

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

BENJAMIN A. VAUGHN,

Defendant.

ORDER

04-C-0745-C

00-CR-0116-C-01

Defendant Benjamin A. Vaughn has filed a motion for post-conviction relief pursuant to 28 U.S.C. § 2255. He asserts that he is entitled to a modification of the sentence imposed on him in May 2001 because the court based the sentence on facts not found by a jury beyond a reasonable doubt.

The first question is whether defendant's motion is timely. 28 U.S.C. § 2255 sets out four events that trigger the one-year limitations period for the filing of post-conviction motions: (1) The date on which the judgment of conviction becomes final; (2) the date on which an impediment to making a motion is removed (and the impediment was the result of government action in violation of the Constitution or laws of the United States); (3) the

date on which the facts supporting the claims could have been discovered through the exercise of due diligence; or (4) 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.” Defendant’s sentence became final on May 27, 2001, when he failed to file a notice appeal from the sentence imposed on him on May 16, 2001. Because he did not file this motion until October 4, 2004, his motion is not timely under subsection (1). It is not timely under either of the other two subsections because he does not assert the existence of any impediment to filing his motion or suggest that new facts have surfaced. Therefore, the last provision is the only one that has potential application to him.

The application is potential and not actual because the Supreme Court has not held that it is unconstitutional for federal judges to base sentencing determinations on facts not found by a jury. In Blakely v. Washington, 124 S. Ct. 2531 (2004), the Court ruled that the Washington state courts could not constitutionally rely on judicial findings to impose a sentence above the “standard range” set forth in the statute. The Court declined expressly to rule on the federal sentencing guidelines. However, in United States v. Booker, 375 F.3d 508 (7th Cir. 2004), the court of appeals held that the ruling in Blakely rendered the federal sentencing guidelines unconstitutional. The Supreme Court heard the government’s appeal from the Booker decision on October 4, 2004.

At the present time, it is questionable whether it could be said that the Supreme Court has recognized a right not to be sentenced in accordance with the sentencing guidelines when the sentence falls within the statutory maximums. Although the majority of the panel that decided Booker thought that such a holding was implicit in Blakely, the dissenting judge did not and neither did the Court of Appeals for the Fifth Circuit. See United States v. Pineiro, 2004 WL 1543170 (July 12, 2004). Certainly, no court has held that if the Supreme Court has recognized such a right, the right applies retroactively to cases on collateral review.

Defendant's motion is premature. In these circumstances, the issue is whether it should be denied without prejudice or held in abeyance until the Supreme Court has reached its decision on the constitutionality of the federal sentencing guidelines.

On first consideration, it appears that defendant would not lose any rights if his motion were denied without prejudice. This circuit has ruled that the time for filing a first petition grounded on a newly recognized right starts to run from the date on which the new right has been made retroactively applicable to cases on collateral review. Ashley v. United States, 266 F.3d 671 (7th Cir. 2001). However, other circuits have held that the filing time starts running on the day that the Supreme Court initially recognizes the new right. Dodd v. United States, 365 F.3d 1273, 1277 (11th Cir. 2004); United States v. Lopez, 248 F.3d 427, 432-33 (5th Cir. 2001); Nelson v. United States, 184 F.3d 953, 954 (8th Cir. 1999)

(dicta); Triestman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997) (dicta). As unlikely as it is, it is not beyond the realm of possibility that the Supreme Court would rule in Booker that Blakely applies to the sentencing guidelines, that this holding was obvious in the Blakely decision *and* that ¶ 6 of § 2255 should be read as holding that the filing time begins to run on the day that the Supreme Court recognizes a new right, not on the day that the right is made retroactively applicable to cases on collateral review. If that were to happen, any defendant who had not filed within one year of the Blakely decision would be barred from obtaining the benefit of the decision.

To be fair to defendant, I will stay consideration of his motion pending the decision of the United States Supreme Court in Booker.

ORDER

IT IS ORDERED that defendant Benjamin A. Vaughn's motion for post-conviction relief pursuant to 28 U.S.C. § 2255 is held in abeyance until the United States Supreme

Court has issued its decision in United States v. Booker, No. 04-104.

Entered this 14th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge