

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

OSCAR FIGUEROA :
v. : NO. 3:99CR-85 (EBB)
UNITED STATES OF AMERICA :

RULING ON MOTION PURSUANT TO 28 U.S.C. § 2255

Petitioner has filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence citing United States v. Booker, 543 U.S. 220, and United States v. Thomas, 274 F.3d 655 (2d Cir. 2001).

On January 11, 2000, petitioner pleaded guilty to Count One of the first superseding indictment which charged him with conspiracy to possess with intent to distribute and to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The indictment did not specify any quantity of cocaine and the plea agreement, pursuant to which petitioner pleaded, contained no stipulation as to quantity but reserved to each party the right to present evidence as to the quantities of cocaine powder and crack cocaine attributable to the defendant. The plea agreement also stipulated that the offense to which petitioner was pleading guilty carried a maximum penalty of life in prison.

Following an evidentiary hearing, the court determined that the government had offered evidence that the petitioner should be held accountable for 150 to 500 grams of cocaine base and 518 kilograms of powder cocaine, resulting in an adjusted offense

level under the Sentencing Guidelines of 31. Petitioner's criminal history category was V. Therefore his guideline range was 168 to 210 months. Accordingly, on May 24, 2000, the court imposed a sentence of 168 months to serve, to be followed by a term of supervised release of five years.

Petitioner's first claim is that his Fifth Amendment right to indictment was violated because the superseding indictment did not specify the quantity of drugs for which he should be held accountable. Petitioner cites United States v. Thomas, 274 F.3d 655 (2001), which in the wake of Apprendi v. New Jersey 530 U.S. 466 (2000), held that, because the quantity of drugs in a crime may raise a defendant's sentence above the statutory maximum for an indeterminate amount of drugs under 21 U.S.C. § 841(b)(1)(C), quantity must be charged in the indictment and proved to a jury beyond a reasonable doubt. Id., 663. However, in such a case the court may consider drug quantity in determining relevant conduct pursuant to U.S.S.G. § 1B1.3a so long as the sentence imposed does not exceed the maximum established in § 841(b)(1)(C), which maximum is twenty years. Id. at 663-664). Apprendi does not apply where the sentence imposed is not greater than that maximum. Id., at 664. Petitioner's sentence of 168 months does not exceed twenty years (240 months) and, therefore, does not violate Apprendi or Thomas.

Petitioner also maintains the court's determination of quantity was contrary to the holding of United States v. Booker,

supra, which held the United States Sentencing Guidelines violative of the Sixth Amendment to the extent that a maximum sentence might be increased based on findings of fact, other than a prior conviction, made by a judge. As previously stated, petitioner's sentence does not exceed the maximum that could be imposed based on an indeterminate quantity of drugs. Additionally, the Second Circuit Court of Appeals in Guzman v. United States, 404 F.3d 139 (2d Cir. 2005), held that Booker is not retroactive and does not apply to cases on collateral review where the defendant's conviction was final as of January 12, 2005.

Accordingly, the motion [Doc. No. 1] is denied. A certificate of appealability will not issue, petitioner having failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED.

ELLEN BREE BURNS, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, CT, this ____ day of December, 2005.