

June 22, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10128
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN EARL THOMAS, also known as Wino,
also known as Max,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-78-10-N

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

John Earl Thomas, in reliance on Blakely v. Washington, 124 S. Ct. 2531 (2004), argues that the district court plainly erred in imposing a sentence based on facts not alleged in the indictment, not admitted by him in court, and not proved to a jury beyond a reasonable doubt. Thomas challenges on Blakely grounds the district court's findings that he be held accountable for sentencing purposes for 612.6 grams of cocaine base and that he be held accountable for possession of a firearm.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

To demonstrate plain error, Thomas has the burden of showing an error that is obvious and that affects his substantial rights. United States v. Mares, 402 F.3d 511, 520 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517). To show that the error affected his substantial rights, Thomas has the burden of demonstrating that "the sentencing judge--sentencing under an advisory scheme rather than a mandatory one--would have reached a significantly different result." Id. at 521 (citation omitted). Thomas has not shown that the district court would have imposed a different sentence. Accordingly, we AFFIRM the judgment of the district court.