

May 20, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41111
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIC BANKS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 2:02-CR-3-TJW-ALL

Before GARZA, DEMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Eric Banks pleaded guilty to possession of an unregistered firearm, in violation of 18 U.S.C. §§ 5841, 5861(d), and 5871, and was sentenced to 75 months in prison and three years of supervised release. Banks now appeals, challenging only his sentence.

Citing Blakely v. Washington, 124 S. Ct. 2531 (2004), Banks contends that the district court erred when it imposed a four-level Sentencing Guidelines increase under U.S.S.G. § 2K2.1(b)(5)

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

for having used and possessed a destructive device in connection with another offense. In light of the Supreme Court's recent decision in United States v. Booker, 125 S. Ct. 738, 756 (2005), this increase violated Banks's Sixth Amendment right to a trial by jury.

Where, as here, a defendant has preserved a Booker challenge in the district court, "we will ordinarily vacate the sentence and remand, unless we can say the error is harmless under Rule 52(a) of the Federal Rules of Criminal Procedure." United States v. Mares, 402, 511, 520 n.9 (5th Cir. 2005). In this case, the Government has not met its burden of demonstrating beyond a reasonable doubt that the Sixth Amendment violation at issue did not contribute to the sentence that Banks received. See United States v. Akpan, ___ F.3d ___, No. 03-20875, 2005 WL 852416 at *12 (5th Cir. Apr. 14, 2005). Accordingly, we vacate Banks's sentence and remand for resentencing. See id.

VACATED AND REMANDED RESENTENCING.