

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARIO J. MORSE,

Defendant.

ORDER

04-C-583-C
03-CR-90-C-01

On August 17, 2004, defendant Mario J. Morse 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. Defendant argues 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). In Blakely, 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. The Court declined expressly to rule on the federal

sentencing guidelines. However, in Booker, 04-104 (U.S. Jan 12, 2005), the Supreme Court held 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.

Unfortunately for defendant, the Supreme Court's decision does not affect the validity of his sentence. In McReynolds v. United States, Nos. 04-2520, 04-2632 & 04-2844, slip op. (7th Cir., Feb. 2005), the court of appeals held that the rights recognized in Booker do not apply retroactively to cases on collateral review. The court of appeals characterized the Booker 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.

Because 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 Mario J. Morse's motion for vacation, modification or correction 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