United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

No. 21-10244
Summary Calendar

October 29, 2021

Lyle W. Cayce
Clerk

United States of America,

Plaintiff—Appellee,

versus

Adan Ramirez-Rubio,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-291-1

Before King, Costa, and Ho, *Circuit Judges.*

Per Curiam:*

Adan Ramirez-Rubio appeals his 72-month prison sentence following his guilty plea conviction for illegal reentry into the United States. He contends that the district court's upward variance from the guidelines imprisonment range was substantively unreasonable. However, Ramirez-

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* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

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Rubio's argument that the district court failed to afford appropriate weight to his mitigating arguments does not show that it failed to consider a factor that should have received significant weight, gave significant weight to an improper factor, or made a clear error of judgment in balancing the sentencing factors. *See United States v. Fraga*, 704 F.3d 432, 440-41 (5th Cir. 2013). Accordingly, the district court did not abuse its discretion. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Next, Ramirez-Rubio contends that his sentence violates due process because it exceeds the statutory maximum for the offense charged in the indictment. Specifically, he argues that the 8 U.S.C. § 1326(b)(2) enhancement, which increased his statutory maximum sentence to 20 years of imprisonment, should not apply because the indictment failed to allege a prior conviction. However, as Ramirez-Rubio correctly concedes, this issue is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998). *See United States v. Pineda-Arrellano*, 492 F.3d 624, 625-26 (5th Cir. 2007).

AFFIRMED.