

MANDATE

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**United States Court of Appeals
For the First Circuit**

No. 04-1500

UNITED STATES,

Appellee,

v.

JOSEPH MONROIG,

Defendant, Appellant.

Before

Boudin, Chief Judge,
Selya and Lipez, Circuit Judges.

JUDGMENT

Entered: August 30, 2005

Appellant, Joseph Monroig ("Monroig"), appeals the denial of his pre-trial motion to suppress the tape recording of his confession. He also appeals his sentence, alleging that it violates United States v. Booker, 125 S. Ct. 738 (2005), and Shepard v. United States, 125 S. Ct. 1254 (2005). Having considered the parties' briefs and the record, we affirm.

Monroig makes three claims on appeal: (1) that the district court erroneously denied his pre-trial motion to suppress a tape recorded confession; (2) that his sentence violates Booker; and (3) that his sentence violates Shepard. On none of his claims can he prevail.

Denial of the Motion to Suppress

Monroig does not dispute that his plea was knowing, voluntary, and intelligent. By pleading guilty, Monroig waived his right to appeal the denial of his motion to suppress the tape recording of

his confession. "An unconditional guilty plea waives any and all independent non-jurisdictional claims arising out of alleged errors antedating the plea." United States v. Rodriguez-Castillo, 350 F.3d 1, 4 (1st Cir. 2003). See also United States v. Cordero, 42 F.3d 697, 698 (1st Cir. 1994) ("[A]n unconditional guilty plea insulates virtually all earlier rulings in the case from appellate review."). Because a motion to suppress is a non-jurisdictional claim, see Cordero, 42 F.3d at 699 ("[T]he suppression ruling, even if erroneous, cannot be termed 'jurisdictional' in any meaningful sense of the word."), the Federal Rules of Criminal Procedure require that a defendant specifically preserve the right to appeal a pre-trial motion in writing. See Fed. R. Crim. P. 11(a)(2). Monroig did not preserve the right to appeal his motion to suppress; he, therefore, waived his right to appeal it.

United States v. Booker

Monroig's sentence does not violate United States v. Booker, 125 S. Ct. 738 (2005).

First, Monroig's "claim that the judge should have found the predicate facts for the enhancement by proof beyond a reasonable doubt is foreclosed by the fact that he stipulated to the application of the enhancement in his plea agreement." United States v. Sahlin, 399 F.3d 27, 32 (1st Cir. 2005). See also United States v. Serrano-Beauvaix, 400 F.3d 50, 56 (1st Cir. 2005) ("By pleading guilty [defendant waived] consideration of the [facts underlying his disqualification for the safety valve] by a jury."). In his plea agreement, Monroig stipulated to (1) a 120 month sentence and (2) an upward departure pursuant to U.S.S.G. § 5K2.1¹ to achieve the 120 month sentence. At the change of plea hearing, the district court reviewed with Monroig the stipulated sentence and the reason for the departure.

Second, Monroig's sentence, to the extent it depended upon Monroig's prior convictions at all, does not violate Booker. "The rationale of Apprendi [v. New Jersey], 530 U.S. 466 (2000) and therefore of Blakely [v. Washington], 124 S. Ct. 2531 (2004) simply does not affect sentence-enhancement provisions premised upon a defendant's prior criminal convictions. In the roiled wake of Booker, it remains the law that previous criminal convictions are not 'facts' that must be found by a jury and proved beyond a reasonable doubt." United States v. Work, 409 F.3d 484, 491 n.1 (1st Cir. 2005) (internal citations omitted). See also United States v. Lewis, 406 F.3d 11, 21 n.11 (1st Cir. 2005) ("The [armed career criminal] finding does not implicate the Booker line of

¹U.S.S.G. § 5K2.1 provides in pertinent part: "If death resulted, the court may increase the sentence above the authorized guideline range."

cases because prior criminal convictions are not facts that a jury must find beyond a reasonable doubt.").

Third, Antonakopoulos rejects the proposition that a Booker error requires automatic remand:

The plain-error standard is not met by a simple assertion that the defendant was sentenced under a mandatory Guidelines system, and so is entitled to remand. In our view, one cannot possibly say that *all* sentences imposed before Booker threatened the fairness, integrity, or public reputation of judicial proceedings, or undermined our confidence in the outcome of the sentence, simply because the Guidelines were mandatory.

United States v. Antonakopoulos, 399 F.3d 68, 80 (1st Cir. 2005) (emphasis in original).

Furthermore, the § 3553 factors Monroig proffers--his age, schooling, and drug abuse problems--do not offer any "reasonable indication that the district judge might well have reached a different result under advisory guidelines" in the circumstances of this case. United States v. Heldeman, 402 F.3d 220, 224 (2005). Monroig's sentence does not violate Booker.

United States v. Shepard

To support his allegation of a Shepard violation, Monroig argues that Shepard v. United States, 125 S. Ct. 1254 (2005), implicitly overruled Almendarez-Torres v. United States, 523 U.S. 224, 243-44 (1998), in which the Supreme Court held that prior convictions were not facts that needed to be proven beyond a reasonable doubt, and quotes Justice Thomas's concurrence in Shepard, Shepard, 125 S. Ct. at 1264 (Thomas, J., concurring). The Supreme Court has, however, consistent with Almendarez-Torres, explicitly excepted prior convictions from its holdings in Apprendi, 530 U.S. at 489, Blakely, 124 S. Ct. at 2536, and Booker, 125 S. Ct. at 756, and "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." State Oil Co. v. Khan, 522 U.S. 3, 20 (1997). "Our marching orders are clear: follow Supreme Court decisions until the Supreme Court overrules them." United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323, 335 n.19 (1st Cir. 2003). Almendarez-Torres continues to be good law, and therefore, prior convictions are not facts that must be admitted by defendant or proven beyond a reasonable doubt. Consonantly, Monroig's sentence presents no Shepard error.

Affirmed. 1st Cir. R. 27(c).

By the Court:

Certified and Issued as Mandate
under Fed. R. App. P. 41.

Richard Cushing Donovan, Clerk


~~Deputy Clerk~~

Date: 9/22/05

Richard Cushing Donovan, Clerk.

By: MARGARET CARTER
Chief Deputy Clerk.

[cc: Joshua L. Gordon, Esq., Mark E. Howard, AUSA]