

2005 WL 234368 (N.D. Ohio)

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United States District Court,
N.D. Ohio, Western Division.
Timothy TUTTAMORE, Plaintiff

v.

UNITED STATES OF AMERICA, Defendant
No. 3:04CV7529, 3:02CR751, 3:02CR752.

Feb. 1, 2005.

Timothy Tuttamore, Federal Correctional Institution, Terra Haute, IN, Petitioner, pro se.

[Thomas P. Weldon](#), Office of the U.S. Attorney, Toledo, OH, Attorney to be Noticed, for United States of America, Respondent.

ORDER

[CARR](#), Chief J.

*1 This is a § 2255 case in which the petitioner claims: 1) denial of effective assistance of counsel due to failure to file a notice of appeal; 2) denial of the right to have sentencing enhancements tried by a jury; 3) inaccurate computation of his criminal history category; and 4) his sentence was enhanced improperly because the weapon he admitted brandishing was unloaded and inoperable. For the reasons that follow, I find no merit to any of these contentions, and the petition shall be overruled.

The petitioner plead guilty to both counts of a two count indictment charging him with committing separate armed bank robberies. The government represents that the petitioner had also committed another armed bank robbery.

The petitioner's plea agreement acknowledged his understanding that he was waiving his right to appeal his conviction and sentence, provided that the sentence did not exceed the statutory maximum. Various enhancements increased his base offense level.

For purposes of this decision, I assume that some or all of those enhancements would not pass constitutional muster under [U.S. v. Booker](#), --- U.S. ---, 125 S.Ct. 738 (2005).

The petitioner did not take a direct appeal. His conviction and sentence became final on July 28, 2003. He signed this petition on August 1, 2004. [\[FN1\]](#)

[FN1](#). I assume, for purposes of this decision, that the petitioner

delivered his signed petition to the authorities for mailing on the same date. [Townes v. U.S.](#), 190 F.3d 468, 469 (6th Cir.1999). Thus, the date of mailing, which is deemed to be the date of filing, [Houston v. Lack](#), 487 U.S. 266, 270-72 (1988), is August 1, 2004.

Discussion

The petition is subject to dismissal because it was filed more than one year after the petitioner's conviction and sentence became final, [28 U.S.C. § 2255](#) (prescribing a one-year statute of limitations for filing [§ 2255](#) proceedings).

The petition should also be dismissed due to petitioner's waiver of his right to appeal or otherwise challenge his conviction or sentence (unless the sentence exceeded the statutory maximum). Such waivers are enforceable. [Watson v. U.S.](#), 165 F.3d 486, 488-89 (6th Cir.1999).

To the extent that petitioner relies on *Booker*, he cannot do prevail, because the decision in *Booker* is not retroactive for purposes of [§ 2255](#) collateral attacks. See, e.g., [In re Anderson](#), --- F.3d ---, ---, 2005 WL 123923, *3 (11th Cir.2005); [Gerrish v. U.S.](#), --- F.Supp.2d ---, 2005 WL 159642 (D.Me.2005); [Warren v. U.S.](#), 2005 WL 165385, *10 (D.Conn.2005). Thus, petitioner's challenges--both substantive and procedural--to the computation of his sentence are not properly reviewable.

The failure of petitioner's counsel to file a notice of appeal did not manifest ineffective assistance of counsel. Any appeal would have summarily been dismissed due to the waiver of the right to appeal in the plea agreement.

Such waivers are part of the benefit the government obtains in exchange for allowing a defendant to gain the benefits of such bargain. Thus, such waivers are valid and enforceable. *See, e.g., McNeil v. U.S., 72 F.Supp. 801, 807 (N.D.Ohio 1999).*

Conclusion

In light of the foregoing, it is

ORDERED THAT the petition for relief under [28 U.S.C. § 2255](#) be, and the same hereby is denied.

*2 An appeal from this decision could not be taken in good faith, pursuant to [28 U.S.C. 1915\(a\)\(3\)](#) and that there is no basis upon which to issue a certificate of appealability. [28 U.S.C. 2253\(c\)](#); [Fed. R.App. P. 22\(b\)](#).

So ordered.

N.D.Ohio, 2005.

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