

November 9, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-21004  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FLOYD OSCAR,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:04-CR-225-ALL  
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Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:\*

Floyd Oscar appeals the 27-month sentence imposed following entry of his guilty plea to a charge of knowingly entering into a marriage for the purpose of evading a provision of the immigration laws. Oscar argues, for the first time on appeal, that the district court erred under United States v. Booker, 125 S. Ct. 738 (2005), in sentencing him pursuant to a mandatory application of the Sentencing Guidelines.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Oscar contends the issue should be reviewed de novo because Booker had not been decided at the time of his sentencing and an objection would have been futile. However, as Oscar acknowledges, this court reviews the issue for plain error. United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir.), cert. denied, 126 S. Ct. 267 (2005).

In order to establish plain error, Oscar must establish that (1) there is an error; (2) that is clear or obvious; and (3) that affects his substantial rights. United States v. Olano, 507 U.S. 725, 732-34 (1993). If these criteria are met, this court has the authority to correct the error, but is not required to do so. Id. at 736.

Oscar contends that the district court's error was "structural" and that prejudice should therefore be presumed. This argument, however, is foreclosed by United States v. Malveaux, 411 F.3d 558, 560 n.9 (5th Cir.), cert. denied, 126 S. Ct. 194 (2005).

Oscar must demonstrate that the error affected his substantial rights, Valenzuela-Quevedo, 407 F.3d at 733-34, and he concedes that he cannot make such a showing based on the record. Because Oscar has failed to establish plain error, we affirm his sentence.

AFFIRMED.