

June 22, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40992
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE ALBERTO GARCIA-AGUILAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-263-ALL

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Jorge Alberto Garcia-Aguilar pleaded guilty to being an alien unlawfully found in the United States after deportation, having previously been convicted of an aggravated felony, and he was sentenced to 46 months of imprisonment and three years of supervised release. He appeals his conviction and sentence.

Garcia-Aguilar argues for the first time on appeal that the felony and aggravated felony provisions of 8 U.S.C. § 1326(b) 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

unconstitutional and that the validity of Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998), has been called into question in light of later cases decided by the Supreme Court. He concedes that this issue is foreclosed, and he raises it solely to preserve it for further review by the Supreme Court. Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000) did not overrule Almendarez-Torres. As Garcia-Aguilar concedes, this argument is foreclosed unless and until the Supreme Court itself decides to overrule Almendarez-Torres. See Apprendi, 530 U.S. at 489-90; United States v. Mancia-Perez, 331 F.3d 464, 470 (5th Cir.), cert. denied, 540 U.S. 935 (2003).

Garcia-Aguilar also argues that the district court erred in sentencing him under a mandatory application of the guidelines prohibited by United States v. Booker, 125 S. Ct. 738, 756-57, 769 (2005). Garcia-Aguilar did not raise this issue in the district court, so we review it for plain error. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir. 2005). Although there was an error, Garcia-Aguilar's arguments and review of the record do not demonstrate "that the district judge would have imposed a different sentence" under advisory guidelines. Id. at 733. Garcia-Aguilar has not shown that the error affected his substantial rights as required under the plain error standard. See Valenzuela-Quevedo 407 F.3d at 732-33; United States v. Mares, 402 F.3d 511, 520-22 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005)(No. 04-9517).

Garcia-Aguilar further argues that even if he has failed to show prejudice, the court should reverse because the error was structural and should be deemed presumptively prejudicial. He acknowledges that the court did not adopt this approach in Mares, but he believes that Mares was wrongly decided and he raises the issue to preserve it for further review. The issue is indeed foreclosed. See United States v. Malveaux, __F.3d__, No. 03-41618, 2005 WL 1320362 at *1 n.9 (5th Cir. Apr. 11, 2005).

AFFIRMED.