

June 20, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40694
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEAN THOMAS MORTON, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:03-CR-203-ALL-MAC

Before STEWART, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Dean Thomas Morton, Jr., appeals following his guilty plea to possession with intent to distribute less than 100 grams of a mixture containing a detectible amount of phencyclidine. The Government has waived Morton's appeal waiver in the plea agreement by not seeking to enforce it. See United States v. Story, 439 F.3d 226, 230 (5th Cir. 2006).

Morton argues that his sentence is invalid in light of United States v. Booker, 543 U.S. 220 (2005), because the

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

district court applied the Sentencing Guidelines as if they were mandatory. We review for plain error. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir.), cert. denied, 126 S. Ct. 267 (2005). To prevail under a plain-error analysis, Morton must show, among other things, that the error prejudiced him by adversely affecting his substantial rights. See id. at 733.

Morton fails to identify anything in the record to suggest that his sentence would have been lower had the court applied the Sentencing Guidelines as advisory rather than mandatory. See id. He thus fails to establish prejudice to his substantial rights. See id. The judgment of the district court is AFFIRMED.