

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5723
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL RODRIGUEZ-ROCHA,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-92-CR-222-1
- - - - -

June 22, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Raul Rodriguez-Rocha was deported pursuant to a warrant of deportation signed by Luis Valdez, a deportation officer, in the name of Richard Casillas, the district director in San Antonio, Texas. Subsequently, Rodriguez-Rocha was arrested in San Antonio, Texas, and charged with illegal reentry after being deported. The district court denied his motion for judgment of acquittal and found him guilty. Rodriguez-Rocha was sentenced to 71 months imprisonment, three years supervised release, and a \$50 special assessment.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

To establish a violation of 8 U.S.C. § 1326 the government must prove that Rodriguez-Rocha was an alien; that he was arrested and deported as those terms are contemplated by the statute; that he was subsequently found in the U.S.; and that he did not have the consent of the Attorney General to reapply for admission. United States v. Quezada, 754 F.2d 1190, 1192 (5th cir. 1985). An arrest within § 1326 means a mandatory arrest under 8 C.F.R. § 243.2 which requires the district court to issue a warrant of departure after a final administrative order of deportation has been issued. United States v. Wong Kim Bo, 466 F.2d 1298, 1303-05 (5th Cir.), reh'g denied, 472 F.2d 720 (5th Cir. 1972).

Rodriguez-Rocha is attempting to collaterally challenge his prior deportation order. An alien may collaterally challenge the prior deportation proceedings if he can show that the deportation hearing was fundamentally unfair and that the defective deportation hearing effectively eliminated his right to direct judicial review of the deportation order. United States v. Encarnacion-Galvez, 964 F.2d 402, 406 (5th Cir.), cert. denied, 113 S.Ct. 391 (1992). The Court need not address the second prong if Rodriguez-Rocha cannot demonstrate that the prior deportation proceeding was fundamentally unfair. Id.

To establish that the prior proceeding was fundamentally unfair Rodriguez-Rocha must demonstrate that the alleged procedural deficiencies caused actual prejudice. Encarnacion-Galvez, 964 F.2d at 407. Prejudice means that "there was a reasonable likelihood that but for the errors complained of the

defendant would not have been deported." Id. Therefore, even assuming Rodriguez-Rocha could establish that the proceedings were unfair because the deportation officer rather than the district director signed the warrant of deportation, he cannot establish prejudice. He does not allege that the grounds recited in the deportation order were untrue, or that he would not have been deported if the district director, rather than the deportation officer, had been required to sign the warrant of deportation. See id. at 409; United States v. Zaleta-Sosa, 854 F.2d 48, 52 n.5 (5th cir. 1988). Rodriguez-Rocha was arrested within the meaning of § 1326.

AFFIRMED.