

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

November 26, 2007

Charles R. Fulbruge III  
Clerk

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No. 07-50050  
Summary Calendar

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UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

TOMAS GAUSIN-CENISEROS, also known as Tomas Garcin-Ceniceros

Defendant-Appellant

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 3:06-CR-1490-ALL

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Before REAVLEY, SMITH, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Tomas Gausin-Ceniseros having pleaded guilty to one count of illegal reentry following deportation, the district court sentenced him, pursuant to 8 U.S.C. § 1326(b), to 120 months in prison.

In claiming the sentence is unreasonable, Gausin contends: his previous crimes were accounted for by the Sentencing Guidelines; and the sentence imposed by the district court, which represents an upward deviation from the 77-

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

96 month advisory guideline range, was greater than necessary to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a).

The district court gave fact-specific reasons, consistent with the factors set forth in § 3553(a), for its determination that a sentence above the advisory guideline range was warranted. The court's comments establish it: was aware of the correctly calculated guideline range; and took into consideration the abuse Gausin suffered as a child. On the other hand, the district court determined Gausin had continued to commit violent offenses after receiving lenient treatment in the past, and there was a need to impress upon Gausin the seriousness of his offense and to protect society and Gausin's family from further criminal conduct. The record does not establish the district court failed to account for a factor that should have received great weight, gave significant weight to an irrelevant factor, or committed a clear error of judgment in balancing the sentencing factors. See, e.g., *United States v. Smith*, 440 F.3d 704, 707-09 (5th Cir. 2006). Accordingly, Gausin has failed to show the sentence is unreasonable.

In the light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Gausin 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 court has held this issue is "fully foreclosed from further debate". *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007), petition for cert. filed (Aug. 28, 2007) (No. 07-6202).

AFFIRMED.