

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

GENARO VICARIO,

Defendant.  
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ORDER

04-C-543-C  
98-CR-82-C-03

On August 9, 2004, defendant Genaro Vicario filed a motion for vacation of his sentence pursuant to 28 U.S.C. § 2255. In his motion, defendant contends that he was sentenced illegally because the court made findings of fact concerning his offense behavior and then used those facts to enhance his sentence under the sentencing guidelines in the mistaken belief that the guidelines were mandatory. In an order dated September 3, 2004, I told defendant that his motion was untimely under the Antiterrorism and Effective Death Penalty Act unless he qualified to proceed under 28 U.S.C. § 2255(3), which permits defendants to file a § 2255 “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.” I told defendant that that subsection might apply to him because I understood him to be arguing that his sentence is illegal under Blakely v. Washington, 124 S. Ct. 2531 (2004) and United States v. Booker, 375 F.3d 508 (7th Cir. 2004). I told him also that the Supreme Court had agreed to hear the Booker case and that if it were to decide that the lower courts have been acting unconstitutionally in basing sentencing determinations on facts that were not established by a jury finding and that the right applies retroactively, then defendant’s motion would be timely under § 2255(c). For this reason, I ordered defendant’s motion to be held in abeyance pending the Supreme Court’s decision.

Now the Supreme Court has rendered its opinion. In United States v. Booker, 04-104 (U.S. Jan. 12, 2005), it held that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases the maximum punishment. The Court held also that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts that are not the product of factfinding by a jury but that the guidelines are not unconstitutional if judges use them for advisory purposes. However, the Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application.

Unfortunately for defendant, on February 2, 2005, the Court of Appeals for the Seventh Circuit resolved the uncertainty, at least for motions filed in this circuit asserting the right newly recognized in Booker. In McReynolds v. United States, Nos. 04-2520, 04-

2632 & 04-2844, slip op. (7th Cir.), the court 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. 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.

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 for him 90 days after the court of appeals affirmed his conviction and sentence on August 6, 1999. That limitations expired for defendant in November of 2000.

ORDER

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

Entered this 10th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB  
District Judge