

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DONOVAN THOMAS,)
)
Plaintiff)
)
v.) Civil No. 04-243-P-H
)
UNITED STATES OF AMERICA,)
)
Defendant)

AMENDED¹ RECOMMENDED DECISION

Donovan Thomas was convicted on November 5, 2003, of conspiracy to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), subject to the penalty provisions of 21 U.S.C. § 841(b)(1)(B). Thomas is currently serving a 120-month sentence imposed following a plea of guilty. No appeal was ever taken from the judgment. Thomas now seeks relief pursuant to 28 U.S.C. § 2255, claiming he was sentenced under unconstitutional sentencing guidelines and his attorney was ineffective because he did not raise a challenge to the constitutionality of the guidelines. I now recommend that the court summarily **DENY** this motion because Thomas has not set forth any allegation that would entitle him to relief.

Discussion

Thomas's first ground seeking 28 U.S.C. § 2255 relief states:

Ground One: The sentence was based on the Sentencing Guidelines which are unconstitutional under Blakely v. Washington.

Supporting Facts: The Defendant plead guilty to conspiracy to distribute 500 grams of cocaine. The court sentenced Defendant in part on the basis of a Career Offender designation under the Guidelines. The sentencing

¹ The only amendments are found on page 3, second paragraph wherein "Martin's" is changed to "Thomas's", and again on page 3, last line wherein "five-year" is changed to "ten-year".

court subsequently found the Guidelines unconstitutional when sentencing a co-defendant Fan-Fan.

Aside from the rather obvious fact that the case involving Mr. Fan-Fan is currently on appeal before the United States Supreme Court, the problem with Thomas's claim is that there is no authority for the proposition that the case of Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531 (June 24, 2004) has any applicability in the context of a § 2255 motion vis-à-vis a claim that was never raised on direct appeal. See United States v. McGuire, ___ F.3d ___, 2004 WL 2606761 (1st Cir. Nov. 17, 2004) (no relief on plain error review of a Blakely challenge on direct review when defendant did not raise the claim in front of the district court). What is more, Thomas's Blakely challenge seems to be aimed at his Career Offender status and the First Circuit has concluded that Blakely is not the basis for any relief predicated on challenging the use of prior convictions by proof by a lesser degree than beyond a reasonable doubt. See United States v. Stearns, 387 F.3d 104, 107 (1st Cir. 2004). Thus, in view of First Circuit law, at the present time Thomas's § 2255 challenge has no foothold as currently postured.²

Thomas's second ground consists of the following statements:

Ground Two: Denial of effective assistance of counsel

Supporting Facts: My counsel did not object to the sentencing guidelines under the Appendi and Blakely cases, and as a result, my sentence was based on unconstitutional guidelines.

² Indeed, although two judges in this district have concluded that the Blakely rationale reaches the Federal Sentencing Guidelines, see United States v. Zompa, 326 F. Supp. 2d 176, 177 (D. Me. 2004); Fanfan v. United States, Cr. No. 03-116-P-H, 2004 WL 1723114 (D. Me. June 28, 2004), this intra-district view is not unanimous, United States v. Williard John Allen, Cr. No. 04-08-P-C, Order Denying Mot. Dismiss, at 1 (D. Me. Nov. 16, 2004) (respectfully remaining "dubitante" about whether "the Blakeley case is ultimately found to apply to sentences under the Sentencing Guidelines"). See also United States v. Arbour, 335 F.Supp.2d 152, 156 (D. Me. 2004) (acknowledging the Blakely limbo vis-à-vis federal sentencing determination, suggesting that "some defendants may prefer to wait until October or November for further Blakely clarification").

An ineffective assistance of counsel claim will succeed only if Thomas --who bears the burden on both points, Scarpa v. DuBois, 38 F.3d 1, 8-9 (1st Cir.1994)--shows (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that but for the error or errors, the outcome would likely have been different, Strickland v. Washington, 466 U.S. 668, 687 (1984); Cofske v. United States, 290 F.3d 437, 441 (1st Cir.2002). In Hill v. Lockhart, the Supreme Court held that a claim that the ineffective assistance of counsel rendered a plea not voluntary and intelligent must be evaluated under the Strickland general test for ineffective assistance of counsel. 474 U.S. 52, 58 (1985).

Thomas's counsel's failure to raise this then nonexistent Blakely ground or to seek to appeal on this ground does not fall below an objective standard of reasonableness so as to constitute ineffective assistance of counsel. Cf. Cofske, 290 F.3d at 443-45 (concluding that counsel was not ineffective for failure to object to sentencing calculation where the law on issue was unclear). In actuality, at the time Thomas pled guilty the law surrounding Blakely's precursor, Apprendi, had been pretty well settled, at least in the First Circuit; Apprendi concerns were of no moment unless the sentence imposed exceeded the default statutory maximum under the sentencing guidelines. See, e.g., United States v. Piccolo, 282 F.3d 41, 44 (1st Cir. 2002); United States v. Campbell, 268 F.3d 1, 7, n.7 (1st Cir. 2001).³ Because Thomas received a ten-year sentence while

³ In Footnote 7 of Campbell the First Circuit mused:

It is unclear whether the Supreme Court contemplated the impact of its decision in Apprendi on the calculation of sentencing guidelines ranges generally, and drug violation guideline ranges in particular, where drug quantity is one of the most important variables in determining where a guideline range will fall. Nevertheless, until the Supreme Court offers us additional guidance, First Circuit jurisprudence on this point has been well-established.

Id. at 7 n.7. The Blakely majority expressly disavowed that it intended to give guidance apropos the federal sentencing guideline scheme and the courts now await guidance from the Supreme Court's pending

convicted under a statute that had a twenty-year default statutory maximum, it was certainly not objectively unreasonable for counsel to proceed without raising any Apprendi/Blakely related issue. The First Circuit has reached just this conclusion in an unpublished decision. See Campbell v. United States, No. 02-2387, 2004 WL 1888604, *3 (Aug. 25, 1st Cir. 2004) ("Moreover, counsel's failure to anticipate Blakely would not constitute unreasonable performance under Strickland because "First Circuit jurisprudence on this point ha[d] been well established.' Campbell, 268 F.3d at 7, n.7. Therefore, reasonable jurists could not find that he has made a substantial showing that the Blakely issue would have been clearly stronger than the issues raised by appellate counsel.").

Conclusion

Based upon the foregoing, Thomas's motion under 28 U.S.C. § 2255 should be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

decision in Fan-Fan and United States v. Booker, 375 F.3d 508 (7th Cir. 2004), cases where the issue was expressly joined.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

Dated December 14, 2004