

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
DENNIS VIRELLI	:	No. 99-573-01
	:	

MEMORANDUM

Baylson, J.

Match 22, 2005

On April 18, 2000, Defendant entered a plea of guilty pursuant to a plea agreement. On October 15, 2002, Defendant was sentenced by the Honorable Herbert Hutton to a term of 60 months to be served consecutive to a prior ten year sentence.

Presently before the Court is Defendant's Motion to Vacate, Set Aside, or Correct Sentence filed on January 6, 2005 pursuant to 28 U.S.C. §2255. For the following reasons, Defendant's motion is denied.

28 U.S.C. §2255 provides a one-year period in which to file a motion. The relevant subsections of 28 U.S.C. §2255 specify that the one-year limitation period "shall run from the latest of – (1) the date on which the judgment of conviction becomes final; . . . (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." 28 U.S.C. §2255, (1),(3).

Here, Defendant did not file the motion within one year of the date on which the judgment of conviction became final. The motion's timeliness therefore depends on a ruling that the Supreme Court's decision in United States v. Booker, 125 S.Ct. 738 (2005), declared a right that "has been newly recognized by the Supreme Court and made retroactively applicable to

cases on collateral review.” 28 U.S.C. §2255 (3).¹

In United States v. Booker, 125 S.Ct. 738 (2005), the Supreme Court declared the Federal Sentencing Guidelines unconstitutional insofar as they are mandatory, and recognized a new right for federal criminal defendants for the purposes of 28 U.S.C. §2255. While the Third Circuit has yet to rule on the question of whether this new right is to be “made retroactively applicable to cases on collateral review,” 28 U.S.C. §2255 (3), several judges of this Court have held that the newly recognized right in Booker is not retroactive, U.S. v. Wenzel, 2005 WL 579064 *12 (E.D. Pa. Mar. 2, 2005)(McLaughlin, J.); U.S. v. Aikens, 2005 WL 433440 *8 (E.D. Pa. Feb. 25, 2005)(DuBois, J.); U.S. v. Russell, 2005 WL 281183 (E.D. Pa. Feb. 3, 2005)(Bartle, J.); U.S. v. Williams, 2005 WL 240939 *2 (E.D. Pa. Jan. 31, 2005)(Bartle, J.), and this is also the prevailing view among other federal courts. Wenzel, 2005 WL 579064 *11 (listing cases).

In U.S. v. Swinton, 333 F.3d 481 491 (3d. Cir. 2003), the Third Circuit held that the newly recognized right in Apprendi v. New Jersey, 530 U.S. 466 (2000), was not retroactive. In Apprendi, the Supreme Court held that, other than a prior conviction, any sentencing enhancement beyond a statutory maximum must be based upon facts found by a jury beyond a reasonable doubt. 530 U.S. at 471, 490 (2000). Blakely expanded Apprendi, which was limited to sentences exceeding the statutory maximum, and overturned a sentence imposed under Washington’s sentencing system because it permitted judges to enhance sentences based on facts that had not been proven beyond a reasonable doubt to a jury. 124 S.Ct. 2531. In Booker, the

¹Defendant’s motion, filed before the Supreme Court’s decision in Booker, relied on Blakely v. Washington, 124 S.Ct. 2531 (2004)(overturning a sentence imposed under Washington’s sentencing system because it permitted judges to enhance sentences based on facts that had not been proven beyond a reasonable doubt to a jury). The Court will however treat the motion as encompassing the Supreme Court’s more recent decision.

Supreme Court reaffirmed Apprendi, ruling that Blakely was applicable to the Federal Sentencing Guidelines. 125 S.Ct. 738. The Court finds no indication that the Third Circuit would treat Booker differently from Apprendi in relation to the question of retroactivity, since there is “no reason why the analysis in Swinton concerning Apprendi should not apply equally to Booker and compel the conclusion that Booker is likewise not retroactive.” Williams, 2005 WL 240939 at *2.

As Defendant did not file the motion pursuant to 28 U.S.C. §2255 within one year of the date on which the judgment of conviction became final, and as the right asserted is not retroactively applicable to cases on collateral review, Defendant has failed to meet the requirements of 28 U.S.C. §2255 and the motion is denied.

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DENNIS VIRELLI	:	No. 99-573
	:	
	:	
	:	

ORDER

AND NOW this 22nd day of March, 2005 upon consideration of Defendant's Motion to Vacate, Set Aside, or Correct Sentence, and the response thereto, it is ORDERED that: (1) the motion is DENIED; and (2) no certificate of appealability is issued.

BY THE COURT:
s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.