United States Court of Appeals
Fifth Circuit
F I L E D
December 14, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40648
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAIME HERNANDEZ-GARCIA, also known as Pablo Turbiates-Furtunas,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:04-CR-1083-ALL

Before KING, Chief Judge, and HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:[*]

Jaime Hernandez-Garcia appeals his guilty-plea conviction and sentence for being illegally present in the United States following removal. Hernandez argues that the district court erred by finding that his prior Texas felony conviction for burglary of a habitation was a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii). In United States v. Garcia-Mendez, 420 F.3d 454, 456-57 (5th Cir. 2005), this court held that a prior Texas conviction for burglary of a habitation was a prior

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

conviction for a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because it was equivalent to the enumerated offense of burglary of a dwelling. Hernandez asserts that Garcia-Mendez is inapplicable to the present case because the issue in that case was reviewed for plain error and because this court did not apply the categorical analysis mandated by Taylor v. United States, 495 U.S. 575 (1990). While the review of this issue in Garcia-Mendez was for plain error, this court clearly held that a Texas conviction for burglary of a habitation was a conviction for a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii). See 420 F.3d at 456-57. Hernandez's argument that this court did not properly apply the categorical analysis of Taylor in Garcia-Mendez is nothing more than an argument that Garcia-Mendez was incorrectly decided, and is unavailing. See Burge v. Parish of St. Tammany, 187 F.3d 452, 466 (5th Cir. 1999) (applying prior panel rule).

Hernandez's constitutional challenge is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998). Although Hernandez 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). Hernandez 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.

AFFIRMED.