

May 19, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41609
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLYDE TINER REED, III,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:03-CR-253-1

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Clyde Tiner Reed, III, appeals his sentence following his guilty plea conviction for distribution of crack cocaine. Reed argues that his sentence was improper under United States v. Booker, 543 U.S. 220 (2005), because it was based on facts that were neither found by a jury nor admitted by him.

Reed's assertion of Booker error is correct. He preserved this error by raising an objection to his sentence grounded in Blakely v. Washington, 542 U.S. 296 (2004). See United States v. Garza, 429 F.3d 165, (5th Cir. 2005), cert. denied, 126 S. Ct.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

1444 (2006). When, as is the case here, a Booker error has been preserved in the district court, we “will ordinarily vacate the sentence and remand, unless [this court] can say the error is harmless under Rule 52(a) of the Federal Rules of Criminal Procedure.” United States v. Pineiro, 410 F.3d 282, 284 (5th Cir. 2005) (internal quotation marks and citation omitted). The Government has not met its “arduous” burden of demonstrating “beyond a reasonable doubt that the Sixth Amendment Booker error did not affect the sentence that [Reed] received.” Pineiro, 410 F.3d at 285, 287. Consequently, Reed’s sentence is VACATED, and the case is REMANDED FOR RESENTENCING.