

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

No. 00-50164
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FILEMON ALDAVERA-RICO,

Defendant-

Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. DR-99-CR-691-1

December 19, 2001

Before DAVIS, BENAVIDES and STEWART, Circuit Judges:

PER CURIAM:*

Filemon Aldavera-Rico (“Aldavera”) challenges the sentence he received following his guilty-plea conviction for illegal reentry, in violation of 8 U.S.C. § 1326. Specifically, he renews his argument that the district court erred in assessing a 16-level increase, pursuant to U.S.S.G. § 2L1.2(b)(1)(A), based on his felony driving-while-intoxicated (DWI) conviction, which was determined to be an aggravated felony. Aldavera contends that felony DWI is not “crime of violence” as defined in 18 U.S.C. § 16 and is thus not an aggravated felony.

In United States v. Chapa-Garza, 243 F.3d 921, 927-28 (5th Cir. 2001), decided after the district court sentenced Aldavera, this court held that a felony DWI conviction is not a crime of

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

violence and is thus not an aggravated felony for the purpose of a § 2L1.2(b)(1)(A) 16-level enhancement. Aldavera has filed an unopposed motion to remand the case for resentencing based on Chapa-Garza. Because Chapa-Garza demonstrates that the 16-level enhancement was error, the motion is GRANTED. Aldavera's sentence is VACATED, and this cause is REMANDED for resentencing. Because we so hold, Aldavera's alternative argument that the enhancement was error under Apprendi v. New Jersey, 530 U.S. 466 (2000), is moot and is not addressed.

VACATED AND REMANDED; MOTION GRANTED.