

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 19, 2008

No. 07-40601
Conference Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

BENJAMIN RODRIGUEZ-RODRIGUEZ

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:06-CR-1139-1

Before JONES, Chief Judge, and JOLLY and DENNIS, Circuit Judges.

PER CURIAM:*

Benjamin Rodriguez-Rodriguez (Rodriguez) appeals his conviction and sentence for illegal reentry. He argues that the district court erred in enhancing his sentence pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(i) based on a finding that his Texas conviction for possession of a controlled substance with intent to deliver was a "drug trafficking offense." Rodriguez correctly concedes that his

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Guidelines argument is foreclosed by *United States v. Ford*, 509 F.3d 714, 717 (5th Cir. 2007), and he raises it solely to preserve its further review.

In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Rodriguez also challenges the constitutionality of 8 U.S.C. § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must be found by a jury. This argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007), cert. denied, 128 S. Ct. 872 (2008).

AFFIRMED.