

FILED

February 27, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41325
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN LOMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 6:04-CR-46-ALL

Before REAVLEY, JOLLY and OWEN, Circuit Judges.

PER CURIAM:*

Juan Lomas appeals the sentence imposed following his guilty-plea conviction for two counts of unlawful transportation of illegal aliens in violation of 8 U.S.C. § 1324. Lomas argues that the district court erred in imposing his sentence under the then mandatory United States Sentencing Guidelines held unconstitutional in United States v. Booker, 543 U.S. 220 (2005). Lomas specifically objected to the sentence based on the then pending Booker and Fanfan cases. The Government concedes that

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Lomas's objection based on United States v. Blakely, 542 U.S. 296 (2004), at sentencing was sufficient to preserve his Fanfan claim. See United States v. Walters, 418 F.3d 461, 463 (5th Cir. 2005) (discussing difference between Booker error and Fanfan error). We review preserved Fanfan claims for harmless error. United States v. Mares, 402 F.3d 511, 520 n.9 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005). The Government must prove beyond a reasonable doubt that the outcome of the district court proceedings was not affected by the application of the mandatory Guidelines.

The Government has not demonstrated that the Fanfan error was harmless beyond a reasonable doubt. The district court expressly declined to say what the sentence would be if Booker and Fanfan were decided favorably to Lomas. The district court did not make any comments indicating whether it would have imposed the same sentence under an advisory guidelines system.

The case is REMANDED for reconsideration by the district court and to resentence Lomas if appropriate.