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UNITED STATES OF AMERICA VS. MICHAEL A. LARRY, Defendant.

NO. 3-03-CR-0249-H, NO. 3-04-CV-2318-H

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,  
DALLAS DIVISION

2005 U.S. Dist. LEXIS 853

January 19, 2005, Decided

January 19, 2005, Filed

**DISPOSITION:** Magistrate recommended Defendant's motion to correct, vacate, or set aside his sentence be denied.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant filed a motion to correct, vacate, or set aside his sentence pursuant to 28 U.S.C.S. § 2255. The matter was referred to a magistrate judge for recommended disposition.

**OVERVIEW:** Defendant pled guilty to a bank robbery in violation of 18 U.S.C.S. § 2113(a) and was sentenced to 180 months confinement followed by 3 years of supervised release. Defendant argued that his sentence was enhanced by factors not alleged in the indictment or determined by a jury as required by *Blakely v. Washington*. Because both *United States v. Booker*, which extended *Blakely* to the federal Sentencing Guidelines, and *Blakely* involved new rules of criminal procedure, neither decision applied retroactively to cases on collateral review. Defendant also complained that his lawyer misrepresented that he would not have been subject to a sentencing enhancement as an armed career criminal. The court found that defendant failed to allege, much less prove, that his guilty plea was induced by representations about the federal sentencing guidelines pertaining to armed career criminals. At arraignment, counsel advised defendant about the maximum statutory penalty for the offense. Given the overwhelming evidence against defendant and the likelihood of a conviction, the court could not conclude that he would have risked losing a three-level reduction by insisting on a trial.

**OUTCOME:** The court recommended that defendant's motion to correct, vacate, or set aside his sentence be denied.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Habeas Corpus > Retroactivity of Decisions*

[HN1] Application of new rules of criminal procedure is prohibited on collateral review, except where the new rule places certain kinds of conduct beyond the power of the government to proscribe or requires the observance of procedures that are implicit in the concept of ordered liberty.

*Criminal Law & Procedure > Counsel > Effective Assistance > Pleas*

*Criminal Law & Procedure > Guilty Pleas > Voluntariness*

[HN2] A guilty plea may be involuntary when an attorney materially misinforms the defendant of the consequences of his plea or the probable disposition of the case.

*Criminal Law & Procedure > Counsel > Effective Assistance > Pleas*

*Criminal Law & Procedure > Guilty Pleas > Voluntariness*

[HN3] Misinformation about the likely period of incarceration does not vitiate a plea where the defendant has been advised of the maximum penalty for the offense.

*Criminal Law & Procedure > Counsel > Effective Assistance > Pleas*

*Criminal Law & Procedure > Habeas Corpus > Cognizable Issues*

[HN4] In order to obtain post-conviction relief, a defendant must prove that he would not have pled guilty and insisted on going to trial but for the misleading and deficient advice given by his attorney.

**COUNSEL:** [\*1] For Michael A Larry (1), Defendant: Pro se, Beaumont, TX; Kevin B Ross, Public Defender or Community Defender Appointment, Sorrels & Udashen, Dallas, TX.

For USA, Plaintiff: Felicia M Moncrief, Retained, US Attorney's Office, Department of Justice, Dallas, TX.

**JUDGES:** JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE.

**OPINIONBY:** JEFF KAPLAN

**OPINION:**

**FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Defendant Michael A. Larry, appearing *pro se*, has filed a motion to correct, vacate, or set aside his sentence pursuant to 28 U.S.C. § 2255. For the reasons stated herein, the motion should be denied.

I.

Defendant pled guilty to a two-count information charging him with bank robbery in violation of 18 U.S.C. § 2113(a). Punishment was assessed at 180 months confinement followed by supervised release for a period of three years. The district court also ordered restitution in the amount of \$1,890.00. No appeal was taken. Instead, defendant now seeks post-conviction relief under 28 U.S.C. § 2255.

II.

In two grounds for relief, defendant argues that: (1) his sentence was enhanced by factors not alleged [\*2] in the indictment or determined by a jury as required by *Blakely v. Washington*, U.S. , 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); and (2) his attorney misrepresented that he would not be subject to a sentencing enhancement as an armed career criminal.

A.

Defendant first contends that his sentence violates *Blakely*. In *Blakely*, a majority of the Supreme Court held that an enhanced sentence imposed by a judge under the *Washington Sentencing Reform Act*, which was based on facts neither admitted by the defendant nor found by a jury, violated the *Sixth Amendment to the United States Constitution*. See *Blakely*, 124 S. Ct. at 2538. The Supreme Court recently extended its holding in *Blakely* to invalidate the mandatory nature of the federal sentencing guidelines. *United States v. Booker*, S. Ct. , 2005 U.S. LEXIS 628, 2005 WL 50108 at \*15 (U.S. Jan. 12, 2005). However, nothing in *Booker* or *Blakely* suggests that those rulings apply retroactively. To the contrary, *Booker* expressly holds that the decision applies "to all cases on *direct review*." *Booker*, 2005 WL 50108 at \*29 (Breyer, [\*3] J.), citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 107 S. Ct. 708, , 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) (emphasis added). See also *In re Dean*, 375 F.3d 1287, 1290 (11th Cir. 2004) (holding that *Blakely* is not applicable

to cases already final); *United States v. Juarez*, 2004 WL 2965029 at \*2 (N.D. Tex. Dec. 8, 2004) (same); *United States v. Montana*, 2004 U.S. Dist. LEXIS 25876, 2004 WL 2996963 at \*1 (N.D. Ill. Dec. 23, 2004) ("Nothing suggests any likelihood that the Supreme Court's ruling in [*Booker*] will include a retroactive application and extension of the *Blakely* principles that would open up for potential revision the many thousands of long-ago-imposed sentences such as [defendant's].").

Because both *Booker* and *Blakely* involve new rules of criminal procedure, neither decision applies retroactively to cases on collateral review. See *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060, 103 L. Ed.3d 334 (1989). n1 Defendant is not entitled to post-conviction relief on this ground.

n1 *Teague* prohibits the [HN1] application of new rules of criminal procedure on collateral review, except where the new rule places certain kinds of conduct beyond the power of the government to proscribe or requires the observance of procedures that are "implicit in the concept of ordered liberty." *Teague*, 109 S. Ct. at 1073. Neither exception is applicable here.

[\*4]

B.

Defendant also complains that his lawyer misrepresented that he would not be subject to a sentencing enhancement as an armed career criminal. [HN2] A guilty plea may be involuntary when an attorney "materially misinforms" the defendant of the consequences of his plea or the probable disposition of the case. *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir. 1990), cert. denied, 111 S. Ct. 1079, 498 U.S. 1122, 112 L. Ed. 2d 1184 (1991); see also *United States v. Rumery*, 698 F.2d 764, 766 (5th Cir. 1983). However, [HN3] misinformation about the likely period of incarceration does not vitiate a plea where the defendant has been advised of the maximum penalty for the offense. See *United States v. Gracia*, 983 F.2d 625, 629 (5th Cir. 1993); *United States v. Jones*, 905 F.2d 867, 868 (5th Cir. 1990). [HN4] In order to obtain post-conviction relief, a defendant must prove that he would not have pled guilty and insisted on going to trial but for the misleading and deficient advice given by his attorney. See *United States v. Morales-Sosa*, 2001 U.S. Dist. LEXIS 3725, 2001 WL 169594 at \*2 (N.D. Tex. Jan. 16, 2001), citing *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985). [\*5]

Defendant fails to allege, much less prove, that his guilty plea was induced by representations about the federal sentencing guidelines pertaining to armed career

criminals. At arraignment, counsel advised defendant that the maximum statutory penalty for the offense was 40 years confinement, followed by a supervised release term of two or three years, and a possible fine of \$500,000 or twice the pecuniary gain to the defendant or loss to the victim. (Gov't App. at 006). When asked by the trial judge whether anyone had made any promises in return for his guilty plea, defendant responded, "No, sir." (Gov't App. at 007). This sworn testimony carries a strong presumption of veracity in a subsequent habeas proceeding. *See United States v. Rivas-Martinez*, 2002 U.S. Dist. LEXIS 23436, 2002 WL 31770478 at \*2 (N.D. Tex. Dec. 5, 2002), *citing Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (1977).

Moreover, even had defendant known that his sentence would be enhanced as an armed career criminal, the court is not convinced that he would have insisted on a trial. Defendant received a six-level enhancement because he was at least 18 years old at the time [\*6] of the instant offense, the offense of conviction involved a crime of violence, and he had at least two prior felony convictions for crimes of violence. (*See* PSR at 5, P 41, *citing U.S.S.G. § 4B1.1(b)(C)*). This mandatory enhancement would have

applied regardless of whether defendant pled guilty or was convicted by a jury. By pleading guilty, defendant was able to receive a three-level reduction for acceptance of responsibility. (*Id.* at 6, P 42, *citing U.S.S.G. § 3E1.1(a) & (b)*). Given the overwhelming evidence against defendant and the likelihood of a conviction, the court cannot conclude that he would have risked losing this three-level reduction by insisting on a trial. n2

n2 In the factual resume signed by defendant, he admitted robbing two different Wells Fargo banks on June 3, 2003 and June 16, 2003. Defendant told at least one teller he had a gun. (*See* Fact. Res. at 2-3).

#### **RECOMMENDATION**

Defendant's motion to correct, vacate, or set aside his sentence should be denied. [\*7]

DATED: January 19, 2005.

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE