

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL STAFFORD, SR.,

Defendant.

ORDER

96-CR-0003-C

Undaunted by the denial or dismissal of two motions brought pursuant to 28 U.S.C. § 2255, two motions for a new trial, one motion for reconsideration of the order denying his first motion for a new trial and one motion for relief under Fed. R. Crim. P. 35, defendant has filed another motion challenging the sentence imposed on him on March 4, 1997. He entitles this one a “Motion to Correct the Sentence under Section 28 USC 2241(C)(3)(d)/2243 Nunc Pro Tunc,” but it is actually a sixth incarnation of a § 2255 motion. (Accompanying this motion are other motions to correct the presentence report and to correct the statement of reasons for sentencing but these are subsidiary to the motion to correct the sentence.)

Defendant tries to justify his bringing of this new motion by arguing that a traditional

habeas corpus remedy under § 2241(C)(3) is available when the Antiterrorism and Effective Death Penalty Act forecloses review under § 2255. In support of his argument, he cites Triestman v. United States, 124 F.3d 361 (2d Cir. 1997). He neglects to explain, however, that Triestman involved a serious claim of actual innocence under United States v. Bailey, 516 U.S. 137 (1995), a case in which the Supreme Court held that mere possession of a gun in connection with a drug trafficking crime is not enough to make one guilty of “using” a gun in connection with such a crime in violation of 18 U.S.C. § 924(c)(1). In United States v. Davenport, 147 F.3d 605 (7th Cir. 1998), the Court of Appeals for the Seventh Circuit held that a defendant raising a similar claim could proceed under § 2241 if he was foreclosed from bringing a § 2255 motion. Neither case is of any help to defendant because he is not trying to raise a viable claim of actual innocence. Instead, he is arguing that when the court sentenced him in 1997, it should not have enhanced his Sentencing Guidelines sentence in reliance on facts that had not been found by the jury beyond a reasonable doubt.

Defendant argues that the Supreme Court’s ruling in United States v. Booker, 125 S.Ct. 738 (2005), “establishes a retroactive application through the U.S.S.G. by ‘clarifying’ Amendments.” If he means that the ruling has retroactive application to cases that were not pending on direct appeal when it was decided, he is wrong. The court of appeals has decided that Booker is *not* retroactive. McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005).

Having filed previous motions attacking his conviction, defendant is barred by 28

U.S.C. § 2255 from filing another such motion unless a panel of the court of appeals certifies his motion. Until he obtains such certification, this court has no jurisdiction to entertain his present motion.

ORDER

IT IS ORDERED that defendant Paul Stafford, Sr.'s motion to correct his sentence is construed as a motion brought pursuant to 28 U.S.C. § 2255 and dismissed because it is a successive collateral attack under that statute and this court lacks authority to entertain it.

Entered this 5th day of April, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge