

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY M. TIERNEY,

Defendant.

ORDER

05-C-0394-C
02-CR-0155-C-01

Defendant Timothy Tierney has filed a motion for vacation of his sentence pursuant to 28 U.S.C. § 2255 contending that he is entitled to a modification of the sentence imposed on him in May 2003, on two grounds. First, defendant contends that because the court considered facts that had not been presented to a jury, his sentence is illegal under United States v. Booker, 125 S. Ct. 738 (2005), in which the Supreme Court decided that the Constitution does not permit the use of mandatory sentencing guidelines in federal court to the extent that their application depends on facts that a jury has not determined. Second, defendant argues that his federal sentence is unconstitutional because if he had been prosecuted in state court for the same crime, he would have received a lesser sentence.

The initial question is whether defendant's motion is timely. Section 2255 has a one-year period of limitations that begins running from the latest of (1) the date on which the defendant's conviction becomes final; or (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion; or (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly recognized by the Court and made retroactively applicable to cases on collateral review; or (4) the date on which the defendant could have discovered the facts supporting his claims through the exercise of due diligence.

Defendant was sentenced on May 20, 2003. Defendant did not appeal his conviction to the court of appeals. Therefore, his conviction became "final" under 28 U.S.C. § 2255 ¶ 6(1) no later than the expiration of the 10-day period for taking a direct appeal under Fed. R. App. P. 4(b)(1)(A)(i), which was approximately May 30, 2004. Cf. Clay v. United States, 537 U.S. 522, 524 (2003) (holding that for federal prisoner who takes unsuccessful direct appeal from judgment of conviction but does not petition Supreme Court for writ of certiorari, judgment becomes "final" under § 2255 with expiration of time in which prisoner could have filed writ of certiorari). Defendant filed this motion on July 7, 2005. Under § 2255, his motion is untimely under subsection (1), but he could proceed under subsection (3) if he is filing 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.

As to defendant's first argument, defendant is asserting a newly recognized right. In Booker, the Supreme Court recognized 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 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. The Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application.

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, 397 F.3d 479 (7th Cir. 2005), 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 480 (quoting Schiro 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 when the 10-day period for taking a direct appeal under Fed. R. App. P. 4(b)(1)(A)(i) expired. That limitations period expired on approximately May 30, 2004, making his motion untimely.

As to defendant’s second argument, he is not asserting a newly recognized right so he is bound by the provisions of subsection (1) under which the limitations period began to run when the 10-day period for taking a direct appeal under Fed. R. App. 4(b)(A)(i) expired. As noted above, that limitations period expired on approximately May 30, 2004, making his motion untimely. Even if his motion were timely, it would be denied on its merits. Defendant has no constitutional right to be charged in state court even if he could prove that he would have received a lower sentence there. He violated federal law; therefore, it was

proper to try him in federal court.

ORDER

IT IS ORDERED that defendant Timothy Tierney's motion for vacation of his sentence pursuant to 28 U.S.C. § 2255 is DENIED as untimely. Defendant's motion for appointment of counsel is DENIED as moot.

Entered this 20th day of July, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge