

FILED

December 16, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 04-10188
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT WAYNE MONTGOMERY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:03-CR-32-ALL-C

Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

PER CURIAM:*

Robert Wayne Montgomery appeals the sentence he received after he pleaded guilty to being a felon in possession of a firearm. Montgomery argues that, because the gun was not loaded and evidence of drug dealing or drug-related activities was not present, the district court erred when it increased his base offense level under U.S.S.G. § 2K2.1(b)(5). Inasmuch as Montgomery does not contest that he had a prior felony or that he possessed a firearm in a bag with cocaine, his argument is

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

unavailing. See United States v. Condren, 18 F.3d 1190, 1199-2000 (5th Cir. 1994); United States v. Washington, 340 F.3d 222, 231 (5th Cir.), cert. denied, 124 S. Ct. 942 (2003).

Montgomery's argument that the district court committed plain error when it enhanced his sentence based on facts not alleged in the indictment, proven to a jury, or proven beyond a reasonable doubt, in violation of Blakely v. Washington, 124 S. Ct. 2531 (2004), is foreclosed. See United States v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004), petition for cert. filed (U.S. July 14, 2004)(No. 04-5263).

Montgomery's sentence is AFFIRMED.