

FILED

November 15, 2005

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40575
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARMANDO RODRIGUEZ-ZUNIGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:03-CR-1149-1

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JOLLY, JONES and WIENER, Circuit Judges.

PER CURIAM:*

This court affirmed the judgment of conviction and sentence of Armando Rodriguez-Zuniga. United States v. Rodriguez-Zuniga, No. 04-40571 (5th Cir. Oct. 21, 2004). The Supreme Court vacated and remanded for further consideration in light of United States v. Booker, 125 S. Ct. 738 (2005). See Gonzalez-Orozco v. United States, 125 S. Ct. 1368 (2005). We requested and received supplemental letter briefs addressing the impact of Booker.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

In his original appeal to this court, Rodriguez-Zuniga made a Blakely objection to his sentencing. Because Rodriguez-Zuniga did not make this argument at the district court, we review for plain error. See United States v. Cruz, 418 F.3d 481, 484 (5th Cir. 2005).

Under the Booker holding that changes the Guidelines from mandatory to advisory, there is error in this case because the district court viewed and acted under the Sentencing Guidelines as mandatory and not discretionary. Rodriguez-Zuniga, however, identifies no evidence in the record suggesting that the district court "would have reached a significantly different result" under an advisory scheme rather than a mandatory one. United States v. Mares, 402 F.3d 511, 521 (5th Cir. 2005), cert. denied, 126 S. Ct. 43 (2005). Accordingly, Rodriguez-Zuniga cannot make the necessary showing of plain error that is required by our precedent. See United States v. Bringier, 405 F.3d 310, 318 n.4 (5th Cir. 2005) (comments that sentence was "harsh" are insufficient to demonstrate that defendant's substantial rights were affected), cert. denied, 126 S. Ct. 264 (2005); United States v. Creech, 408 F.3d 264, 272 (5th Cir. 2005) ("[M]ere sympathy ... is not indicative of a judge's desire to sentence differently under a non-mandatory Guidelines regime."); United States v. Hernandez-Gonzalez, 405 F.3d 260, 262 (5th Cir. 2005) (sentence at the bottom of the Guideline range and potential mitigating factors do not raise a reasonable probability of a different sentence), cert. denied, 126 S. Ct. 202

(2005).

Furthermore, Rodriguez-Zuniga correctly acknowledges that this court has rejected the argument that a Booker error is a structural error or that such error is presumed to be prejudicial. See Mares, 402 F.3d at 520-22; see also United States v. Malveaux, 411 F.3d 558, 561 n.9 (5th Cir. 2005), cert. denied, 124 S. Ct. 194 (2005). He desires to preserve this argument for further review.

Because nothing in the Supreme Court's Booker decision requires us to change our prior affirmance in this case, we adhere to our prior determination and therefore reinstate our judgment AFFIRMING Rodriguez-Zuniga's conviction and sentence.

AFFIRMED.