

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	NO. 99-CR-363-06
v.	:	
	:	CIVIL ACTION
STEVEN MAZZONE	:	NO. 05-CV-0654

SURRICK, J.

OCTOBER 12, 2005

MEMORANDUM & ORDER

Presently before the Court is Defendant Steven Mazzone's Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 921). For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

Defendant was charged with RICO, RICO Conspiracy, and related offenses. The Government 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 obtaining a significant position in the LCN hierarchy. (Doc. No. 167 at 1-2.) Defendant was found guilty by a jury of one count each of RICO and RICO Conspiracy and one count of illegal sports bookmaking in violation of 18 U.S.C. §§ 1955, 1962(c), 1962(d). (Doc. No. 738.) The jury also found that the Government had proven that Defendant had committed various Racketeering Acts.

A Sentencing Hearing was held on December 5, 2001. The presentence report ("PSR") provided a sentencing guideline range of 87 to 108 months based on an offense level of 29 and criminal history category I. At the Hearing, Defendant's objections to the PSR were overruled,

and the Court adopted the PSR in its entirety. (Doc. No. 899 at 58.) The Court found that Defendant had played an aggravating role as a leader or organizer. (*Id.*) The Court also found that Defendant extorted or helped extort the amount specified in the PSR. (*Id.*) The Court imposed a sentence of 108 months, rejecting the Government's request for an upward departure from the sentencing guidelines. (*Id.*) The Court also sentenced Defendant to three years of supervised release, a \$15,000 fine, and \$300 in special assessments. (*Id.* at 59.)

On November 12, 2003, the Third Circuit affirmed Defendant's conviction and sentence, denying his claims that the verdict was not supported by the evidence. *United States v. Mazzone*, 349 F.3d 144, 149 n.1 (3d Cir. 2003). The Court also denied Defendant's claim that the district court erred in grouping the counts of conviction, in calculating the loss amount, and in increasing the sentence due to Defendant's aggravating role. *Id.* 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, citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and asserting that the Court improperly sentenced him based on facts that were not proven to a jury or admitted by the Defendant. (Doc. No. 921 at 6.) Specifically, Defendant objects to the increased offense level under the Federal Sentencing Guidelines in light of the Court's findings with respect to the extortion involving threats of bodily injury, the amount of money extorted, and the aggravating role Defendant played in the offenses. (*Id.*)

II. STANDARD OF REVIEW

Section 2255 permits a prisoner in federal custody to challenge the validity of his sentence. 28 U.S.C. § 2255 (2000); *see also United States v. Eakman*, 378 F.3d 294, 297 (3d Cir. 2004). The prisoner has one year from the latest of the following acts to file a petition under § 2255:

(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.

28 U.S.C. § 2255 (2000). It is within the court's discretion to hold an evidentiary hearing on a § 2255 motion. *Virgin Islands v. Forte*, 865 F.2d. 59, 62 (3d Cir. 1989). A hearing need not be held, however, if the "motion and the files and records conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255 (2000); *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992).

III. DISCUSSION

In his Motion, Defendant cites *Apprendi*, arguing that the court should vacate his sentence because it was based on facts not admitted by him or proven to a jury. *Apprendi* held that a court violated the Sixth Amendment when it increased the defendant's sentence beyond the state statutory maximum based on facts that were neither proven to a jury nor admitted by the defendant. 530 U.S. at 489. In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 2537 (2004), the Supreme Court held that *Apprendi* applied to mandatory sentencing schemes, and that

a defendant could not be sentenced based on facts not admitted by the defendant to the court or charged in the indictment and found by a jury. The Supreme Court subsequently held that *Blakely* applied to the Federal Sentencing Guidelines and fashioned a remedy under which the Guidelines became advisory, rather than mandatory, for a sentencing court. *United States v. Booker*, 125 S. Ct. 738, 756 (2005). Although Defendant’s Motion cites only *Apprendi*, this is in reality a claim under *Booker*. We note, however, that Defendant’s conviction became final prior to the date on which *Booker* was decided. Therefore, in order for *Booker* to provide any relief to Defendant, it must be retroactive.

On May 17, 2005, the Third Circuit directly addressed the issue of the retroactivity of *Booker* in the case of *Lloyd v. United States*, 407 F.3d 608, 615 (3d Cir. 2005). Citing *Teague v. Lane*, 489 U.S. 288 (1989), the Court of Appeals observed that if petitioner’s conviction was final prior to *Booker* and the rule announced in *Booker* was “new,” then the court had to determine whether *Booker* falls under the relevant *Teague* exception for “watershed” rules.¹ *Lloyd*, 407 F.3d at 611-12. A “watershed” rule “implicat[es] the fundamental fairness and accuracy of the criminal proceeding.” *Id.* at 612. The Third Circuit concluded that the rule in *Booker* was indeed new, as it was not “dictated by precedent.” *Id.* at 613 (quoting *Humphress v. United States*, 398 F.3d 855, 861 (6th Cir. 2005)); *see also Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 2512 (2004). It then found that the rule was not “watershed” within the definition set forth in *Teague* and its progeny because it was not one “without which the likelihood of an

¹ The Supreme Court has held that *Apprendi* and its progeny, which presumably includes *Booker*, set forth a new rule of criminal procedure. *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 2523 (2004); *see also Lloyd*, 407 F.3d at 612 n.2.

accurate conviction is seriously diminished.”² *Lloyd*, 407 F.3d 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 was final as of January 12, 2005.³

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, we cannot grant relief on his *Booker* claim.

Since the record “conclusively show[s] that the prisoner is entitled to no relief,” 28 U.S.C. § 2255, the Motion will be denied without a hearing.

An appropriate Order follows.

² 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*, 124 S. Ct. at 2513-14). *Summerlin*, for example, declined to apply *Ring v. Arizona*, 536 U.S. 584 (2002), retroactively because that case, which held that the jury must find the fact necessary for a death sentence, was not “watershed” within the developed definition. 124 S. Ct. at 2525.

³ In holding that *Booker* does not apply to cases on collateral review where the judgment was final as of January 12, 2005, the date *Booker* was decided, the Third Circuit joined several other Circuits. See *Guzman v. United States*, 404 F.3d 139, 144 (2d Cir. 2005); *Humphress*, 398 F.3d at 857; *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).

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ORDER

AND NOW, this 12th day of October, 2005, 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. 921), it is ORDERED that the Motion is DENIED.

BY THE COURT:

S:/R. Barclay Surrick, Judge