

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 13a0244n.06

No. 02-2391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 08, 2013
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.) On Appeal from the United States
) District Court for the Eastern
JACK LEWIS THOMAS,) District of Michigan
)
)
Defendant-Appellant.)

Before: BOGGS and DAUGHTREY, Circuit Judges.

PER CURIAM. Defendant-appellant Jack Thomas was convicted of two counts of bank robbery, in violation of 18 U.S.C. § 2113(a), and one count of possessing a firearm in furtherance of a crime of violence (the second bank robbery), in violation of 18 U.S.C. § 924(c). The district court sentenced Thomas to concurrent terms of 135 months' imprisonment for each count of bank robbery, followed by a mandatory consecutive term of 84 months' imprisonment for the § 924(c) count. Thomas appealed, and we affirmed. *United States v. Thomas*, 105 F. App'x 773, 775 (6th Cir. 2004). Thomas has moved for rehearing, asking that we vacate his sentence and remand to the district court for re-sentencing.

We agree, and the government concedes, that Thomas is entitled to a remand and re-sentencing under *United States v. Booker*, 543 U.S. 220 (2005). *Booker* applies to all cases on direct review, *id.* at 268, including cases such as Thomas's for which a petition for rehearing or rehearing

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en banc is pending. At Thomas's original sentencing hearing, the district court treated the Sentencing Guidelines as mandatory, which, after *Booker*, constitutes plain error. See *United States v. Barnett*, 398 F.3d 516, 525–26, 529–30 (6th Cir. 2005). Because there is no clear and specific evidence that the district court would have imposed the same sentence post-*Booker*, Thomas's case must be remanded for the district court to re-sentence him under the procedures set out in *Booker*. See also *United States v. McFalls*, 675 F.3d 599, 604–05 (6th Cir. 2012).