

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK A. WINFIELD,

Defendant.

OPINION AND ORDER

05-C-0744-C

01-CR-0071-C-01

Defendant Mark A. Winfield has filed a post conviction motion pursuant to 28 U.S.C. § 2255, contending that his sentence violated both the Fifth and Sixth Amendments to the United States Constitution because he was sentenced as a career offender responsible for distribution of 803.5 grams of cocaine base, although no jury had made a determination of his status or the amount of drugs. Although under § 2255, ¶ 6(1), the time in which defendant could have filed a post conviction motion expired in February 2003, one year and ten days after his sentence was imposed, he contends that his motion comes within the exception in § 2255 that allows filing within one year of 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.” § 2255, ¶ 6(3).

Defendant has filed his motion within one year of the Supreme Court’s decision in United States v. Booker, 125 S. Ct. 738 (2005), that mandatory sentencing guidelines are unconstitutional to the extent they rest on facts that have not been determined by a jury beyond a reasonable doubt. He contends that he was sentenced unconstitutionally just as Booker was, because the court sentenced him under the belief that the sentencing guidelines were mandatory and that they permitted judges to determine certain factual matters that affected the calculation of the guidelines. In defendant’s case, I determined how many grams of cocaine base he was responsible for distributing and also that he was a career offender under the guidelines. According to Booker, this was a violation of defendant’s constitutional rights if the court was proceeding under the assumption that the guidelines are mandatory, as I was.

In Dodd v. United States, 125 S. Ct. 2478 (2005), the Supreme Court held that when the Court recognizes a new right, the one-year period for filing a post conviction motion based on that new right expires one year after the decision is entered. In announcing this decision, the Court conceded that it was likely that in most instances, the retroactivity question would not be decided within the year. It acknowledged that, as a result, defendants would not have the benefit of the exception in § 2255, ¶ 6(3), but concluded that it was not

free to read the statute to reach a conclusion that Congress had not intended.

The Supreme Court decided Booker on January 12, 2005. The one-year period will expire on January 12, 2006, but the Court has not decided whether the decision is retroactive. It is safe to say that it will not do so by then, because no case pending before the court raises the issue. Therefore, the one-year period will have run. The exception will not be available to this defendant or to others who let their time for appeal expire without any action or who have already filed and lost post conviction motions.

If the Supreme Court had held that the decision is retroactive, defendant's motion would be timely. Whether he would be allowed to proceed on it is another question and one that I need not decide. (Defendant did not take an appeal from his sentence after it was imposed on him on February 7, 2002, so he would have to show both cause and prejudice for his failure to raise the sentencing issue on direct appeal. Prewitt v. United States, 83 F.3d 812 (7th Cir. 1996) (holding that post conviction review is not available for claims not raised on direct appeal in absence of showing of both good cause for failure to raise claims on direct appeal and actual prejudice from failure to raise claims or if refusal to consider issue would lead to fundamental miscarriage of justice) (citing Reed v. Farley, 512 U.S. 339, 354 (1994)).)

Defendant spends some time in his memorandum arguing that the retroactivity decision can be made by a lower court. The point of this argument is difficult to determine.

Like every other court of appeals that has addressed the question, the Court of Appeals for the Seventh Circuit has held that Booker has no retroactive application. McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005). This court is bound to follow McReynolds.

The decisive fact is that the Supreme Court's failure to decide by January 13, 2006 that Booker is retroactive means that defendant cannot take advantage of the exception set out in ¶ 6(3) of § 2255. Therefore, his motion for post conviction relief is untimely because he did not file it within one year of the date on which his conviction became final and he has not suggested that he comes within any other exception to this one-year limitations period.

ORDER

IT IS ORDERED that defendant Mark Winfield's motion for post conviction relief brought pursuant to 28 U.S.C. § 2255 is DENIED as untimely.

Entered this 4th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge