

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :  
 :  
 vs. : CRIMINAL NO. 00-608-01  
 :  
 KENNETH GOLDEN :

**MEMORANDUM AND ORDER**

**Juan R. Sánchez, J.**

**April 22, 2005**

Kenneth Golden asks this Court to vacate, set aside or correct his sentence based on 28 U.S.C. § 2255<sup>1</sup> and the retroactive application of *United States v. Booker*, 125 S. Ct. 738 (2005). This Court denies Golden's motion because *Booker* does not apply retroactively on a petition for collateral review and Golden's second § 2255 petition was not certified.

**DISCUSSION**

Golden signed a guilty plea agreement on February 23, 2001. In the agreement, Golden plead guilty to conspiracy to distribute cocaine,<sup>2</sup> attempted possession with intent to distribute one quarter pound of cocaine,<sup>3</sup> carrying a firearm during a drug trafficking crime,<sup>4</sup> and conducting a prostitution enterprise.<sup>5</sup> As part of the agreement, Golden abandoned rights to certain personal property items specifically listed in the plea agreement. Plea Agreement, 2/23/05, pp. 5-8. On March 29, 2001,

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<sup>1</sup>This is Golden's second § 2255 petition.

<sup>2</sup>21 U.S.C. § 846.

<sup>3</sup>21 U.S.C. §§ 846, 841(a)(1).

<sup>4</sup>18 U.S.C. § 924(c)(1).

<sup>5</sup>18 U.S.C. §§ 371, 1952(a)(3).

Judge Van Antwerpen signed a judgment and preliminary order forfeiting additional property seized from Golden. On September 19, 2001, Golden was sentenced to 108 months imprisonment, five years supervised release, a special assessment of \$800, and a fine of \$10,000.

Golden filed his first § 2255 petition on May 6, 2002.<sup>6</sup> The Court granted Golden's petition to a limited extent, vacating the prior sentence so Golden could take an appeal. Golden appealed and the Third Circuit affirmed the District Court's judgment. Golden subsequently filed a Motion for Return of Property, which the District Court denied.<sup>7</sup> On October 4, 2004, Golden filed his second § 2255 petition, which was supplemented on March 28, 2005. Golden claims, in light of *Booker*, he was improperly sentenced.

In *Booker*, the Supreme Court held the United States Sentencing Guidelines violate the Sixth Amendment. The Court determined a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. As a remedy, the Court severed the statutory provision making the guidelines mandatory. *Booker*, 125 S. Ct. at 757 (excising 18 U.S.C. § 3553(b)(1) and stating the guidelines are advisory). In the wake of *Booker*, "district courts, while not bound to apply the [g]uidelines, must consult those [g]uidelines and take them into account when sentencing." *Id.* at 767.

Golden's sentence became final prior to the *Booker* decision. Therefore, Golden argues the holding in *Booker* applies retroactively to his sentence. Golden's argument lacks merit. The Third Circuit recently held *Booker* is not retroactively applicable to a case on collateral review. *In re*

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<sup>6</sup>The Court directed Golden's attorney to re-file his petition on the correct forms. These forms were submitted on June 13, 2002.

<sup>7</sup>Golden has filed a second Motion for Return of Property, which mentions property Judge Van Antwerpen previously addressed.

*Anthony Bola Olopade*, 2005 WL 820550 (3d Cir. April 11, 2005). The Court further held “a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.” *Id.* (quoting *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001)) (internal quotations omitted). “It is clear that the Supreme Court has not expressly held that *Booker* is applicable to cases on collateral review. In the *Booker* decision itself, the Court did not mention collateral review and only expressly applied its holdings to cases on direct appeal.” *Id.* (citing *Booker*, 125 S.Ct. At 769). Therefore, *Booker* will not apply retroactively to Golden’s sentence.

Golden also failed to certify his second § 2255 petition. Section 2255 provides:

**A second or successive motion must be certified** as provided in section 2244 by a panel of the appropriate court of appeals to contain: **(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or **(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255 (emphasis added). The certification process referred to in § 2255 is 28 U.S.C. § 2244(b)(3). “Section 2244(b)(3) sets forth the protocols and standards for requests for second or successive habeas corpus applications in the court of appeals. [A] prisoner . . . must make ‘a *prima facie* showing that the application satisfies the requirements of this subsection.’” *In re Anthony Bola Olopade*, 2005 WL 820550 (quoting 28 U.S.C. § 2244(b)(3)(C)) (emphasis provided). Golden has to show his second motion relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* (citing *In re Turner*, 267 F.3d 225, 227 (3d Cir. 2001)). Golden has failed to do this. Golden’s arguments for sentence modification are without merit. Accordingly, we enter the following:

**ORDER**

And now this 20<sup>th</sup> day of April, 2005, Defendant's Motion for Sentence Modification (docket # 76) and Motion for Return of Property (docket # 84) are DENIED. Defendant's Motion for Leave (docket # 82) is DENIED as moot.

BY THE COURT:

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Juan R. Sánchez, J.