

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40827
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE SANCHEZ-GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

January 24, 2003

Before JOLLY, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

Jose Sanchez-Garcia (Sanchez) appeals the sentence following his guilty-plea conviction for being found in the United States after a prior deportation, in violation of 8 U.S.C. § 1326(a) and (b). He argues that the district court erred in going beyond the statute of conviction and the charging instrument to determine that a 16-level increase in his offense level was warranted under U.S.S.G. § 2L1.2(b)(1)(A)(vii). He contends that the reasoning from our decisions interpreting the "career offender" guidelines, U.S.S.G. §§ 4B1.1 and 4B1.2, should be applied, which limit consideration to the conduct charged in the indictment, rather

than the underlying conduct of the offense. See, United States v. Gaitan, 954 F.2d 1005, 1009-11 (5th Cir. 1992); United States v. Fitzhugh, 954 F.2d 253, 254-55 (5th Cir. 1992).

Our holdings in Gaitan and Fitzhugh were based on specific language contained in the commentary to U.S.S.G. § 4B1.2, limiting the sentencing court's inquiry to the conduct alleged in the indictment in determining whether the enhancement applies. Neither U.S.S.G. § 2L1.2 nor its commentary contains such limiting language. Furthermore, U.S.S.G. § 1B1.3 instructs that when determining the defendant's "specific offense characteristics" under Chapter Two of the Guidelines, "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." U.S.S.G. § 1B1.3, comment. (backg'd). We conclude, therefore, that the district court did not misapply U.S.S.G. § 2L1.2(b)(1)(A)(vii).

Sanchez also contends that the sentence-enhancing provisions contained in 8 U.S.C. § 1326(b) are facially unconstitutional in light of Apprendi v. New Jersey, 530 U.S. 466 (2000). Sanchez acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but seeks to preserve the issue for further review. The judgment of the district court is AFFIRMED.