

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

UNITED STATES OF AMERICA	:	CIVIL ACTION NO. 04-1141
	:	
v.	:	CRIMINAL ACTION NO. 01-738-01
	:	
ANTHONY THOMAS	:	

MEMORANDUM AND ORDER

Kauffman, J.

February 27, 2007

Now before the Court is the Motion of Petitioner Anthony Thomas (“Petitioner”) to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, the Motion will be denied.

I. Background

On April 4, 2002, Petitioner was charged by superseding indictment with one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count One), one count of bank robbery, in violation of 18 U.S.C. § 2113(a) (Count Two), and one count of bank robbery by the use of a dangerous weapon or device, in violation of 18 U.S.C. § 2113(d) (Count Three). Petitioner pled guilty to Counts One and Three on July 22, 2002. On March 26, 2003, this Court sentenced Petitioner to a term of 210 months imprisonment and Petitioner did not appeal. Petitioner filed the instant Motion on March 17, 2004.

II. Analysis

Petitioner first argues that his sentence should be invalidated as a result of the Supreme

Court's landmark decision in United States v. Booker, which held that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. 220 at 244 (1995). Petitioner argues that his sentence should be vacated because various enhancements used to calculate his sentencing guideline did not fall under any of these categories.

This argument is without merit because Booker does not apply retroactively. Lloyd v. United States, 407 F.3d 608, 611 (3d Cir. 2005). In other words, it does not apply to initial motions under 28 U.S.C. § 2255 where the judgment became final before January 12, 2005, the date the Supreme Court issued Booker. Id. Petitioner's judgment became final prior to that date, on April 5, 2004, when his time to file an appeal of his sentence expired. See Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) ("If a defendant does not pursue a timely direct appeal to the court of appeals, his or her sentence become[s] final . . . on the date on which the time for filing such an appeal expired."). Accordingly, Petitioner's Booker claim will be denied.

Petitioner also argues that his sentence violates the Sixth Amendment because his lawyer failed to produce documents that would demonstrate he was mentally incompetent during the commission of his crimes. The Sixth Amendment of the United States Constitution establishes a right to the effective assistance of counsel. In order to demonstrate a violation of this right, Petitioner must show (1) that his "counsel's performance was deficient" and (2) that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984). Petitioner's burden under the first prong is to show that his counsel's representation fell below an "objective standard of reasonableness," despite a "strong presumption that counsel's conduct falls within

the wide range of reasonable professional assistance.” Id. at 689.

In this case, Petitioner has failed to demonstrate that his counsel performed deficiently. Indeed, the Record demonstrates the contrary. At Petitioner’s first sentencing hearing, on January 21, 2004, Petitioner’s counsel successfully requested a continuance in order to search for documents that might help substantiate Petitioner’s claim of mental incompetence. When the sentencing commenced, on March 26, 2004, Petitioner’s counsel informed the Court that he had not found any such documents that were not already in the possession of the Probation Office, despite the use of a subpoena and a site visit. In light of these facts, and the fact that Petitioner has not identified the medical records his counsel allegedly failed to produce at his sentencing, the Court finds that Petitioner has failed to overcome the “strong presumption” that his counsel provided “reasonable professional assistance.” Strickland, 466 U.S. at 688-89. Accordingly, Petitioner’s Sixth Amendment claim will be denied.

III. Conclusion

For the foregoing reasons, the Court will deny Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence. Because Petitioner has not made the requisite showing of the denial of a constitutional right, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

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ORDER

AND NOW, this 27th day of February, 2007, upon consideration of Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (docket nos. 130 and 149), it is **ORDERED** that:

1. The Motion is **DENIED**.
2. The Clerk of the Court shall mark Civil Action No. 04-1141 **CLOSED**.
3. Because there is no probable cause to issue a certificate of appealability, no certificate of appealability shall issue.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.