

July 18, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-11464
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN CARLOS ROCHA-AGUILAR, also known as
Juan Carlos Rocha Aguilar,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:04-CR-109-ALL

Before HIGGINBOTHAM, BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:*

Juan Carlos Rocha-Aguilar (Rocha) was convicted following pleading guilty to one count of illegal reentry following deportation, in violation of 8 U.S.C. § 1326. Rocha argues that the district court erred in denying his motion to dismiss the indictment on the basis that his prior deportation was invalid and in characterizing his prior state felony conviction for simply possession of cocaine as an "aggravated felony" for sentencing purposes. He concedes, however, that these issues are

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

foreclosed. See United States v. Hernandez-Avalos, 251 F.3d 505, 509 (5th Cir. 2001); United States v. Hinojosa-Lopez, 130 F.3d 691, 693-94 (5th Cir. 1997).

Rocha also argues that the district court erred by imposing a sentencing under a mandatory federal sentencing guideline scheme, which was held to be unconstitutional in United States v. Booker, 125 S. Ct. 738 (2005). The Government concedes that Rocha preserved the issue in the district court, that the district court committed error, and that the error was not harmless. In light of the foregoing, the Government's unopposed motion for summary affirmance of the conviction and to vacate the sentence and remand for resentencing is GRANTED. Rocha's conviction is AFFIRMED, but we VACATE the district court's sentence and REMAND for resentencing in accordance with Booker.

MOTION GRANTED; CONVICTION AFFIRMED; VACATED AND REMANDED FOR RESENTENCING.