

November 8, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-61174  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SHERRIE MILLER DALY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Mississippi  
USDC No. 3:03-CR-106  
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Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Sherrie Miller Daly appeals from her sentence following a guilty-plea conviction for conspiracy to structure transactions to evade reporting requirements. She argues that the district court erred by denying her motion for a downward departure based upon surrogate assistance. Because the district court did not deny that motion based upon a mistaken belief that it lacked the authority to depart, this court lacks jurisdiction to review that denial. See United States v. DiMarco, 46 F.3d 476, 477-78 (5th Cir. 1995).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Moreover, even if United States v. Booker, 125 S. Ct. 738 (2005), is construed to allow this court's review of the district court's denial of Daly's motion for a downward departure, she has not shown that the district court's factual finding supporting that denial was clearly erroneous. See United States v. Villanueva, 408 F.3d 193, 203 & n.9 (5th Cir. 2005), petition for cert. filed (July 26, 2005) (No. 05-5580).

Daly also contends that the district court improperly applied an upward departure from the sentencing guidelines when determining her sentence and subsequently altered the basis for that sentence when setting forth the written judgment. These arguments lack factual merit.

Accordingly, the district court's judgment is AFFIRMED.