

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
: :  
vs. : :  
: :  
TRACY CLARK : NO. 01-428-02

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.**

**OCTOBER 27, 2006**

The defendant, Tracy Clark, has filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct his sentence, contending that counsel was ineffective. Defendant also contends that he should be resentenced because the case of United States v. Booker, 543 U.S. 220 (2005), changed the mandatory nature of the Sentencing Guidelines.

**PROCEDURAL HISTORY**

On July 26, 2001, in the Eastern District of Pennsylvania, a federal grand jury returned a two-count indictment charging defendant Tracy Clark with one count of being a felon in possession of a firearm, in violation of Title 18 U.S. C. § 922(g), Count Two, and co-defendant Anthony Miller, a/k/a “Deucie”, with one count of possession with the intent to deliver cocaine base, i.e., “crack” cocaine, in violation of Title 21 U.S.C. § 841(a)(1), Count One. On April 17, 2002, a federal grand jury returned a two-count superseding indictment charging defendant Tracy Clark with one count of being a felon in possession of a firearm, in violation of Title 18 U.S.C. §§ 922(g) and 924(e), Count Two, and co-defendant Anthony Miller, a/k/a “Deucie”, with one count of possession with the intent to deliver cocaine base, i.e., “crack” cocaine, in violation of Title 21 U.S.C. § 841(a)(1), Count One.

On May 6, 2002, Clark appeared before the Court and pled guilty to Count Two. On August 27, 2002, we granted defense counsel's motion to withdraw and appointed new counsel for Clark, Patrick J. Egan, Esquire. On August 30, 2002, Clark filed a pro se motion to withdraw his guilty plea. On October 10, 2002, Clark's pro se motion was denied. On November 4, 2002, new counsel for Clark filed a motion to withdraw his guilty plea. On March 31, 2003, defendant's motion was granted. Trial was set for June 2, 2003.

On June 4, 2003, a jury returned a guilty verdict as to Count Two against Clark. On July 11, 2003, Clark was sentenced to 293 months imprisonment, 5 years of supervised release and a \$100 special assessment. A timely notice of appeal was filed. On October 29, 2004, the Third Circuit Court of Appeals affirmed the conviction and sentence of Clark.

On December 12, 2004, defendant filed a petition for a writ of certiorari alleging, for the first time, inter alia, the District Court violated his Sixth Amendment right by enhancing his sentence under the Armed Career provisions of U.S.S.G. § 4B1.4(a) and (b)(3)(B) without a jury determination nor an admission by the defendant. On January 7, 2005, the Supreme Court decided United States v. Booker, 543 U.S. 220, (2005). On January 25, 2005, the Supreme Court denied certiorari in this case.

#### STATEMENT OF FACTS

The defendant was convicted of possession of a firearm by a convicted felon, in violation of Title 18 U.S.C. §§ 922(g) and 924(e).

Agents set up surveillance of the 600 block of north Creighton Street. As a result of what the surveillance revealed, surveillance was also established at Building 1918 of the Parkside Apartments located at 4991 Parkside Avenue. Co-defendant Anthony Miller, a/k/a

“Deucie”, was seen entering Apartment 72 with the use of a key.

Based upon information obtained as a result of the surveillances established at both locations, a Search and Seizure warrant for 4991 Parkside Avenue, Building 1918, Apartment 72 was obtained. On December 8, 1999, at approximately 5:30 P.M., Philadelphia Police Officers and agents from the Office of Attorney General, Bureau of Narcotics, executed a Search and Seizure warrant at 4991 Parkside Avenue, Building 1918, Apartment 72.

Once they gained entrance, they saw defendant Tracy Clark in the livingroom area. Defendant Clark was attempting to pull an object from his waistband area. Agents secured defendant Clark and recovered from him a black Llama Minimax II, 45 caliber semi-automatic firearm with Serial Number 07-04-12550-98 loaded with five rounds in the magazine and one in the chamber.

An interstate nexus determination on the Llama Minimax II, 45 caliber semi-automatic firearm with serial number 07-04-12550-98 revealed that the weapon was not manufactured in the Commonwealth of Pennsylvania.

There was a stipulation at trial to the three predicate violent crime or drug trafficking convictions of Clark.

Confiscated from the jacket of Anthony Miller, a/k/a, “Deucie”, was \$290.00 currency; one brown bag containing one clear plastic bag containing 45 blue tinted packets of alleged “crack” cocaine; one clear plastic bag containing 45 blue tinted packets of alleged “crack” cocaine; one plastic zip lock bag containing 48 blue tinted packets of alleged “crack” cocaine for a total of 138 blue tinted packets. Taken from the pants pocket of Anthony Miller, a/k/a, “Deucie”, was \$1390.00.

Confiscated from the dining room area were approximately 40 clear zip lock packets containing amber color vials containing alleged “crack” cocaine; one plate containing a clear zip lock bag containing smaller blue tinted zip lock packets, a razor blade with white residue and two white straws; one zip lock sandwich bag containing numerous blue tinted zip lock packets; one tan colored box containing several empty amber colored glass vials with black caps; one plastic bag containing one smaller empty plastic bag wrapped in amber colored tape, alleged kilogram wrapper, containing white residue; and one plastic trash bag containing a tan colored box containing numerous empty amber colored glass vials with black caps and clear zip lock bags containing numerous blue tinted packets.

Confiscated from the rear bedroom were one blue bag containing an Impulse heat sealer; four Ever brand stamps; a stainless steel strainer; one box of numerous glassine packets; one dust mask; one plate with a silver colored spoon containing a white powder residue; one Sentry safe model number 1330 containing empty zip lock packets and trash; and one green plastic box containing receipts and records.

Confiscated from the kitchen were one glass bowl with red lid containing alleged cutting agent; one clear sandwich type bag containing alleged “crack” cocaine; found in the microwave was one glass bowl containing white powdery residue; three digital scales and several boxes of sandwich bags found in the closet; one plate containing several blue tinted zip lock packets containing alleged “crack” cocaine; one sandwich bag containing amber chunky substance alleged “crack” cocaine; a razor blade recovered from the top of the kitchen cabinets and one Braun coffee grinder containing white powder residue.

All suspected narcotics were sent to the Lima Regional Laboratory of the

Pennsylvania State Police for analysis and proved positive for the presence of cocaine base, that is “crack” cocaine.

Because we determined that a hearing was necessary on the pending petition we appointed counsel, Christopher Warren, Esquire, for the defendant. Specifically, the complaint of Mr. Clark as to his attorney Patrick J. Egan was that Mr. Egan did not properly advise him as to the possible consequences of his withdrawing his plea of guilty and going to trial on the charge against him.

Based upon the testimony produced at the hearing held on May 30, 2006 we make the following findings of fact.

#### FINDINGS OF FACT

1. Egan was appointed because Tracy Clark was seeking replacement counsel for Nino Tinari, Esquire. New counsel was required because Clark had entered a guilty plea which he wanted to withdraw alleging that it was not voluntarily entered because he did not receive proper advice from his attorney Nino Tinari when he entered the plea. N.T. 25.

2. At the time Egan went to interview Clark, Clark had already filed a pro se motion to withdraw his guilty plea. N.T. 25.

3. Egan advised Clark that he wasn't sure it was in his best interest to have the guilty plea withdrawn because he would lose the benefit of the point reduction he received for acceptance of responsibility. N.T. 26.

4. Mr. Egan discussed with the defendant his guideline range, both with the plea and without the plea. N.T. 27.

5. The decision to withdraw the plea was defendant Clark's, after discussions with

Mr. Egan about both the merits of the case against him and the potential sentencing scenarios, both with and without the change of plea. N.T. 27.

6. Mr. Egan advised defendant Clark as to what the guidelines would be if he proceeded to trial and if he pled guilty. N.T. 29.

7. According to Mr. Egan “there was never any doubt in his mind that he wanted to go to trial.” N.T. 29.

8. Mr. Egan would not have advised Mr. Clark that the most he could get by way of a sentence after a trial was 17 years in prison. N.T. 36.

#### CONCLUSIONS OF LAW

1. To establish a claim of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 688 (1984), a defendant must demonstrate: 1) trial counsel’s representation fell below an objective standard of reasonableness; and 2) prejudice, that is, a reasonable probability that the result of the proceedings would have been different but for trial counsel’s errors.

2. Defendant has failed to demonstrate that trial counsel’s representation of him fell below an objective standard of reasonableness.

3. Defendant has failed to demonstrate that trial counsel’s representation was ineffective.

4. Because defendant’s direct appeals were not final prior to the decision in United States v. Booker, 543 U.S. 220 (2005), his request to be resentenced will be granted.

We therefore enter the following Order.

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

UNITED STATES OF AMERICA                   :           CRIMINAL ACTION  
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TRACY CLARK                                   :           NO. 01-428-02

**ORDER**

**AND NOW**, this 27th day of October, 2006, defendant's request for a new trial based on ineffective assistance of counsel is **DENIED**.

Defendant's request to be resentenced as a result of U.S. v. Booker, supra, is **GRANTED**. Defendant will be resentenced by this Court on November 27, 2006 at 9:30 a.m. in Courtroom 11B.

There is no probable cause for appeal.

BY THE COURT:

/s/ Robert F. Kelly  
ROBERT F. KELLY  
SENIOR JUDGE