

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENARO VICARIO,

Defendant.

ORDER

04-C-0543-C

98-CR-0082-C-03

Defendant Genaro Vicario has filed a timely motion pursuant to 28 U.S.C. § 2255 for relief from an allegedly unconstitutional sentence imposed upon him on April 1, 2004. He asks the court to correct his sentence by applying the “interpretation of the U.S. Supreme Court case ruling in Blakely v. Washington.”

Defendant was convicted and sentenced in 1998. He appealed; the court of appeals affirmed his conviction and sentence on August 6, 1999. His judgment of conviction became final 90 days later. Clay v. United States, 537 U.S. 522, 529-30 (2003) (even if defendant chooses not to file petition for writ of certiorari, his conviction does not become final until time for filing petition has expired 90 days after court of appeals has entered

judgment). Once his conviction became final, defendant had only one year in which to file a post-conviction motion.

Under § 2255, the one-year limitations period starts to run from the date on which the judgment of conviction becomes final *or* from 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) *or* from the date on which the facts supporting the claims could have been discovered through the exercise of due diligence *or* from 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.” This last exception is the only one that has potential application to defendant’s sentence.

Although the Supreme Court has not held that the lower courts have been acting unconstitutionally in basing sentencing determinations on facts that were not established by a jury finding using the beyond-a-reasonable-doubt standard of proof, it is possible that it will reach that decision. 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. 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 has agreed

to hear the government's appeal from the Booker decision in October.

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.

Until the Supreme Court has clarified the constitutionality of the Sentencing Guidelines, defendant's motion is premature. In these circumstances, the issue is whether it should be denied without prejudice, permitted but stayed or denied outright.

On first consideration, it appears that defendant would not lose any rights if his motion were denied without prejudice. However, two matters give me pause. 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). (In the same case, it held also that the retroactivity decision may be made by a district court or court of appeals.) 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 seems, it is not beyond the realm of possibility that the Supreme Court would rule 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.

The other factor is more likely and also more problematic. Now that defendant has filed his § 2255 motion with the court, I do not think I am free to ignore it or to treat it as anything other than the § 2255 motion it is intended to be. Thus, it becomes defendant's first filed § 2255 motion. If I deny it outright as premature, it is possible that the next motion that defendant files will have to be considered a second petition, subject to more onerous requirements under § 2255. To avoid this obvious prejudice to defendant, I will hold his present motion in abeyance, pending a decision on Booker. If in that case, the Supreme Court holds that Blakely does not apply to the sentencing guidelines, I will deny

defendant's motion. If the Supreme Court reaches the opposite conclusion, I will allow the parties to brief the question of retroactivity at that time, together with any other issues that might bear on defendant's motion.

ORDER

IT IS ORDERED that defendant Genaro Vicario's motion for reduction of his sentence pursuant to 28 U.S.C. § 2255 is held in abeyance until after the Supreme Court issues its decision in United States v. Booker, No. 04-104.

Entered this 3d day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge