

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

UNITED STATES OF AMERICA : CIVIL ACTION NO. 04-4645
 :
 vs. : CRIMINAL NO. 00-608-01
 :
 KENNETH GOLDEN :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

December 12, 2005

Kenneth Golden, a federal inmate in custody at the Federal Medical Center-Devens in Ayers, Massachusetts, asks this Court to grant his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255,¹ and motion for return of seized property pursuant to Federal Rule of Criminal Procedure 41(g).² This Court finds Golden's asserted habeas claims are meritless, and the record insufficient to consider the merits of the petition for return of property.

¹Section 2255 provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

²Federal Rule of Criminal Procedure 41(g) provides, in pertinent part, that "a person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."

BACKGROUND

Golden signed a guilty plea agreement on February 23, 2001. In the agreement, Golden plead guilty to conspiracy to distribute cocaine,³ attempted possession with intent to distribute one quarter pound of cocaine,⁴ carrying a firearm during a drug trafficking crime,⁵ and conducting a prostitution enterprise.⁶ As part of the agreement, Golden abandoned rights to personal property listed in the plea agreement. Guilty Plea Agreement ¶ 3. Golden entered his guilty plea in open court and under oath on March 2, 2001. Twenty-seven days later, Judge Van Antwerpen signed a judgment and preliminary order forfeiting additional property seized from Golden. On September 19, 2001, Golden was sentenced to 108 months imprisonment, five years supervised release, a special assessment of \$800, and a fine of \$10,000.

Golden filed his first § 2255 petition on May 6, 2002.⁷ The Court granted Golden's petition to a limited extent, vacating the prior sentence so Golden could take a timely appeal. Golden appealed and the Third Circuit affirmed the District Court's judgment. On October 6, 2003, the Supreme Court denied Golden's petition for a writ of certiorari. Golden subsequently filed a Motion for Return of Property, which the District Court denied.

On October 4, 2004, Golden filed another § 2255 petition and asserted eight claims of ineffective assistance of trial counsel. Additionally, he challenged his sentence as improper in

³21 U.S.C. § 846.

⁴21 U.S.C. §§ 846, 841(a)(1).

⁵18 U.S.C. § 924(c)(1).

⁶18 U.S.C. §§ 371, 1952(a)(3).

⁷The Court directed Golden's attorney to re-file his petition on the correct forms. These forms were submitted on June 13, 2002.

light of the Supreme Court's ruling in *United States v. Booker*, 125 S. Ct. 738 (2005).⁸ Golden's habeas counsel filed a supplement on March 28, 2005 in which she reasserted some claims raised in Golden's second petition and raised one additional sentencing issue. On April 11, 2005, Golden filed a second Motion for Return of Property.

By an order entered April 25, 2005, the District Court denied the second § 2255 motion because *Booker* does not apply retroactively on a petition for collateral review and the subsequent § 2255 petition was not certified. The second motion for return of property also was denied because it mentioned property previously addressed by the District Court's first denial. Golden filed motions to reopen and reconsider the second § 2255 petition on May 4, 2005, and the second motion for return of property on May 11, 2005. The Court granted both motions by an order entered July 1, 2005, and directed the government to respond to Golden's motions by July 8, 2005. The government replied Golden's 2255 petition should be dismissed as meritless. On November 1, 2005, the Court heard arguments on the claims asserted in Golden's second petition, the supplement filed by habeas counsel, and one unbriefed sentencing challenge.

DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁹ after a petitioner files a first petition for writ of habeas corpus as a matter of course, his right to file a second or successive petition is limited. Specifically, he must move in the appropriate court of appeals for the right to file a second or successive petition. 28 U.S.C. §§ 2244(b)(3)(A), 2255.

⁸Golden's second petition challenged his sentence in light of *Booker*'s progeny cases, *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because his petition was filed before *Booker* was decided. Because he is a federal prisoner sentenced pursuant to the Federal Sentencing Guidelines, Golden's sentencing argument is more properly raised as a *Booker* challenge, which habeas counsel raised in the supplement.

⁹Pub. L. 104-132, 110 Stat. 1214 (1996) (codified in relevant part at 28 U.S.C. §§ 2241-55).

Authorization to file is permitted only if the motion contains: “(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* § 2255.

The Third Circuit identified one circumstance outside this general rule. When the district court grants a petitioner’s first writ of habeas corpus to restore his right to file a direct appeal, a subsequent § 2255 motion, filed after the appeal becomes final, does not require pre-certification. *In re Olabode*, 325 F.3d 166, 172 (3d Cr. 2001). The first petition for writ of habeas corpus, in this context, does not attack the conviction or judgment; it places the petitioner in the position he would have been in had his attorney timely filed an appeal. *Id.* Golden’s case is analogous to *Olabode*; his first habeas petition only sought to reinstate his right to a direct appeal. Therefore, this Court must consider the merits of the asserted claims in his successive petition.¹⁰

In considering Golden’s habeas petition, this Court is mindful § 2255 “does not provide habeas petitioners with a panacea for all alleged trial or sentencing errors.” *Armstrong v. United States*, 382 F. Supp. 2d 703, 706 (E.D. Pa. 2005) (quotation and citation omitted). To prevail, the petitioner must plead and prove errors which are constitutional, jurisdictional, “a fundamental defect which inherently results in a complete miscarriage of justice,” or “an omission inconsistent with the rudimentary demands of fair procedure.” *Hill v. United States*, 368 U.S. 424, 428 (1962). A petitioner is entitled to relief only if he can establish he is in

¹⁰Golden timely filed his successive petition on October 4, 2004. AEDPA prescribes a one-year period of limitations for filing of federal habeas petitions by federal prisoners from the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255. Golden’s conviction became final on October 6, 2003.

custody in violation of federal law or the Constitution. *Enright v. United States*, 347 F. Supp. 2d 159, 163 (D.N.J. 2004).

Most of Golden's claimed errors involve ineffective assistance of counsel in violation of the Sixth Amendment right to counsel. To demonstrate ineffective assistance of counsel, Golden must make a two-fold showing as required by *Strickland v. Washington*, 466 U.S. 668 (1984). First, he must prove trial counsel's performance was so deficient that it fell below "an objective standard of reasonableness." *Id.* at 688. Second, he must demonstrate counsel's deficient performance prejudiced him by providing an unreliable result. *Id.* at 688, 694. That is, there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002).

The court must be "highly deferential," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotations omitted). The defendant must identify the acts or omissions of counsel alleged not to have been the result of reasonable professional judgment. *Id.* at 690. The court then must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Id.*

Golden maintains his trial counsel was ineffective for nine reasons,¹¹ all of which have no merit. First, Golden faults trial counsel for failing to argue Count Three of the indictment was

¹¹The Third Circuit has directed ineffectiveness claims be pursued in a collateral proceeding such as this one. *United States v. Gambino*, 788 F.2d 938, 950 (3d Cir. 1986).

legally insufficient because an essential element was missing. Golden contends “willfully” is a required element for a violation of 18 U.S.C. § 924(c)(1); the superceding indictment incorporates the *mens rea* element that Golden acted knowingly. The plain language of the statute, however, undermines Golden’s position. Section 924(c)(1) imposes a minimum five-year term of imprisonment on “any person who, during and in relation to a crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” The subsection is silent as to the mental state required for a violation. The Supreme Court has interpreted criminal statutes lacking a mental element to include a broadly applicable scienter requirement. *United States v. X-Citement Video*, 513 U.S. 64, 70 (1994). Applying this principle to 18 U.S.C. § 924(c) establishes the government need only prove the defendant had knowledge of the use of the firearm. A person cannot have possession or control of a firearm and allow the firearm to play a role in the crime unless the person knew of the firearm's existence. This conclusion is consonant with the majority of Circuit Courts of Appeals addressing the *mens rea* requirement for 18 U.S.C. § 924(c).¹²

Golden erroneously focuses on the District Court’s incorporation of “willfulness” as an element of the firearm violation when explaining the charges during the guilty plea colloquy. Golden’s claimed error is not whether the trial judge correctly identified the requisite *mens rea* for a violation of 18 U.S.C. § 924(c), but whether the indictment itself is legally sufficient. To comport with the Fifth and Sixth Amendments, a legally sufficient indictment must (1) contain

¹²*United States v. Santeramo*, 45 F.3d 622, 624 (2d Cir. 1995) (recognizing government need to prove knowledge of the use of the firearm); *United States v. Dahlman*, 13 F.3d 1391, 1400 (10th Cir. 1993) (same), *cert. denied*, 114 S. Ct. 1575 (1994); *United States v. Oakie*, 12 F.3d 1436, 1440 (8th Cir. 1993) (same); *United States v. Williams*, 985 F.2d 749, 755 (5th Cir.) (same), *cert. denied*, 114 S. Ct. 148 (1993); *United States v. Gutierrez*, 978 F.2d 1463, 1467 (7th Cir. 1992) (same); *United States v. Martinez*, 967 F.2d 1343, 1346 (9th Cir. 1992) (same); *United States v. Sutton*, 961 F.2d 476, 479 (4th Cir.) (same), *cert. denied*, 113 S. Ct. 171 (1992).

all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense. See *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Whited*, 311 F.3d 259, 262 (3d Cir. 2002). “It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’” *Hamling*, 418 U.S. at 117 (citing *United States v. Carll*, 105 U.S. 611, 612 (1882)). Because the superceding indictment expressly incorporates knowledge and tracks the language in 18 U.S.C. § 924(c), Golden’s ineffective assistance claim on this ground fails.

Second, Golden maintains trial counsel was ineffective for not informing the District Court he had a diabetic condition and failed to take his medication prior to his guilty plea hearing. He contends his guilty plea was not knowingly, intelligently or voluntarily given because without his diabetic medication he suffered symptoms that affected his judgment. Federal Rule of Criminal Procedure 11 mandates a defendant must make an intelligent and competent waiver of his constitutional rights when entering a guilty plea. When the court is on notice of a possible impairment, the trial judge must make a further inquiry into a defendant’s competence to enter a guilty plea. See, e.g., *United States v. Cole*, 813 F.2d 43, 47 (3d Cir. 1986) (trial judge’s failure to inquire as to the effect of defendant’s having taken drugs the day prior to his guilty plea, despite an otherwise extensive colloquy and knowledge of defendant’s ingestion of drugs, rendered his guilty plea ineffective). A further inquiry, however, presupposes the court has notice of the alleged impairment. *Id.* at 47 (rejecting government’s reliance on

cases in which the court had no knowledge the defendant had taken drugs prior to the guilty plea hearing).

At the change of plea hearing, Golden was placed under oath and was specifically asked how he was feeling and if he could understand the court. Guilty Plea Hr'g Tr. 4-5, Mar. 2, 2001. He stated he had a cold and was "having a little hard time hearing," but the trial judge sufficiently ensured Golden could hear his questions nonetheless and would ask the court to repeat any questions or statements. Guilty Plea Hr'g Tr. 5. Golden never mentioned his diabetes or failure to take his medication. Golden answered the Rule 11 questions with little difficulty, and after an extended and thorough colloquy, the District Court found he was alert, intelligent, and fully competent to enter the guilty plea. Guilty Plea Hr'g Tr. 34-35. The Government aptly notes, and this Court also finds persuasive, Golden never raised issue as to his competency to enter a guilty plea when he motioned to have his guilty plea withdrawn, at his sentencing, or on direct appeal. The record thus is clear Golden knowingly and voluntarily pled guilty, and omission by counsel from raising issue as to his diabetic status does not amount to deficient performance.

Third, Golden asserts his counsel was ineffective for failing to argue he was actually innocent of the firearm violation and by ignoring his requests to bifurcate the gun charge.¹³

Specifically, he claims he had a lawful permit to carry a firearm on his person and never used a

¹³Golden's habeas counsel also raised issue as to whether Golden knowingly and voluntarily entered the guilty plea as to the § 924(c) charge because the District Court failed to adequately explain the essential elements and merely referenced the Supreme Court's decision in *Muscarello v. United States*, 524 U.S. 125 (1998). This argument is frivolous. Consistent with the Third Circuit's ruling on direct appeal, the record clearly establishes the District Court expressly set forth the essential elements of the crime. Guilty Plea Hr'g Tr. 21. The court accepted Golden's plea only after engaging in a lengthy colloquy and determining he was fully aware of the essential elements. And contrary to habeas counsel's contention, the District Court's discussion of *Muscarello* was limited to that case's holding – defining the carrying element of the firearm violation. Guilty Plea Hr'g Tr. 21-22.

gun or his permit in connection with drug trafficking. This Court, as did the Third Circuit on direct appeal, finds this argument unpersuasive because evidence establishes Golden knowingly carried a firearm during and in relation to a drug trafficking crime. The factual basis set forth by the government at the change of plea hearing established Golden had a loaded .380 semi-automatic pistol in the driver's seat area of his vehicle when he transacted to purchase one-quarter pound of cocaine from an undercover police officer and confidential source. Guilty Plea Hr'g Tr. 25. During his own testimony at the hearing to withdraw his guilty plea, Golden admitted he knew the gun was in his vehicle during the drug buy. Motion to Withdraw Guilty Plea Hr'g Tr. 11-12, July 26, 2001.

Nor is there any evidence to support Golden's contention "he pled guilty on the ill-advise and total mis-guidance of counsel." Pet'r Pet. 25. At the evidentiary hearing on the motion to withdraw the guilty plea, trial counsel testified he reviewed the government's evidence with Golden and met with him numerous times prior to entry of the guilty plea to discuss possible defenses to the firearm charge. Withdraw Guilty Plea Hr'g Tr. 58-61. It was trial counsel's opinion, in light of the facts and case law, Golden's asserted defense of having a lawful permit and not having the gun present for the drug transaction "could be problematical" and he "could easily be convicted of it." Withdraw Guilty Plea Hr'g Tr. 69-70. If Golden proceeded to trial on the gun charge, he risked losing the three-level reduction for acceptance of responsibility which was awarded to him for entering the guilty plea and admitting his guilt. This Court finds trial counsel was reasonable to advise Golden to plead guilty to the firearm charge. Even if we were to find Golden's trial counsel's conduct deficient, which we do not, Golden fails to satisfy the prejudice prong of the *Strickland* test. Had Golden proceeded to trial, there is a strong

probability a conviction would have resulted because the Government's evidence sufficiently establishes Golden knowingly carried a firearm during and in relation to a drug trafficking crime.

Fourth, Golden contends trial counsel was ineffective in having him plead guilty to the drug conspiracy charge because the government's evidence was insufficient to establish "he sold drugs to anyone, or distributed drugs," Pet'r Pet. 34, or conspired with anyone to distribute or possess drugs. This argument is unavailing based on the Government's proffered testimony of a co-defendant, Magali Rivera-Matos, who would testify Golden gave and sold her cocaine (some of which she later sold) on multiple occasions, and she observed him sell cocaine to others. She further would testify Golden told her about his cocaine business and how he worked with another to split the costs of buying cocaine to sell. After the Government summarized this evidence, Golden declined the opportunity to deny the drug charges. Instead, he fully admitted to them. Guilty Plea Hr'g Tr. 32-33.

Fifth, Golden avers trial counsel was ineffective in recommending he agree to forfeiture of property and the government violated a court order as to some of his assets. This Court lacks jurisdiction to hear a challenge under § 2255 to the forfeiture order because forfeiture is not a sufficient restraint on liberty to satisfy the "in custody" requirement for habeas corpus relief. *See Smollen v. United States*, 94 F.3d 20, 26 (1st Cir. 1996) (denying prisoners right to challenge restitution obligation in § 2255 proceeding); *United States v. Gaudet*, 81 F.3d 585, 592 (5th Cir. 1996) (same as to forfeiture). Even if the court were to find jurisdiction to hear the challenge to the forfeiture order, it would be without merit. The forfeited assets constitute assets used or intended to be used to facilitate drug trafficking or substitute assets, and Golden expressly agreed on the record at sentencing and in writing the forfeited assets would be used to pay the fine or forfeited to the Government. Sentencing Tr. 8-13, Sept. 19, 2001.

Golden's last five ineffective assistance of counsel claims, none of which this Court finds persuasive, relate to his sentencing. He erroneously believes trial counsel at sentencing was ineffective for failing to insist section 2D1.2 of the United States Sentencing Guidelines ("Guidelines"), and not section 2D1.1, establishes the base offense level for the drug offenses to which he pled guilty. This argument fails because section 2D1.2 operates to enhance a sentence – not to set the base offense level – and applies only to statutory violations under 21 U.S.C. §§ 859-61 – none of which Golden was charged with in the superceding indictment. U.S. Sentencing Guidelines Manual §§ 2D1.1, 2D1.2 (1999).

Nor does this Court find any error by trial counsel in not objecting to a seven-level enhancement for involvement of a minor. Although Golden stipulated to the enhancement, Guilty Plea Agreement ¶ 8b, he claims he lacked knowledge of the underage status of any persons involved with his prostitution business and was not present for the hiring of these alleged persons. To the contrary, the record shows the Government planned to call one of Golden's employees who would testify Golden hired her when she was fifteen years old, he knew she was underage, and she engaged in sexual acts as part of the prostitution business. This testimony was summarized and made part of the factual basis for the guilty plea, Guilty Plea Hr'g Tr. 27, and Golden admitted to these facts, Guilty Plea Hr'g Tr. 31-33.

Golden also places improper fault on trial counsel for not objecting to the drug quantity of one-quarter pound of cocaine. Specifically, Golden claims he intended to purchase a small amount of cocaine for personal use only, not with the intent to distribute, but the Government informant induced him to purchase one-quarter pound of cocaine. I find this assertion incredible. Golden stipulated to the drug amount of one-quarter pound of cocaine in the written plea agreement. Guilty Plea Agreement ¶ 8a; Guilty Plea Hr'g Tr. 9-10. During his guilty plea

colloquy, he also admitted to attempting to possess with intent to distribute approximately one-quarter pound of cocaine when he was arrested in 2000 and distributing cocaine to employees. Guilty Plea Hr'g Tr. 25, 29-33. He further testified to giving cocaine to employees and prior drug distributions for the same amount of cocaine in 1999 at the hearing on his motion to withdraw his guilty plea. Guilty Plea Hr'g Tr. 34-36.

Golden also contends, through habeas counsel, the district court incorrectly calculated his sentence using the 1998 Guidelines and applied an enhancement for role adjustment. As an initial matter, this Court questions whether it has jurisdiction to consider the merits of these claims because Golden raised them well after the one-year limitations period expired.¹⁴ Federal Rule of Civil Procedure 15 applies to motions to amend habeas corpus petitions and treats an amendment as timely filed when the original and amended claims are tied to a common core of operative facts. *Mayle v. Felix*, 125 S. Ct. 2562 (2005); *United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999) (holding the relation back provisions apply when the amended motion to a § 2255 petition clarifies already raised claims). While Golden asserted in his initial motion his attorney had been ineffective at sentencing for allowing the District Court to apply section 2D1.1, the drug quantity and the victim involvement enhancement, the two sentencing claims raised solely by habeas counsel are completely new.

Even if this Court considers the merits of the sentencing challenges, I would deny habeas relief. The parties agreed the Guidelines effective at the time of commission of the crime would govern Golden's sentencing,¹⁵ and stipulated to the enhancement for Golden's status as an

¹⁴Golden raised issue with the application of the 1998 Guidelines in the supplement filed in March 2005, and challenged the role adjustment at the hearing on this petition in November 2005.

¹⁵The guilty plea agreement identifies the Guidelines effective November 1, 1999 as controlling Golden's sentence, but both parties argued the 1998 Guidelines applied. No significant difference exists between the 1998 and 1999 Guidelines as applied to Golden's sentence.

organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive.¹⁶ Guilty Plea Agreement ¶ 8. Although the District Court was not bound by the stipulations, it nevertheless applied the 1998 Guidelines and correctly calculated Golden's sentence.¹⁷ It is true the Guidelines in effect at the time of sentencing ordinarily controls; however, the Guidelines applicable at the time the crime(s) were committed govern if the offense level for a crime changes prior to sentencing and would subject the defendant to a higher sentence. Guidelines Manual § 1B1.11. Absent adjustments for specific offense characteristics, the 2000 Guidelines altered the base offense level for promoting prostitution or prohibited sexual conduct to nineteen – a five level increase from the 1998 Guidelines. This Court thus finds persuasive the Government's assertion the parties stipulated to the 1998 Guidelines to avoid any *ex post facto* concerns. See Guidelines Manual § 1B1.11 (explaining violation of *ex post facto* clause justifies not relying on Guidelines in effect at time of sentencing).

¹⁶This Court finds unpersuasive habeas counsel's averment the plea agreement is confusing because it does not track the language in section 2G1.1 and is unclear as to which offense group, prostitution or drug charges, the role adjustment attaches. To the contrary, the agreement cites section 2G1.1 for the base offense level and the applicable adjustment for involvement of a minor. Similarly, the agreement cites to the appropriate Guidelines section for the role adjustment and only incorporates it in the stipulation related to the prostitution offenses.

¹⁷The 1998 Guidelines set the base offense level for promoting prostitution or prohibited sexual conduct at fourteen, but required an increase by seven levels if the offense involved a victim between the ages of twelve and fifteen years. Guidelines Manual § 2G1.1. The base offense level for the drug charges was eighteen. *Id.* § 2D1.1. Because the offense level for the prosecution offenses was higher than that for the drug charges, the four-level enhancement for role adjustment attached to the prosecution charge and resulted in a total base offense level of twenty-five. *Id.* § 3B1.1(a). One level was added pursuant to section 3D1.4 to combine the levels applicable to the drug and prostitution offenses, resulting in a combined offense level of twenty-six. *Id.* § 3D1.4. Golden was entitled to and received a three-level reduction for acceptance of responsibility. *Id.* § 3E1.1. With a criminal history category I and combined offense level of twenty-three, Golden's sentence fell within the forty-six to fifty-seven month range, but the five-year mandatory consecutive sentence for the firearm violation increased both ends of the range by sixty months (106 to 117 months).

Had the District Court held the 2000 Guidelines controlled, Golden still would be entitled to no relief because the sentence calculation would not have changed. Golden urges this Court to remand the case for re-sentencing because the drug charges, not the prostitution offenses, would have controlled under the 2000 Guidelines, resulting in a lower sentence. I disagree. The 2000 Guidelines set two base offense levels for prostitution offenses – nineteen if the offense involved a minor and fourteen for all other circumstances. Guidelines Manual § 2G1.1(a) (2000). Had the lesser level controlled, the sentence calculation should have focused on the drug charges. The factual basis for the prostitution offenses, however, established Golden’s prostitution business involved an employee who was fifteen years old at the time of hiring. A two-level enhancement for the age-specific status of the minor increased the base offense level to twenty-one. *Id.* § 2G1.1(b)(2). The Government’s proffered evidence provided ample support for the four-level enhancement for Golden’s role,¹⁸ *id.* § 3B1.1(a), resulting in a total offense level of twenty-five. Because the same outcome would have resulted had the District Court applied the 2000 Guidelines, it would have been futile for Golden’s trial attorney to raise issue with the sentence calculation using the 1998 Guidelines.

Golden also contends his sentence is improper in light of *Booker*. In *Booker*, the Supreme Court held the United States Sentencing Guidelines violate the Sixth Amendment. The

¹⁸Golden contends the enhancement for role adjustment excludes Golden’s employee hired when she was fifteen years old because section 2G1.1 defines the minor victim involved with the prostitution offense as a participant for role adjustment purposes only if the victim assisted in the promoting of prostitution or prohibited sexual conduct in respect to another victim. The Government concedes it has no evidence McKnight assisted in the prostitution of another minor. Nevertheless, the role adjustment still attaches because the factual basis shows multiple employees were involved, not including McKnight, and the criminal activity was otherwise extensive because the prostitution business reached beyond employees and involved numerous patrons of Golden’s health club. *See* Guidelines Manual § 3B1.1 app. note 3 (explaining “otherwise extensive” requires all persons involved during the offense be considered).

Court determined a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. As a remedy, the Court severed the statutory provision making the Guidelines mandatory. *Booker*, 125 S. Ct. at 757 (excising 18 U.S.C. § 3553(b)(1) and stating the Guidelines are advisory). In the wake of *Booker*, “district courts, while not bound to apply the [g]uidelines, must consult those [g]uidelines and take them into account when sentencing.” *Id.* at 767.

Golden’s sentence became final on October 6, 2004, prior to the *Booker* decision. Therefore, Golden argues the holding in *Booker* applies retroactively to his sentence. Golden’s argument lacks merit. The Third Circuit recently held *Booker* announced a new rule of criminal procedure that is not retroactively applicable to “initial motions under § 2255 where the judgment was final as of January 12, 2005, the date *Booker* issued.” *Lloyd v. United States*, 407 F.3d 608, 616 (3d Cir. 2005). *Booker* cannot offer Golden a remedy.

Finally, Golden has requested this Court order the return of certain items seized by the Government during the investigation of his case. The Government bears the burden to demonstrate it has a legitimate reason to retain the requested property because Golden’s criminal proceedings have terminated. *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir. 1999). Because the record is lacking as to the status of the requested property (i.e., whether the assets are contraband, subject to forfeiture, or otherwise innocuous; whether the government still retains the property), the Court cannot reach the merits at this time. *Id.* at 378 (holding district court fails its duty under the federal rules of civil procedure by not holding an evidentiary hearing (i.e., gathering sufficient evidence) “on any disputed issue of fact necessary to the resolution of the motion”).

Accordingly, an appropriate order follows.

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

UNITED STATES OF AMERICA : CIVIL ACTION NO. 04-4645
 : :
 : CRIMINAL NO. 00-608-01
 : :
 : :
KENNETH GOLDEN : :

ORDER

AND NOW, this 12th day of December, 2005, it is hereby ORDERED that:

1. Petitioner's Motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct sentence (Document 76) is DENIED.

2. The Government is directed to show cause why the Petitioner's Motion for Return of Seized Property (Document 84) should not be granted within thirty (30) days of this Order.

3. A certificate of appealability is DENIED, on the ground that Petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c).

4. Petitioner's Motion for Proposed Order (Document 94) is DENIED as moot.

BY THE COURT:

Juan R. Sánchez, J.
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