

January 4, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40225

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAMES HELTON, also known as Defendant #6,

Defendant - Appellant

Appeal from the United States District Court
for the Eastern District of Texas

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before DAVIS, SMITH and DENNIS, Circuit Judges.

PER CURIAM:*

In our previous opinion in this case, we affirmed Defendant-Appellant Helton's conviction and sentence. See United States v. Helton, No. 04-40225, 115 Fed. Appx. 687 (5th Cir. 2004) (per curiam) (unpublished). Following our judgment, Helton filed a petition for certiorari. The Supreme Court granted Helton's petition for certiorari, vacated our judgment, and remanded 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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

case to this court for further consideration in light of United States v. Booker, 125 S. Ct. 738 (2005). We now reconsider the matter in light of Booker and decide to reinstate our previous judgment affirming Helton's conviction and sentence.

Helton raised a Booker-related challenge to his sentence for the first time on direct appeal. Because Helton never raised a Booker objection in trial court, however, Appellant's claim would fail under the plain-error test discussed in United States v. Mares, 402 F.3d 511, 520-22 (5th Cir. 2005). There is no indication that the district court, if given the opportunity to treat the guidelines as advisory only, would have imposed a lesser sentence.

For the reasons stated above, our prior disposition remains in effect, and we REINSTATE OUR EARLIER JUDGMENT affirming Helton's conviction and sentence.