

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH ISHAM, SR.,

Defendant.

ORDER

03-CR-0141-C
05-C-0206-C

Defendant Joseph Isham, Sr. has moved pursuant to 28 U.S.C. § 2255 for vacation of his sentence on the ground that this court sentenced him illegally when it based its sentence on facts that had not been found by the jury beyond a reasonable doubt. He asserts also that his attorney gave him ineffective assistance when she failed to object to the illegal sentencing.

Defendant's motion is timely but it must be dismissed because it does not raise any claim that would entitle defendant to vacation of his sentence. It is true that in United States v. Booker, 125 S. Ct. 738 (2005), the United States Supreme Court recognized a new right of defendants not to be subject to a mandatory sentencing scheme based upon judicial

findings of contested factual matters. However, the Court of Appeals for the Seventh Circuit has determined that Booker does not apply retroactively to cases on collateral review such as this one. McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005). The court of appeals characterized the Booker 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 480 (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. The court was persuaded that the Booker decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being “the degree of flexibility judges would enjoy in applying the guideline system.” Id.

The district courts in this circuit are bound by the holding in McReynolds. Therefore, defendant’s motion must be denied for his failure to show that his sentence is illegal in any respect. At the time defendant was sentenced it was not improper for federal courts to base their sentencing guideline determinations on facts that had not been found by a jury beyond a reasonable doubt. Booker did not change anything as far as defendant is concerned.

ORDER

IT IS ORDERED that defendant Joseph Isham, Jr.'s motion for vacation of his sentence pursuant to 28 U.S.C. § 2255 is DENIED.

Entered this 18th day of May, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge