

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 99-363-01
v.	:	
	:	CIVIL ACTION
JOSEPH MERLINO	:	NO. 05-635

SURRICK, J.

MAY 26, 2006

MEMORANDUM & ORDER

Presently before the Court is Defendant Joseph Merlino's Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 919, 99-CR-363). For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

In January 2001, a federal grand jury returned a thirty-six count Fourth Superseding Indictment charging Defendant and others with a series of crimes including Racketeer Influenced and Corrupt Organization (RICO) conspiracy and substantive RICO violations. The indictment alleged that over a number of years Defendant played a continuing role in the charged offenses as a member of Philadelphia's La Cosa Nostra ("LCN") organized crime family, eventually rising through the ranks to become LCN's acting Boss. Following a trial before the Honorable Herbert J. Hutton, a jury found Defendant guilty of one count each of RICO and RICO conspiracy in violation of 18 U.S.C. § 1962(d) and (c), one count of racketeering through collection of an unlawful debt in violation of 18 U.S.C. § 1962(c), one count of illegal sports bookmaking in violation of 18 U.S.C. § 1955, three counts of receiving stolen goods in violation of 18 U.S.C. § 659, and one count of conspiracy to receive stolen goods in violation of 18 U.S.C. § 371. (Doc. No. 736.) The jury also found that the Government successfully proved that Defendant had

committed various Racketeering Acts, including conspiracy to extort “street tax” and protection money, illegal sports bookmaking, and receipt of various stolen goods. (*Id.*)

A Sentencing Hearing was held on December 3, 2001. (Doc. No. 827.) The Presentence Investigation Report prepared by the United States Probation Office provided a sentencing guideline range of 135 to 168 months based on an offense level of 30 and criminal history category IV. (Doc. No. 814.) At the Sentencing Hearing, Defendant’s objections to the Presentence Investigation Report were overruled, and the Court adopted the Report in its entirety. (Doc. No. 827.) Based on the jury’s verdict, as well as other findings of fact made by Judge Hutton, a sentence of 168 months was imposed. (*Id.*) In addition, Defendant was sentenced to three years of supervised release and ordered to pay \$337,943.89 in restitution and \$800 in special assessments. (*Id.*)

On November 12, 2003, Defendant’s conviction and sentence were affirmed by the Third Circuit Court of Appeals. *United States v. Merlino*, 349 F.3d 144, 167-62 (3d Cir. 2003). Defendant did not petition for a writ of certiorari. Accordingly, Defendant’s conviction became final on February 10, 2004, ninety days after the Third Circuit’s decision. 28 U.S.C. § 2101(c) (2000); Sup. Ct. R. 13.

On February 10, 2005, Defendant filed the instant Motion pursuant to 28 U.S.C. § 2255. Defendant raises two grounds on which he seeks relief. First, Merlino contends that the procedure employed by Judge Hutton at sentencing deprived Defendant of his Fifth Amendment right to due process of law to have all facts essential to punishment charged in the Indictment and his Sixth Amendment right to a jury determination of sentencing facts. (Doc. No. 919 at 6.) He claims that the Court improperly sentenced him based on facts that were not proven to the jury or

admitted by Defendant. Specifically, Defendant objects to the increased offense level applied based on the Court's findings regarding extortion involving threats of bodily injury, the amount of money extorted, the aggravating role Defendant played in the offenses, the value of the stolen goods, and the fact that Defendant was in the business of receiving stolen property. (*Id.*)

Second, Defendant alleges ineffective assistance of counsel at his sentencing hearing. At sentencing, Defendant's trial attorney failed to object to the fact that Judge Hutton did not state his reasons for imposing a sentence at the top of the guideline range. (*Id.*) On direct appeal, Defendant argued that his case should be remanded due to this oversight on the part of the District Court. *Merlino*, 349 F.3d at 161. The Third Circuit determined that because this issue was not raised at sentencing, it was not cognizable on review unless it constituted plain error. *Id.* Declining to exercise its discretion to correct any error, the Court of Appeals affirmed Merlino's sentence. *Id.* at 161-62. Now, Defendant argues that had his attorney objected at sentencing, there is a reasonable probability that the result of that appeal would have been different. He contends that he has suffered prejudice as a result of his counsel's inaction. (Doc. No. 919 at 6.)

II. STANDARD OF REVIEW

Section 2255 permits a prisoner in federal custody to challenge the validity of his sentence. 28 U.S.C. § 2255; *see also United States v. Eakman*, 378 F.3d 294, 297 (3d Cir. 2004).

A petition under § 2255 may be filed at any time within one year from:

- (1) the date on which the conviction became final;
- (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) 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; and
- (4) the date on which the facts supporting the

claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2255. While the court may in its discretion hold an evidentiary hearing on a § 2255 petition, *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989), such a hearing need not be held if the “motion and the files and records conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255; *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992).

III. DISCUSSION

A. Non-Retroactivity of *Booker*

In his Motion, Defendant cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), arguing that his sentence should be vacated because it was based on facts not admitted by him or proven to a jury. In *Apprendi*, the Supreme Court found that a sentence that was increased beyond the statutory maximum on the basis of such facts violated the Sixth Amendment. *Id.* at 489. The rule expressed in *Apprendi* was subsequently applied both to state determinate sentencing schemes, *Blakely v. Washington*, 542 U.S. 296 (2004), and to the Federal Sentencing Guidelines, *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Supreme Court fashioned a remedy under which the Guidelines became advisory, rather than mandatory, for the sentencing court. 543 U.S. at 244. Although Defendant cites only *Apprendi* in his motion, his claim is in reality a claim under *Booker*. *Doe Boy v. United States*, Civ. A. No. 03-319, 2006 U.S. Dist. LEXIS 13503, at *9 (D. Del. Mar. 28, 2006). We note, however, that Defendant’s conviction became final prior to January 12, 2005, the date on which *Booker* was decided. Therefore, Defendant may not obtain any relief unless *Booker* is deemed to apply retroactively.

This issue was directly addressed by the Third Circuit in *Lloyd v. United States*, 407 F.3d 608, 615 (3d Cir. 2005). Applying the standard from *Teague v. Lane*, 489 U.S. 288 (1989), the Court of Appeals found that although the rule announced in *Booker* was “new,” in that it was “not dictated by precedent,” it was not a “watershed” rule, as required for retroactive application under *Teague*. *Lloyd*, 407 F.3d at 611-13 (internal citations and quotations omitted). A “watershed” rule “implicat[es] the fundamental fairness and accuracy of the criminal proceeding.” *Id.* at 612. The *Booker* rule was not deemed to be “watershed” within the definition set forth in *Teague* because it was not a rule “without which the likelihood of an accurate conviction is seriously diminished.”¹ *Id.* at 616 (quoting *Teague*, 489 U.S. at 313). Thus, the *Lloyd* court concluded that *Booker* does not apply retroactively to cases on collateral review where the judgment became final before January 12, 2005.²

In this case, Defendant’s conviction became final when his right to petition for writ of certiorari expired in February 2004, almost one year before *Booker* was decided. Because Defendant’s conviction became final prior to *Booker*, and because the rule in *Booker* is not retroactive, Defendant is not entitled to relief on this claim.

¹ The Third Circuit has noted the considerable rarity of the *Teague* “watershed” exception, pointing out that the Supreme Court has yet to characterize *any* new procedural rule as “watershed.” *Lloyd*, 407 F.3d at 614 (quoting *Beard v. Banks*, 542 U.S. 406, 415-17 (2004)).

² In holding that *Booker* does not apply to cases on collateral review where the judgment became final before January 12, 2005, the Third Circuit joined several other circuit courts. See *Guzman v. United States*, 404 F.3d 139, 144 (2d Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 857 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *United States v. Price*, 400 F.3d 844, 845 (10th Cir. 2005); *Varela v. United States*, 400 F. 3d 864, 868 (11th Cir. 2005).

B. Ineffective Assistance of Counsel

Pursuant to 18 U.S.C. § 3553(c)(1), the sentencing court is required to “state in open court the reasons for its imposition of the particular sentence,” and, where the applicable guideline range exceeds twenty-four months, “the reason for imposing a sentence at a particular point within the range.” Defendant argues that the failure of his trial attorney to object to Judge Hutton’s noncompliance with § 3553(c)(1)³ constitutes ineffective assistance of counsel. Defendant’s sentence of 168 months was the maximum available in the applicable guideline range.

It should be noted that the Third Circuit has already addressed Judge Hutton’s actions at Defendant’s sentencing. Since Defendant did not initially raise this argument at sentencing, the Third Circuit could not grant relief unless the District Court was found to “have committed plain error that prejudiced” Defendant. *Merlino*, 349 F.3d at 161 (citing *United States v. Adams*, 252 F.3d 276, 285 (3d Cir. 2001)). “Even where error and prejudice are found,” the Court of Appeals “will only exercise [its] discretion to correct the error if it ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” *Id.* (quoting *Adams*, 252 F.3d at 285). In this case, the Court of Appeals determined that “[t]he record created precludes any finding that the absence of a formal statement [by Judge Hutton] had—or has—the potential to seriously affect the ‘fairness, integrity or public reputation’ of the proceedings in this case,” in that “[t]he District Court presided over a four month trial, held lengthy sentencing hearings, and approved and adopted detailed presentence investigation reports.” *Id.* at 161-62; *cf. United States v. Robinson*,

³ The Government concedes that Judge Hutton failed to comply with 18 U.S.C. § 3553(c)(1) at Merlino’s sentencing. (Doc. No. 922 at 13.)

No. 96-4404, 1997 U.S. App. LEXIS 15560, at *5-6 (4th Cir. June 27, 1997) (finding court's failure to comply with § 3553(c)(1), while still imposing lawful sentence within guideline range, "does not affect substantial rights or seriously affect the fairness and integrity of judicial proceedings").

In order to state a claim for ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to show prejudice, Defendant must demonstrate that but for his attorney's failure to object to Judge Hutton's noncompliance with § 3553(c)(1), Defendant would have received a different sentence. *See id.* at 694 (showing of prejudice requires petitioner to demonstrate that "but for counsel's unprofessional errors, the result of the proceeding would have been different"); *Bancroft v. United States*, Civ. A. No. 04-3281, 2005 U.S. Dist. LEXIS 26227, at *8 (E.D. Pa. Nov. 2, 2005) (plaintiff must show that but for failure to object to errors in presentence report results of sentencing would have been different). It is apparent that were any such prejudice present here, the Third Circuit could not have concluded that Judge Hutton's error did not "seriously affect the 'fairness, integrity or public reputation' of the proceedings." Where a court improperly lengthens the term of the sentence imposed, the fairness of the proceedings is undoubtedly seriously affected. *See United States v. Brown*, 316 F.3d 1151 (9th Cir. 2003) ("A review of federal appellate decisions considering whether to correct unobjected-to sentencing errors reveals that the key concern has been whether correct application of the sentencing laws would . . . reduce the length of the sentence." (citing *United States v. Syme*, 276 F.3d 131, 157-58 (3d Cir. 2002))); *United States v. Nordby*, 225 F.3d 1053, 1061 (9th Cir. 2001) ("[F]airness is

undermined where a court's error imposes a longer sentence than might have been imposed had the court not plainly erred." (internal quotation omitted)), *overruled on other grounds by United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002). A review of the record of the Sentencing Hearing reveals that had trial counsel timely objected, the sentence imposed by Judge Hutton would undoubtedly have been the same. As the Third Circuit pointed out, Judge Hutton "presided over a four month trial, held lengthy sentencing hearings, and approved and adopted detailed presentence investigation reports." He was certainly familiar with the facts underlying the convictions and with Mr. Merlino himself. The reasons for the imposition of a sentence at the top of the sentencing guideline range are self-evident. Defendant's claim of ineffective assistance of counsel is without merit.

Since the record "conclusively show[s] that the prisoner is entitled to no relief," 28 U.S.C. § 2255, the Motion will be denied.

An appropriate Order follows.

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UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 99-363-01
v.	:	
	:	CIVIL ACTION
JOSEPH MERLINO	:	NO. 05-0635

ORDER

AND NOW, this 26th day of May, 2006, upon consideration of the Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 919, 99-CR-363), it is ORDERED that the Motion is DENIED.

BY THE COURT:

/s R. Barclay Surrick

R. Barclay Surrick, Judge