

August 17, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41115
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RODOLFO ESQUIVEL-JUAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:04-CR-317-ALL

Before BENAVIDES, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:*

Rodolfo Esquivel-Juarez (Esquivel) appeals the 70-month sentence imposed after he pleaded guilty to one count of illegal reentry into the United States. See 8 U.S.C. § 1326.

Esquivel contends that 8 U.S.C. § 1326(b) is unconstitutional and that this court should vacate his sentence and remand his case for resentencing to no more than two years in prison under 8 U.S.C. § 1326(a). As he concedes, this contention

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998).

Esquivel also contends that he is entitled to resentencing because the district court sentenced him under a mandatory application of the federal sentencing guidelines contrary to the rule of United States v. Booker, 125 S. Ct. 738, 756-57, 769 (2005). We review for plain error. See United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir. 2005), petition for cert. filed (July 25, 2005) (No. 05-5556). Although there was an error, Esquivel has failed to demonstrate a sufficient probability "that the district judge would have imposed a different sentence" under advisory guidelines. See id. at 733. Esquivel thus fails to show that the error affected his substantial rights as he must do to meet the plain-error standard. See id.; United States v. Mares, 402 F.3d 511, 502, 521-22 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517).

The judgment of the district court is AFFIRMED.