

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3272

United States of America,

Appellee,

v.

Corey Henderson,

Appellant.

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* Appeal from the United States
* District Court for the District
* of Nebraska.
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* [UNPUBLISHED]
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Submitted: July 5, 2005
Filed: July 27, 2005

Before GRUENDER, MAGILL, and BEAM, Circuit Judges.

PER CURIAM.

On June 3, 2004, Henderson pled guilty to conspiring to distribute or possess with the intent to distribute a quantity of cocaine base between 500 grams and 1.5 kilograms. The district court¹ sentenced Henderson to 188 months' imprisonment, the bottom of the guidelines range. On appeal, Henderson argues only that pursuant to Blakely v. Washington, 124 S. Ct. 2531 (2004), the guidelines are unconstitutional and his sentence should be vacated. In light of United States v. Booker, 125 S. Ct.

¹The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

738 (2005) and United States v. Pirani, 406 F.3d 543 (8th Cir. 2005) (en banc), we affirm Henderson's sentence.

Because Henderson raises this argument for the first time on appeal, we review for plain error. Pirani, 406 F.3d at 549-50. The error at issue is the district court's mandatory application of the now advisory guidelines. It is Henderson's burden to establish that this error affected his substantial rights. That is, that there is a reasonable probability that the district court would have imposed a more favorable sentence under the advisory guidelines regime mandated by Booker. Id. at 553. Henderson is unable to meet this burden. Although the district court sentenced Henderson at the bottom of the applicable sentencing guidelines range, that alone is not enough to make the required showing. Id. And there is nothing in the record to indicate any reasonable probability that the district court would have imposed a lesser sentence had it applied the guidelines in an advisory fashion. Accordingly, we affirm.
