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

BRIAN K. BREAZEALE	:	**CRIMINAL ACTION NO. 98-26-01**
v.	:	
UNITED STATES OF AMERICA	:	**CIVIL ACTION NO. 05-567**

DuBOIS, J. **April 21, 2005**

MEMORANDUM

Presently before the Court is the Motion of petitioner, Brian K. Breazeale, to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Section 2255 Motion"). In the Motion, Breazeale asks the Court to vacate his sentence on the following grounds: (1) the sentence imposed violates Blakely v. Washington, 124 S. Ct. 2531 (2004);[1] (2) defense counsel was constitutionally ineffective in failing to object to two 2-level enhancements based on Blakely; and (3) defense counsel was constitutionally ineffective in failing to argue that the fact of prior convictions should have been submitted to a jury. In response to the Motion, the Government argues that Blakely and Booker do not apply retroactively to cases on collateral review and that, assuming *arguendo*, the Booker issue may be considered by the Court, it is procedurally defaulted. For the reasons set forth below, petitioner's Section 2255 Motion is denied.

[1] Breazeale argues that his sentence is unconstitutional in light of the Supreme Court decision in Blakely v. Washington, 124 S. Ct. 2531 (2004). Although Breazeale's Motion relies upon Blakely, the Court will consider United States v. Booker, 125 S. Ct. 738 (2005), in deciding this issue. The government's memorandum in opposition to the Motion addresses the implications of both Blakely and Booker.

I. BACKGROUND

On January 21, 1998, the Government filed an Indictment charging defendant, Brian Keith Breazeale, with four counts of mailing threatening communications with intent to extort in violation of 18 U.S.C. § 876. On August 19, 1998, a jury returned a verdict of guilty on all counts.

Sentencing was conducted on December 4, 1998. At that time, using the 1998 edition of the United States Sentencing Guidelines Manual, the Court sentenced defendant to, *inter alia*, concurrent terms of imprisonment of 105 months on Counts One through Four of the Indictment. The Guidelines calculations may be summarized as follows: The Guideline for a violation of 18 U.S.C. § 876 is § 2B3.2(a). It called for a base offense level of 18. Because the offense involved expressed threats of death and bodily injury, the Court added two levels pursuant to § 2B3.2 (b)(1). The Court also added two levels for obstruction of justice pursuant to § 3C1.1. After reducing the offense level by three levels for acceptance of responsibility, the total offense level was 22. With a total offense level of 22, in defendant's Criminal History Category, Criminal History Category VI, the Guideline Imprisonment Range was 84 to 105 months. The statutory maximum sentence was 20 years imprisonment on each of the four counts of the Indictment.

The Government argued at sentencing that defendant was a career offender under § 4B1.1 of the Guidelines, and the Court so found. Under that provision, because the offense statutory maximum sentence was 20 years or more, but less than 25 years, the offense level was increased to 32. Defendant's Criminal History Category remained at VI. With a total offense level of 32, in Criminal History Category VI, under the Career Offender Provisions, the Guideline Imprisonment Range was 210 to 262 months.

Defendant filed a Motion to Depart Downward under § 2K2.0 of the Guidelines. The Court

granted the motion on the ground that the case did not fit the Guideline for a career offender because defendant was in custody at the time of the offense conduct and did not have the ability to carry out the threat. As a result of the granting of defendant's motion, defendant was not sentenced under the Career Offender Provisions.

II. DISCUSSION

A. Retroactivity of Booker on Collateral Review

Breazeale argues that his sentence is unconstitutional in light of the Supreme Court decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), and United States v. Booker, 125 S. Ct. 738 (2005). He contends that the two 2-level enhancements above the base offense level are unconstitutional because the Court did not submit the supporting evidence to a jury to be found beyond a reasonable doubt. Specifically, Breazeale objects to the addition of two levels based on the Court's finding that the offense involved expressed threats of death and bodily injury and two levels based on a finding of obstruction of justice.

In United States v. Aikens, 2005 U.S. Dist. LEXIS 2928 (E.D. Pa. Feb. 25, 2005), this Court held that Blakely and Booker do not apply retroactively to cases on collateral review. Courts in this circuit have consistently had the same view. See, e.g., United States v. Russell, 2005 U.S. Dist. LEXIS 1610, 2005 WL 281183 (E.D. Pa. Feb. 3, 2005) (Bartle, J.); United States v. Wenzel, 2005 U.S. Dist. LEXIS 3898, 2005 WL 579064 *12 (W.D. Pa. Mar. 2, 2005) (McLaughlin, J.); United States v. Virelli, 2005 U.S. Dist. LEXIS 4531 (E.D. Pa. Mar. 22, 2005) (Baylson, J.).

As background, the Court begins its analysis with a review of Apprendi, Blakely, and Booker, and its holding in Aikens. See 2005 U.S. Dist. LEXIS 2928.

In Apprendi, 530 U.S. 466 (2000), the defendant pled guilty to state firearm offenses and was sentenced to an enhanced sentence under the New Jersey hate crime law after the trial judge found by a preponderance of the evidence that the defendant had committed a hate crime. The Supreme Court, stating that the Due Process Clause requires that the findings upon which defendant's hate crime sentence was based must be proved to a jury beyond a reasonable doubt, held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 471, 490.

In Blakely v. Washington, 124 S. Ct. 2531, the Supreme Court overturned a sentence imposed under Washington's sentencing system which permitted judges to enhance the sentences of defendants based on information that had not been proven beyond a reasonable doubt to a jury. The Court expanded the ruling in Apprendi which was limited to sentences which exceeded the statutory maximum, concluding that "the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id. at 2536-537 (internal quotations omitted).

Finally, in United States v. Booker, 125 S. Ct. 738, the Supreme Court reaffirmed Apprendi and ruled that the holding in Blakely was applicable to the Sentencing Guidelines. On the latter issue the Court stated that the Sixth Amendment requires that a jury, not judge, find "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict." Id. at 750 (quoting Apprendi, 530 U.S. at 490). In addition, the Court declared that the Sentencing Guidelines were no longer mandatory, but merely advisory, and that the courts

of appeals should review sentences for "reasonableness" in light of the statutory sentencing factors identified in 18 U.S.C. § 3553(a). Id. at 755, 767.

The Supreme Court decision in Teague v. Lane, 489 U.S. 288 (1988), governs whether the rules announced by the Supreme Court in Blakely and Booker apply retroactively to cases on collateral review.[2] The threshold determination in analyzing the retroactivity of a new rule of law is whether the rule is substantive or procedural in nature. United States v. Swinton, 333 F.3d 481, 487 (3d Cir. 2003). The Court finds that the Blakely and Booker are rules of criminal procedure because these decisions "dictate[] what fact-finding procedure must be employed to ensure a fair trial" and are not concerned with whether particular conduct is unlawful. See United States v. Jenkins, 333 F.3d 151, 154 (3d Cir. 2003) (quoting United States v. Sanders, 247 F.3d 139, 147 (4th Cir. 2001)); see also Swinton, 333 F.3d at 488-89 (finding Apprendi to be a procedural rule).

Teague outlined a three-step analysis for determining whether a particular rule is retroactive. O'Dell v. Netherland, 521 U.S. 151 (1997). First, the court must determine whether the Breazeale's conviction became final before the new decision he invokes. See Lewis v. Johnson, 359 F.3d 646, 653 (3d Cir. 2004). If the conviction had not yet become final, the Breazeale is entitled to the benefit of the decision. As Breazeale's conviction became final before Blakely and Booker were decided, he is not entitled to the benefit of those decisions unless the rules they announced are retroactive.

The second step is to determine whether the decision adopted a new rule of law. See id.

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[2] In United States v. Enigwe, 212 F. Supp. 2d 420, 431 (E.D. Pa. 2002), this Court previously held that Apprendi does not apply retroactively to cases on collateral review.

at 654. If the decision did not adopt a new rule, the petitioner is entitled to the benefit of the decision. If a new rule was adopted, the court must determine whether one of the two Teague exceptions applies. A case announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301. Moreover, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Swinton, 333 F.3d at 489 (quoting Teague, 489 U.S. at 301).

The Supreme Court decision in Booker significantly altered the way federal courts utilize the Sentencing Guidelines. First, in the wake of Booker, the rule announced in Apprendi that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt" is now applicable to sentences under the federal the Sentencing Guidelines. Booker, 125 S. Ct. at 756. Second, district courts are no longer bound to follow the federal Guidelines. Rather, sentencing courts are required to "consult [the] Guidelines and take them into account when sentencing." Id. at 767. Thus, the Guidelines, now advisory, permit courts "to tailor the sentence in light of other statutory concerns." Id. at 755.

Before the decisions in Blakely and Booker, courts held, without exception, that Apprendi was inapplicable if the sentence did not exceed the statutory maximum sentence. See, e.g., Simpson v. United States, 376 F.3d 679, 681 (7th Cir., 2004); United States v. Hughes, 369 F.3d 941, 947 (6th Cir. 2004); United States v. Francis, 367 F.3d 805, 820 (8th Cir. 2004); United States v. Jardine, 364 F.3d 1200, 1209 (10th Cir. 2004); United States v.

Alvarez, 358 F.3d 1194, 1211-12 (9th Cir. 2004); United States, v. Cases, 356 F.3d 104, 128 (1stCir. 2004); United States v. Phillips, 349 F.3d 138, 143 (3rd Cir. 2003); United States, v. Floyd, 343 F.3d 363, 372 (5th Cir. 2003). Therefore, at the time that Breazeale's sentence became final, a "reasonable jurist would not have felt compelled" to adopt the rule announced in Booker. See Teague, 489 U.S. at 301. For all of these reasons, the Court concludes that Booker's extension of Apprendi and Blakely to the federal Sentencing Guidelines established a new rule.[3]

The final step in the Teague analysis is to determine whether the new rule satisfies one of the two Teague exceptions. See Lewis, 359 F.3d at 654. If neither exception applies, the petitioner is not entitled to the benefit of the decision.

The first exception – that the rule places certain primary, private individual conduct beyond the power of the criminal law-making authority to proscribe – is not applicable to this case. Under the second exception, a new rule applies retroactively if it is "implicit in the concept of ordered liberty," implicating "fundamental fairness," and is "central to an accurate determination of innocence or guilt," such that its absence "creates an impermissibly large risk that the innocent will be convicted." Teague, 489 U.S. at 311-313; Swinton, 333 F.3d at 487.

The Supreme Court decision in Schriro v. Summerlin, 124 S. Ct. 2519 (2004), is instructive on this issue. In that case, the Court held that Ring v. Arizona, 536 U.S. 584 (2002), which extended the Apprendi rule to a death sentence imposed under the Arizona sentencing scheme, did not apply retroactively to cases on collateral review. Id. The

[3] By the same reasoning, the Court concludes that Blakely announced a new rule. However, the Court's analysis focuses on Booker because it is directly applicable to the instant case since Booker specifically addressed the constitutionality of the Sentencing Guidelines.

Summerlin Court concluded that the rule announced in Ring did not demand retroactive application, holding "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge." Summerlin, 124 S. Ct. at 2523 (internal citations omitted). In reaching its decision, the Court concluded that judicial factfinding did not "seriously diminish" accuracy to the extent that there was an "impermissibly large risk" of punishing conduct the law did not reach. Id. at 2523.

This Court concludes that a similar analysis dictates that Booker is not a watershed rule. See In re Dean, 375 F.3d 1287, 1290 (11th Cir. 2004) (Summerlin "has strongly implied that Blakely is not to be applied retroactively."). Neither of Booker's holdings are "central to an accurate determination of innocence or guilt" such that there is "an impermissibly large risk" that the innocent will be convicted. Summerlin, 124 S. Ct. at 2523. "When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy." Id. at 2525 (emphasis in original). Similarly, Booker's holding that the sentencing guidelines are advisory, cannot be said to "seriously diminish" accuracy to the extent that there was an "impermissibly large risk" of punishing conduct the law did not reach. Teague, 489 U.S. at 312-13.

For all of the foregoing reasons, Booker cannot be applied retroactively to cases on

collateral review.[4] Accordingly, Breazeale's Section 2255 Motion on this ground is denied.[5]

B. Ineffective Assistance of Counsel

Breazeale claims that defense counsel was constitutionally ineffective in failing to object to the two 2-level enhancements (for expresses threats of death and bodily injury and for obstruction of justice) based on Apprendi, Blakely and Booker.

To establish a claim of ineffective assistance of counsel, Breazeale must demonstrate that his counsel's performance (1) "fell below an objective standard of reasonableness," and (2) that counsel's deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

In evaluating whether counsel's performance fell below an objective standard of reasonableness, the court must consider "whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. In its analysis, the court must be "highly deferential," and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

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[4] The Third Circuit has had occasion to rule on Booker's retroactivity only once – in the context of an application to file a second or successive habeas corpus motion under 28 U.S.C. §2244(b)(3)(C). In re Olopade, 2005 U.S. App. LEXIS 5886 (3d Cir. April 11, 2005). Applying the standard applicable to that situation, distinguishable from that applicable to this case, the court denied a petitioner's request for leave to file a second or successive habeas motion because he could not make a "prima facie" showing that Booker constitutes "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. Id. at *12.

[5] In view of this decision, the Court need not address the government's argument that defendant procedurally defaulted his Booker claim.

presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. at 689 (internal quotations omitted). The court must not use the benefit of hindsight to second-guess strategic decisions made by counsel unless they were unreasonable. Id. at 690.

The Court concludes that Breazeale's claim of ineffectiveness is without merit. First, Breazeale's enhanced sentence was well below the relevant statutory maximum sentence of 80 years. Second, defense counsel was not ineffective for failing to forecast a change in the law. See Smith v. Murray, 477 U.S. 527, 535-36 (1986) (counsel's failure to recognize a claim or failing to raise a claim despite recognizing it supported by later case law did not constitute cause for procedural default and did not render counsel's performance constitutionally deficient under the Strickland).

This conclusion is supported by United States v. Davis, 2005 WL 77123 (3d Cir. Jan 13, 2005), where the Third Circuit recently held that counsel was not ineffective in failing to predict the decision in Jones v. United States, 529 U.S. 848 (2000), which held that more than a "de minimis" connection with interstate commerce is required in order to establish a violation of the arson statute. Id. at *5. The Court concluded that counsel had "no duty to predict that the arguments in Jones would become the law of the land." Id.

Prior to the Supreme Court's rulings in Blakely and Booker, it was reasonable for defense counsel to presume that an argument based on Apprendi, Blakely or Booker would likely fail. As discussed above, at the time of Breazeale's sentencing, courts had held without exception that Apprendi was inapplicable to the Sentencing Guidelines so long as the sentence did not exceed the statutory maximum sentence.

Because the Court concludes that counsel's failure to raise an Apprendi-type argument challenging Breazeale's sentence was reasonable under the circumstances, Breazeale has failed to satisfy the first prong of Strickland. For this reason, the Court need not decide whether Breazeale can satisfy the prejudice prong of Strickland. Accordingly, Breazeale's claim of ineffective assistance of counsel is denied.

The Court also concludes that an evidentiary hearing is not required to decide Breazeale's ineffective assistance of counsel claim. "The question whether to order an evidentiary hearing is committed to the sound discretion of the district court." Government of Virgin Islands v. Bradshaw, 726 F.2d 115, 117 (3d Cir. 1984). In making such a determination, the court must consider as true all of petitioner's nonfrivolous factual claims. United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988). If petitioner's nonfrivolous claims conclusively fail to satisfy either prong of the Strickland test – that counsel's performance fell below an objective standard of reasonableness or prejudiced the defendant – then an evidentiary hearing is not required. Id. at 928. In view of the Court's determination that, accepting petitioner's nonfrivolous claims, counsel's performance did not fall below an objective standard of reasonableness, Breazeale's claim of ineffective assistance of counsel conclusively fails and the Court need not hold an evidentiary hearing. See id.

C. Prior Convictions

Breazeale contends that defense counsel was constitutionally ineffective in failing to challenge the fact of his prior convictions. Breazeale does not set forth his argument in any detail, but the Court will presume that he is challenging: (1) the Court's finding that his prior convictions rendered him a career offender within the meaning of § 4B1.1 of the Guidelines;

and (2) that the fact of prior convictions should have been submitted to the jury.

To the extent that Breazeale objects to the Court's finding that he was a career offender, his argument is rejected on the ground that he was not sentenced as a career offender. The Court sentenced Breazeale based on a total offense level of 22, without the 10-level enhancement for career offender status.

With respect to the argument that Breazeale's prior convictions must be found by a jury before the Court can use them to establish defendant's criminal history category, the Supreme Court has held that the fact of a prior conviction need not be found by a jury. Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998). Moreover, in Apprendi and its progeny, the Court specifically exempted prior convictions from its holdings. Apprendi, 530 U.S. at 490 ("*other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury") (emphasis added); Blakely, 124 S. Ct. at 2536; Booker, 125 S. Ct. At 750. Furthermore, the Third Circuit recently held that despite Blakely and Booker, Almendarez-Torres remains binding law until the Supreme Court chooses to revisit the matter. United States v. Ordaz, 398 F.3d 236, 241 (3d Cir. 2005). Therefore, the Court concludes that the judicial finding of Breazeale's prior convictions in establishing his criminal history category did not violate the Sixth Amendment.

III. CONCLUSION / CERTIFICATE OF APPEALABILITY

For the foregoing reasons, the Court denies Breazeale's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Upon the denial of a 28 U.S.C. § 2255 motion by the district court, an appeal to the Court of Appeals is not permitted unless the petitioner obtains a certificate of appealability. 28 U.S.C. § 2253.

"At the time a final order denying a petition under 28 U.S.C. § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should issue." Third Cir. Loc. App. R. 22.2; see United States v. Williams, 158 F.3d 736, 742 n.4 (3d Cir. 1998).

A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make a substantial showing of the denial of a constitutional right, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The Court concludes that defendant has made a substantial showing of the denial of a constitutional right with respect to his claim that his sentence is unconstitutional in light of the Supreme Court decision in United States in Booker, 125 S. Ct. 738 (2005), and therefore grants defendant a certificate of appealability on that issue. While this Court has held that Booker does not apply retroactively to cases on collateral review, because the Third Circuit has yet to rule on this issue reasonable jurists could find this Court's "assessment of the constitutional claims could be debatable or wrong." See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION NO. 98-26**
v.	:	
BRIAN K. BREAZEALE	:	**CIVIL ACTION NO. 05-567**

O R D E R

AND NOW, this 21st day of April, 2005, upon consideration of defendant's Habeas Corpus Motion Under 28 U.S.C. § 2255 (Document No. 43, filed February 7, 2005) and Government's Memorandum in Opposition to the Pro Se Motion of Brian K. Breazeale Under 28 U.S.C. § 2255 (Doc. No. 45, filed February 26, 2005), **IT IS ORDERED** that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody Under 28 U.S.C. § 2255 (Document No. 43) is **DENIED**.

IT IS FURTHER ORDERED thata certificate of appealability is granted with respect to petitioner's claim that his sentence violates United States v. Booker, 125 S. Ct. 738 (2005), on the ground that petitioner has made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c).

BY THE COURT:

JAN E. DuBOIS, J.