IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GARLAND LIGHTFOOT, JR.,

Defendant.

ORDER

98-CR-0113-C

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Defendant Garland Lightfoot, Jr. has filed a motion pursuant to Fed. R. Civ. P. 60(b), asking for relief from the judgment entered herein on July 9, 2002, denying his motion for relief under 28 U.S.C. § 2255. He contends that the United States Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531(2004), is an intervening change in the law that justifies relief from the July 9, 2002 judgment.

Rule 60(b) allows relief from judgment in certain limited circumstances: (1) mistake; (2) newly discovered evidence; (3) fraud or misrepresentation by an adverse party; (4) discovery that the judgment entered is void (such as when the court rendering the judgment lacked subject matter jurisdiction) (5) satisfaction of judgment or (6) for "any other reason justifying relief from the operation of the judgment." The rule makes no specific provision

for relief when there has been an intervening change in the law but it is arguable that provision (6) would apply in the unusual instance in which the judgment would be affected by a subsequent change in the law.

It is not necessary to consider whether subsection (6) applies in this case because defendant has not shown that the previous judgment is affected by any changes in the law. When defendant filed his § 2255 motion in 2002, he contended that he had been sentenced illegally. He argued that under the Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), the court lacked jurisdiction to hear his case because the indictment did not specify the amount of drugs he was alleged to have distributed, as Apprendi requires. I denied defendant's motion, holding that he could not raise this argument in a § 2255 motion because he had not raised it on his direct appeal. In reaching this conclusion, I relied on United States v. Smith, 241 F.3d 546 (7th Cir. 2001), a case in which the Court of Appeals for the Seventh Circuit held that a defendant could not raise an Apprendi-type claim in a post-conviction motion if he had not raised the claim on direct appeal unless he could show cause and prejudice for the failure to do so. Defendant did not allege that he could show either cause or prejudice for his failure. Although Apprendi had not been decided when defendant filed his notice of appeal, the court held in Smith that to show cause, a defendant moving for post-conviction relief would have to do more than simply establish that he had not raised the issue because he had not anticipated the ruling in Apprendi. Id. at 548 ("the

lack of precedent for a position differs from "cause" for failing to make a legal argument. Indeed, even when the law is against a contention, a litigant must make the argument to preserve it for later consideration").

Defendant filed a notice of appeal from the denial of his § 2255 motion. I denied his request for a certificate of appeal on the ground that reasonable jurists would not reach a different conclusion on defendant's motion and I denied his motion for leave to proceed in forma pauperis because he had sufficient funds in his prison account to pay the filing fee. Defendant did not pursue the appeal.

I conclude now that defendant has no basis on which to bring a Rule 60(b) motion. Although he relies on "an intervening change in the law," he has not cited anything that would require a different ruling on his § 2255 motion. Certainly, Blakely does not. In that case, the Supreme Court held a Washington state sentence unconstitutional because the sentencing court had increased the basic sentence in reliance on facts that had not been found by the jury beyond a reasonable doubt. In Blakely, the Court did not address the constitutionality of the federal sentencing scheme under which defendant was sentenced. It is true that in United States v. Booker, 375 F.3d 508 (7th Cir. 2004), the court of appeals held that the decision in Blakely required reversal of a sentence imposed in federal court that was based on facts not found by the jury. (Booker has been argued to the Supreme Court but has not been decided.) However, neither the Supreme Court nor the Court of

Appeals for the Seventh Circuit has held that Blakely applies to persons such as defendant, whose sentences became final before Blakely was decided. Therefore, there has been no "intervening change in the law" that would require opening up the judgment in this case.

If the Supreme Court finds that Blakely applies to federal sentences and *if* it is determined that Blakely has retroactive application to cases that were not pending when it was decided, then defendant could apply to the Court of Appeals for the Seventh Circuit for certification of a second post-conviction motion. § 2255 ¶8. At this time, however, defendant has no basis on which to proceed. His Rule 60(b) motion has no merit and he cannot bring a second motion for post-conviction relief under § 2255 unless he obtains certification of his motion from the court of appeals.

ORDER

IT IS ORDERED that defendant Garland Lightfoot, Jr.'s motion for Rule 60(b) relief is DENIED.

Entered this 13th day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge