

September 21, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60282
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MILTON DAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 2:05-CR-104-ALL

Before REAVLEY, STEWART and OWEN, Circuit Judges.

PER CURIAM:*

Milton Day appeals the 120-month sentence he received following his guilty-plea conviction for credit card fraud and identity theft. Day argues for the first time on appeal that the extent of the district court's "upward departure" was unreasonable because the sentence failed to advance 18 U.S.C. § 3553(a)'s factors and was not justified by the facts of the case.

Day fails to meet his burden of showing that the district court's non-guidelines sentence, which was imposed after United

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

States v. Booker, 543 U.S. 220 (2005), and which was an upward deviation from the guidelines range of imprisonment, was error, plain or otherwise. See United States v. Jones, 444 F.3d 430, 434-36 (5th Cir.), cert. denied, 126 S. Ct. 2958 (2006); United States v. Smith, 440 F.3d 704, 707-10 (5th Cir. 2006); United States v. Smith, 417 F.3d 483, 491-93 (5th Cir.), cert. denied, 126 S. Ct. 713 (2005).

AFFIRMED.