

FILED

February 22, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41020
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SIMON MENDEZ-LEYVA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-358-1

Before REAVLEY, HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:*

Simon Mendez-Leyva (Mendez) appeals his guilty-plea conviction and 18-month sentence for illegal reentry following deportation. Mendez argues that the district court improperly enhanced his base offense level because his prior state conviction for possession of marijuana did not constitute an "aggravated felony" pursuant to U.S.S.G. § 2L1.2(b)(1)(C). This assertion is without merit. See United States v. Caicedo-Cuero, 312 F.3d 697, 706-11 (5th Cir. 2002).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Mendez also argues that 8 U.S.C. § 1326(b) is unconstitutional because it treats prior felony and aggravated felony convictions as sentencing factors. Mendez's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Mendez contends that Almendarez-Torres was incorrectly decided and that a majority of the Supreme Court would overrule Almendarez-Torres in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), we have repeatedly rejected such arguments on the basis that Almendarez-Torres remains binding. See United States v. Garza-Lopez, 410 F.3d 268, 276 (5th Cir.), cert. denied, 126 S. Ct. 298 (2005). Mendez properly concedes that his argument is foreclosed in light of Almendarez-Torres and circuit precedent, but he raises it here to preserve it for further review.

Mendez also contends that the district court erred in sentencing him pursuant to the mandatory guideline regime held unconstitutional in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 764-65 (2005). The sentencing transcript is devoid of evidence that the district court would have imposed the same sentence under an advisory regime, and, therefore, the Government has not borne its burden of establishing beyond a reasonable doubt that the district court's error was harmless. See United States v. Walters, 418 F.3d 461, 464 (5th Cir. 2005).

AFFIRMED. Case remanded for the district court to decide whether to resentence.