

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOMMY LOVE,

Defendant.

ORDER

04-C-566-C
03-CR-63-C-01

Defendant Tommy Love was sentenced in this court on October 6, 2004. His conviction and sentence were affirmed on direct appeal on June 30, 2004. Subsequently, in a letter dated July 19, 2004, defendant asked the Court of Appeals for the Seventh Circuit for permission “to supplement [his] brief” on appeal. In this request, defendant argued pro se that his sentence was illegal under Blakely v. Washington, 124 S. Ct. 2531 (2004). The court of appeals’ docket sheet for defendant’s case does not reflect that defendant’s letter was treated as a formal motion requiring a response. Instead, on July 22, 2004, court of appeals issued its mandate and returned the record to this court.

On August 6, 2004, defendant filed a timely motion for vacation of his sentence in

this court pursuant to 28 U.S.C. § 2255. In his motion, defendant contends that his sentence is illegal under Blakely and United States v. Booker, 375 F.3d 508 (7th Cir. 2004). In an order dated September 3, 2004, I told defendant 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, defendant might be entitled to relief under § 2255. For this reason, I ordered defendant's motion 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. The Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application. (Because defendant's direct appeal was not pending in the court of appeals when the Supreme Court decided Booker on January 12, 2005, defendant cannot argue that he is entitled to direct application of the ruling. Instead, he can succeed on his § 2255 motion only if the decision

applies retroactively to him.)

Unfortunately for defendant, on February 2, 2005, the Court of Appeals for the Seventh Circuit resolved the retroactivity 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 succeed in showing that he is entitled to a modification of his sentence based upon that decision. Therefore, I must deny his § 2255 motion.

ORDER

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

Entered this 15th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge