

2005 WL 372260 (W.D.Wis.)

[Motions, Pleadings and Filings](#)

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United States District Court,
W.D. Wisconsin.
UNITED STATES OF AMERICA, Plaintiff,
v.
Kenneth M. WOOD, Defendant.
No. 00-CR-115-C-01.
Feb. 9, 2005.

[Keith Peterson](#), Attorney at Law, Superior, WI, for Defendant.
[Jeffrey Anderson](#), for Plaintiff.

ORDER

[CRABB](#), J.

*1 Defendant Kenneth M. Wood has filed a motion for vacation of his sentence pursuant to [28 U.S.C. § 2255](#). Defendant contends that he was sentenced illegally because the court made findings of fact concerning his involvement in a conspiracy that was responsible for the distribution of over 500 grams of cocaine and then used those facts to enhance his sentence under the sentencing guidelines in the mistaken belief that the guidelines were mandatory. Although defendant does not say so explicitly, it appears that he intends to argue that his sentence is illegal under *United States v. Booker*, 04-104 (U.S. Jan. 12, 2005), in which the Supreme Court decided that the Constitution does not permit the use of mandatory sentencing guidelines in federal court to the extent that their application depends on facts that a jury has not determined.

The initial question is whether defendant's motion is timely. [Section 2255](#) has a one-year period of limitations that begins running from the latest of (1) the date on which the defendant's conviction becomes final; or (2) the date on which any impediment to the filing of the motion has been removed, provided that the impediment was an illegal one created by government action and one that actually prevented the defendant from filing his motion; or (3) the date on which the right asserted was recognized initially by the Supreme Court, provided that the right was both newly recognized by the Court and made retroactively applicable to cases on collateral review; or (4) the date on which the defendant could have discovered the facts supporting his claims through the exercise of due diligence.

Defendant was sentenced on June 6, 2001. He did not appeal his conviction to the court of appeals. Therefore, his conviction became "final" under [28 U.S.C. § 2255 ¶ 6\(1\)](#) no later than when the 10-day period for taking a direct appeal under [Fed. R.App. P. 4\(b\)\(1\)\(A\)\(i\)](#) expired, or on June 16, 2001. *Cf. Clay v. United States*, 537 U.S. 522, 524, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) (holding that for federal prisoner who takes unsuccessful direct appeal from judgment of conviction but does not petition Supreme Court for writ of certiorari, judgment becomes "final" under [§ 2255](#) with expiration of time in which prisoner could have sought writ of certiorari). He did not file his motion until January 26, 2005, two and a half years after the one-year limitation period expired on June 16, 2002. Therefore, the motion is untimely under subsection (1). Nevertheless, defendant could proceed under subsection (3) if he is filing within a year of the Supreme Court's initial recognition of a newly recognized right if the right has been made retroactively applicable to cases on collateral review. Defendant is asserting a newly recognized right. In *Booker*, the Supreme Court recognized that defendants in federal criminal cases have a right to a jury determination of any disputed factual subject that increases the maximum punishment. The Court held that the Sentencing Guidelines are unconstitutional to the extent they require judges to base sentences on facts that are not the product of factfinding by a jury but that the guidelines are not unconstitutional if judges use them for advisory purposes. The Court did not address the retroactivity of its decision on cases on collateral review, leaving it uncertain whether the right has retroactive application.

*2 On February 2, 2005, the Court of Appeals for the Seventh Circuit resolved the uncertainty, at least for motions filed in this circuit asserting the right newly recognized in *Booker*. In *McReynolds v. United States*, Nos. 04-2520, 04-2632 & 04-2844, slip op. (7th Cir.), the court held that the rights

recognized in *Booker* do not apply retroactively on collateral review. The court of appeals characterized the decision as a procedural one and noted that, as a general rule, procedural decisions do not apply retroactively unless they establish one of those rare "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." ' *Id.* at 4 (quoting *Schiro v. Summerlin*, --- U.S. ----, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)). The court concluded that *Booker* did not establish a "watershed rule"; "the choice between judges and juries as factfinders does not make such a fundamental difference." *Id.* The court was persuaded that the *Booker* decision would not change the process of sentencing in any significant way: defendants would continue to be sentenced as they have been, with the only difference being "the degree of flexibility judges would enjoy in applying the guideline system." *Id.*

Now that the court of appeals has decided that *Booker* has no retroactive application, defendant cannot take advantage of the provision in subsection (3) of [§ 2255](#) that delays the running of the one-year limitation period until the Supreme Court has recognized a new right that has retroactive application. Instead, he is bound by the provisions of subsection (1), under which the limitations period began to run on June 16, 2001 and expired approximately June 16, 2002, making his motion untimely.

ORDER

IT IS ORDERED that defendant Kenneth M. Wood's motion for vacation of his sentence pursuant to [28 U.S.C. § 2255](#) is DENIED as untimely.

W.D.Wis., 2005.

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- [3:00CR00115](#) (Docket) (Dec. 13, 2000)

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