

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY BURKS,

Defendant.

OPINION AND ORDER

06-cr-174-bbc
12-cv-29-bbc

Defendant Gregory Burks has moved for post conviction relief under 28 U.S.C. § 2255, asking this court to re-sentence him under the Fair Sentencing Act of 2010, in the event the Supreme Court of the United States decides that the Act's provisions should be given retroactive effect. He notes that the court has granted review in two cases, Hill v. United States, 417 Fed. Appx. 560 (7th Cir. 2011) and Dorsey v. United States, 635 F. 3d 336 (7th Cir. 2011), both of which raise the question of the retroactivity of the Fair Sentencing Act.

If the court should decide in these cases that the Act applies retroactively to criminal activity occurring before the Act took effect, including defendant's criminal activity, so that

defendant would be entitled to further consideration of his sentence, defendant will be able to file a motion for re-sentencing at that time. At this time, his motion is premature and possibly futile, if the Supreme Court does not find the Act retroactive in application.

Accordingly, I will deny defendant's § 2255 motion without prejudice to his filing a motion for re-sentencing if the Supreme Court holds that the Fair Sentencing Act is retroactive and requires re-sentencing of defendant and others similarly situated. (Defendant states in his § 2255 motion that he does not want to seek a sentence reduction under 18 U.S.C. § 3582 because § 3582 does not give the court authority to conduct a "plenary sentencing hearing." Defendant's motion, dkt #140, at 6 n.1.)

ORDER

Defendant Gregory Burks's motion for post conviction relief is DENIED without prejudice to his filing a motion for re-sentencing if the Supreme Court decides that the Fair Sentencing Act applies to the sentences of persons convicted of crack cocaine crimes committed before the Act took effect.

Entered this 3d day of February, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge