

May 1, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20973
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OLEGARIO CUEVAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-01-CR-894-1

Before BARKSDALE, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Olegario Cuevas appeals his conviction and sentence for illegal reentry after deportation, a violation of 8 U.S.C. § 1326. Cuevas first argues that the district court should have dismissed his indictment because he was denied his right to retained counsel during the prior deportation proceeding, and that the district court abused its discretion by failing to grant an evidentiary hearing on this issue. To challenge the validity

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

of an underlying deportation order, an alien must establish that: (1) the prior deportation hearing was fundamentally unfair; (2) the hearing effectively eliminated his right to seek judicial review of the removal order; and (3) the procedural deficiencies caused actual prejudice. United States v. Lopez-Vasquez, 227 F.3d 476, 483 (5th Cir. 2000).

Addressing the last requirement first, we conclude that Cuevas has failed to show prejudice. "A showing of prejudice means there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported [or removed]." United States v. Benitez-Villafuerte, 186 F.3d 651, 658-59 (5th Cir. 1999)(internal quotation omitted). Cuevas first asserts that an alien denied his right to representation is not required to show prejudice. He has cited no precedent from this court to support such a conclusion. In the alternative, he asserts that he was eligible for a waiver of deportability under 8 U.S.C. § 1181(h). However, as Cuevas concedes in his brief, this subsection clearly states that it does not apply to a lawful permanent resident who has been subsequently convicted of an aggravated felony. Cuevas was deported subsequent to a conviction for aggravated robbery. We conclude that he has not demonstrated prejudice.

Cuevas also contends that, in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), 8 U.S.C. § 1326(b) is unconstitutional because it does not require a prior felony

conviction to be proved as an element of the offense. Cuevas acknowledges that his argument is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998), but he raises the issue to preserve it for Supreme Court review in light of Apprendi.

Apprendi did not overrule Almendarez-Torres. Apprendi, 530 U.S. at 489-90, 496; United States v. Dabeit, 231 F.3d 979, 984 (5th Cir. 2000). This court must follow Almendarez-Torres "unless and until the Supreme Court itself determines to overrule it." Dabeit, 231 F.3d at 984 (internal quotation marks and citation omitted).

AFFIRMED.