

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2271

United States of America,

Appellee,

v.

John Johnson,

Appellant.

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* Appeal from the United States

* District Court for the

* Eastern District of Missouri.

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* [UNPUBLISHED]

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Submitted: October 12, 2005

Filed: November 15, 2005

Before ARNOLD, BOWMAN, and MURPHY, Circuit Judges.

PER CURIAM.

John Johnson appeals his sentence of 40 months' imprisonment following his conviction for being a felon in possession of a firearm, *see* 18 U.S.C. § 922(g)(1). He asserts that because the United States Sentencing Guidelines are unconstitutional, the district court¹ erred in giving them effect in sentencing him. It is true that in *United States v. Booker*, 125 S. Ct. 738, 756 (2005), the Supreme Court held that, with exceptions not relevant here, it was a violation of the sixth amendment to enhance a guideline sentence on the basis of facts not found by a jury. But in this case no

¹The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

enhancements were applied, so the basic *Booker* holding is of no avail to Mr. Johnson.

We recognize that the district court nevertheless erred in passing sentence because it treated the guidelines as mandatory rather than advisory, *see Booker*, 125 S. Ct. at 756-57. But Mr. Johnson raised no objection to his sentence below, so we can review it for plain error only. We have examined the transcript of the sentencing hearing carefully and have discerned nothing in it that would indicate a reasonable probability that the sentence would have been shorter had the district court been aware that the guidelines were merely advisory. Mr. Johnson is thus not entitled to plain error relief. *See United States v. Pirani*, 406 F.3d 543, 552 (8th Cir. 2005) (en banc), *cert. denied*, 126 S.Ct. 266 (2005).

Affirmed.
