

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2489
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANDRES RAMOS-FLORES,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 90 135 01)

(March 9, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.
PER CURIAM:¹

Andres Ramos-Flores appeals the imposition of his sentence. Because we find that the district court improperly departed upward from the Sentencing Guidelines, we vacate and remand for resentencing.

I.

Andres Ramos-Flores (appellant) was originally arrested and charged in the United States District Court for the Southern

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

District of Texas, Houston Division, with illegally transporting and harboring aliens (the "Houston" charges), and released on a \$10,000 personal recognizance bond. A six-count superseding indictment was later filed, charging appellant with three counts of illegally transporting aliens and three counts of illegally harboring aliens.

After his release on bond, appellant was arrested and charged in a five-count indictment in the United States District Court for the Southern District of Texas, Brownsville Division, with illegally transporting illegal aliens (the "Brownsville" charges). He pled guilty to count II and was sentenced to 115 days imprisonment, three years supervised release, and a \$50 special assessment.

Appellant pled guilty to the earlier Houston charges. The probation officer recommended a base offense level of nine with a three-point enhancement under U.S.S.G. § 2J1.7 and 18 U.S.C. §1347 because appellant committed a subsequent offense while on pretrial release for the instant, earlier offense. He also recommended an upward departure because of the number of aliens involved and the threats used against the aliens. The probation officer noted that 18 U.S.C. § 3147 mandated enhancement through an additional consecutive sentence of not more than ten years.

At sentencing appellant objected to the upward departure and the application of 18 U.S.C. § 3147 to enhance his sentence. The district court overruled appellant's objections and sentenced him to concurrent terms of sixty-months imprisonment and three-years supervised release on each count and a \$300 special assessment.

Pursuant to 18 U.S.C. § 3147 the court also imposed additional concurrent terms of twenty-seven-months imprisonment on each count to be served consecutively to the sixty-month term. On appeal this Court vacated the sentence and remanded for resentencing because a § 3147 enhancement applies only to the sentence for the new crime committed while on release. **United States v. Ramos-Flores**, No. 91-2629 (5th Cir. April 7, 1992).

On remand the district court resentenced the appellant to the same term of eighty-seven months, again finding that an upward departure was appropriate. The court noted the aggravating factors in this case that were not adequately taken into consideration by the Sentencing Commission when formulating § 2L1.1, the guideline for transporting and harboring illegal aliens. These factors included the large number of aliens involved in the operation; the use of a weapon to intimidate the aliens; the extortionate behavior that caused psychological harm to one of the aliens; and the commission of a subsequent offense while on pretrial release.

To determine the appropriate upward departure the district court looked by analogy to § 2B3.2, the guideline for extortion by force or threat of injury or serious damage. The court used a base offense level of 18, and increased the base offense an additional five levels because appellant brandished a firearm. U.S.S.G. § 2B3.2(a) & (b)(3)(A)(iii). Looking by analogy to § 2J1.7, the court increased appellant's offense level by an additional three levels because he committed a new offense while on pretrial release. The resulting offense level of 26 with a

criminal history category of II had a guideline range of 70-87 months. See U.S.S.G. § 5A. The court determined that appellant's conduct required a sentence at the highest end of the guideline range. Appellant was sentenced to 60-months imprisonment on count I, 60-months imprisonment on counts II-VI with the first 27 months to be served concurrently to each other but consecutively to the sentence imposed on count I, and the remainder to be served concurrently to each other and the sentence imposed in count I, three-years supervised release, and a \$300 special assessment.

II.

Appellant argues that the district court improperly analogized to §§ 2B3.2 and 2J1.7 to determine the appropriate upward departure. In an appeal by appellant's codefendant, **United States v. Lara**, 975 F.2d 1120 (5th Cir. 1992), this Court held that the district court properly analogized to § 2B3.2 for departure based on the defendant's use of a firearm, id. at 1123-27, but erred in analogizing to § 2J1.7 for departure based on the defendant's subsequent conviction. Id. at 1128-29. Because the addition of three levels for the post-conduct conviction under § 2J1.7 was not harmless error, the sentence must be vacated and the case remanded for resentencing consistent with this court's decision in **Lara**. Id. at 1129.

VACATED AND REMANDED FOR RESENTENCING