

S/ James T. Giles
JAMES T. GILES C.J.