

August 19, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40558
Conference Calendar

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HUMBERTO LOPEZ-CRUZ

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-44-ALL

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

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

PER CURIAM:*

On December 17, 2004, in an unpublished opinion, this court affirmed the sentence of Humberto Lopez-Cruz. United States v. Lopez-Cruz, 115 Fed. Appx. 732 (5th Cir. 2004). The Supreme Court has vacated and remanded for further consideration in light of United States v. Booker, 125 S. Ct. 738 (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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

Lopez contends that the district court illegally sentenced him pursuant to a mandatory Sentencing Guidelines regime, in violation of Booker. He concedes that such argument is raised for the first time and is reviewable for plain error only. See United States v. Mares, 402 F.3d 511, 520-21 (5th Cir. 2005), petition for cert. filed (U.S. Mar. 31, 2005) (No. 04-9517). Sentencing a defendant pursuant to a mandatory guideline scheme, standing alone, constitutes "Fanfan" error, and such an error is "plain." See Booker, 125 S. Ct. at 750, 768-69 (addressing preserved challenge in companion case); United States v. Valenzuela-Quevedo, 407 F.3d 728, 732-33 (5th Cir. 2005).

To satisfy the third prong of the plain-error test, Lopez must show that his "substantial rights" were affected. See Valenzuela-Quevedo, 407 F.3d at 732. "The pertinent question is whether [the appellant] demonstrated that the sentencing judge --sentencing under an advisory scheme rather than a mandatory one--would have reached a significantly different result." Mares, 402 F.3d at 521. This question requires us to assess whether "there is [an] indication in the record from the sentencing judge's remarks or otherwise that gives us any clue as to whether []he would have reached a different conclusion" if sentencing under an advisory scheme. Id. at 522. Lopez has conceded that he cannot make such a showing under Mares.

To the extent that Lopez argues that the Booker error is a "structural" one that is not susceptible to a plain-error

analysis, or that he alternatively contends that plain-error prejudice should be presumed, this court recently rejected such arguments. United States v. Martinez-Lugo, 411 F.3d 597, 601 (5th Cir. 2005).

AFFIRMED.