

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

May 9, 2008

No. 07-40777
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDUARDO MARIO BARRIOS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:07-CR-7-ALL

Before SMITH, BARKSDALE, and ELROD, Circuit Judges.

PER CURIAM:*

Edwardo Mario Barrios (Barrios) pleaded guilty to illegally attempting to reenter the United States following deportation after having been convicted of an aggravated felony. Barrios was sentenced to a 75-month term of imprisonment and a two-year term of supervised release. Barrios argues that his prior California convictions for robbery and witness intimidation are not crimes of violence within the meaning of U.S.S.G. § 2L1.2(b)(1)(A)(ii).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Barrios's conviction for robbery in violation of CAL. PENAL CODE § 211 is a crime of violence under § 2L1.2 because the statutory definition of the offense "falls within the generic or contemporary meaning of robbery." *United States v. Tellez-Martinez*, 517 F.3d 813, 815 (5th Cir. 2008). Thus, the sentence enhancement based on Barrios's robbery conviction was proper, and the district court properly calculated the advisory guidelines range. As it is unnecessary for us to determine whether Barrios's conviction for witness intimidation is a crime of violence, we forego consideration of that issue.

In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Barrios challenges the constitutionality of § 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-Arellano*, 492 F.3d 624, 625 (5th Cir. 2007), cert. denied, 128 S. Ct. 872 (2008).

For the foregoing reasons, the judgment of the district court is AFFIRMED.