

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-4679

UNITED STATES OF AMERICA

v.

TYLER SMITH,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 03-cr-00164-1)
District Judge: Honorable Christopher C. Conner

Submitted Under Third Circuit LAR 34.1(a)
September 17, 2004

Before: ALITO, AMBRO and FISHER, *Circuit Judges*.

(Filed: March 29, 2005)

OPINION OF THE COURT

FISHER, *Circuit Judge*.

In his brief, appellant waives any challenge to his conviction, instead asking that we remand for clarification as to whether the District Court's denial of a downward departure was based on an exercise of discretion. However, the record, including the

prosecutor's concessions that departure would be lawful, make it clear that the District Court understood its authority and simply exercised its discretion not to depart when stating that a departure was "not warranted." We therefore lack appellate jurisdiction over this portion of the appeal. See United States v. Denardi, 892 F.2d 269 (3d Cir. 1989).

We note that appellant also filed a post-briefing motion regarding other sentencing issues arising from Blakely v. Washington, 124 S. Ct. 2531 (2004). Having determined that these other sentencing issues are best determined by the District Court in the first instance, we will vacate the sentence and remand for re-sentencing in accordance with United States v. Booker, 125 S. Ct. 738 (2005).