

May 10, 2006

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-41059  
Summary Calendar

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKY BERNARD SMITH

Defendant - Appellant

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 4:03-CR-183-ALL-PNB  
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Before KING, DeMOSS and PRADO, Circuit Judges.

PER CURIAM:\*

Ricky Bernard Smith appeals from his guilty-plea conviction for possession of stolen mail. Smith argues that his sentence should be vacated and remanded under United States v. Booker, 543 U.S. 220 (2005), because the district court erred by sentencing him based on judicial fact-findings made in violation of his rights under the Sixth Amendment. Smith preserved this issue by objecting to the sentence enhancement on Sixth Amendment grounds. United States v. Akpan, 407 F.3d 360, 376 (5th Cir. 2005).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

We cannot affirm the erroneous sentence unless the Government shows that the error is harmless beyond a reasonable doubt. See United States v. Pineiro, 410 F.3d 282, 285-86 (5th Cir. 2005). We conclude that the Government has not met its burden. See United States v. Garza, 429 F.3d 165, 171 (5th Cir. 2005). We therefore VACATE Smith's sentence and REMAND for re-sentencing.