

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 1, 2012

Lyle W. Cayce
Clerk

No. 12-40050
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JUAN GERARDO ARREDONDO-DE LA O,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:11-CR-782-1

Before KING, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Juan Gerardo Arredondo-De La O (Arredondo) pleaded guilty to being an alien found unlawfully present in the United States following a prior deportation, in violation of 8 U.S.C. § 1326(a). Arredondo's sentence was enhanced pursuant to § 1326(b)(2) and U.S.S.G. § 2L1.2(b)(1)(A)(i) because he had been convicted of drug-trafficking in February 2006 and deported in April 2010. Upon the Government's motion, the district court departed downward from the advisory guidelines sentencing range and sentenced Arredondo to 37

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 12-40050

months of imprisonment and a two-year term of supervised release. Arredondo filed a timely notice of appeal.

Arredondo asserts that the enhancement was erroneous in this case because the deportation order was entered prior to his drug-trafficking conviction and was never reinstated. He thus argues that his guilty plea was invalid because he was actually innocent of the conduct that formed the basis for the enhancement. He concedes that his plea agreement contained a knowing and voluntary appeal waiver that precludes him from challenging his sentence, but he argues that the validity of his plea may nevertheless be reviewed.

Despite Arredondo's appeal waiver, which the Government seeks to enforce, we may review "a claim that the factual basis for a guilty plea fails to establish the essential elements of the crime of conviction." *United States v. Trejo*, 610 F.3d 308, 312 (5th Cir. 2010). Because Arredondo did not raise this issue in the district court, we review it only for plain error. *Id.* at 313. To show plain error, the appellant must show a forfeited error that is clear or obvious and that affects his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If the appellant makes such a showing, this court has the discretion to correct the error but only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

There was no plain error here. Arredondo was charged with violating § 1326(a) and the record shows that each element of that offense was admitted by Arredondo. Arredondo does not contend otherwise. Section § 1326(b)(2) is not a separate criminal offense and merely recites sentencing factors based on recidivism. *See Almendarez-Torres v. United States*, 523 U.S. 224, 235, 239 (1998). Arredondo's plea of guilty to violating § 1326(a) is valid.

Arredondo's arguments that the plea agreement is unenforceable are unavailing. First, the district court implicitly accepted the plea agreement when it did not reject the agreement and when it allowed Arredondo to receive the benefits he bargained for. *See United States v. Sanford*, 429 F.3d 104, 107 n.2

No. 12-40050

(5th Cir. 2005); *United States v. Morales-Sosa*, 191 F.3d 586, 588 (5th Cir. 1999); *United States v. Moreno*, No. 01-20681, 2002 WL 1940097, *1 (5th Cir. July 25, 2002) (unpublished). Second, the Government did not breach the agreement by failing to move for a downward departure based on substantial assistance. The Government retained sole discretion over the decision to make such a motion.

AFFIRMED.