

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

-----  
UNITED STATES OF AMERICA,

Plaintiff,

v.

MARLIN SHAW,

Defendant.

-----

ORDER

02-CR-0024-C-01  
05-C-158-C

Defendant Marlin Shaw has filed a motion for vacation of his sentence pursuant to 28 U.S.C. § 2255. Citing Blakely v. Washington, 124 S. Ct. 2531 (2004), he contends that his sentence is illegal because it was imposed in violation of his Sixth Amendment right to have a jury find beyond a reasonable doubt any fact that is used to increase his sentence.

The initial question is whether defendant's motion is timely. Section 2255 has a one-year period of limitations that begins running from the latest of (1) the date on which the defendant's conviction becomes final; or (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion;

or (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly recognized by the Court and made retroactively applicable to cases on collateral review; or (4) the date on which the defendant could have discovered the facts supporting his claims through the exercise of due diligence.

Defendant was sentenced on July 31, 2002. On December 3, 2002, the government filed a Rule 35(b) motion leading to defendant's resentencing on December 6, 2002. Defendant did not appeal his conviction or either sentence to the court of appeals. Therefore, his conviction became "final" under 28 U.S.C. § 2255 ¶ 6(1) no later than the expiration of the 10-day period for taking a direct appeal under Fed. R. App. P. 4(b)(1)(A)(I), or approximately August 16, 2002. Defendant did not file his motion until March 14, 2005, well after the one-year limitation period expired. Therefore, the motion is untimely under subsection (1). Nevertheless, defendant could proceed under subsection (3) if he is filing within a year of the Supreme Court's initial recognition of a newly recognized right if the right has been made retroactively applicable to cases on collateral review.

Although defendant is asserting a right that was newly recognized in Booker, 125 S. Ct. 738 (2005), when the Supreme Court held that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases the maximum punishment, it is not a right that has been made applicable retroactively. In McReynolds

v. United States, 397 F. 3d. 479 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit held that the rights recognized in Booker do not apply retroactively on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” Id. at 4 (quoting Schriro v. Summerlin, 124 S. Ct. 2519 (2004)). The court concluded that Booker did not establish a “watershed rule”; “the choice between judges and juries as factfinders does not make such a fundamental difference.” Id.

Now that the court of appeals has decided that Booker has no retroactive application, defendant cannot take advantage of the provision in subsection (3) of § 2255 that delays the running of the one-year limitation period until the Supreme Court has recognized a new right that has retroactive application. Instead, he is bound by the provisions of subsection (1), under which the limitations period began to run when the court docketed his judgment and commitment order, August 5, 2002, and expired approximately August 16, 2002.

ORDER

IT IS ORDERED that defendant Marlin Shaw's motion for vacation of his sentence, brought pursuant to 28 U.S.C. § 2255, is DENIED as untimely.

Entered this 15th day of March, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge