

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1470
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDUARDO JAVIER RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93 CR 044 R)

(January 13, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

JONES, Circuit Judge:

A very close question as to the applicability of the ex post facto clause is presented in this appeal of a guideline sentence. Although we understand the district court's reasoning, we conclude that his application of U.S.S.G. § 2L1.2(b)(2), an amendment effective November 1, 1991, violated the defendant's rights under the circumstances of this case. Accordingly, we vacate and remand for resentencing.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Eduardo Javier Ramirez pleaded guilty to the first count of a two-count indictment charging him with being illegally present in the United States on or about December 13, 1990, (Count One) and on or about February 3, 1993, (Count Two) after deportation. The factual resume revealed the following sequence of events:

- Jan. 26, 1987 Ramirez convicted of aggravated sexual assault.
- Dec. 5, 1989 Ramirez deported from U.S. to Mexico.
- Dec. 20, 1989 On or about this date, Ramirez illegally reentered U.S.
- Dec. 13, 1990 Ramirez arrested in Dallas, Texas. (Count One)
- Jan. 7, 1991 Ramirez deported again from the U.S.
- Feb. 3, 1993 Ramirez arrested again in Dallas, Texas. (Count Two)

See R. 1, 9-10.

In calculating Ramirez's offense level, the probation officer added sixteen levels pursuant to U.S.S.G. § 2L1.2(b)(2), an amendment to the guidelines effective Nov. 1, 1991. PSR ¶ 9; see U.S.S.G. App. C, amendment 375. Ramirez objected that, because his offense of conviction predated the amended guideline, the use of this guideline violated the Ex Post Facto Clause, thereby necessitating the use of the guidelines in effect on the date of the commission of the offense.

The district court overruled the objection, finding that Ramirez continued to reside in the United States, thus concluding that the offense continued until February 1993, the date of the

last arrest. The district court sentenced Ramirez to 46 months imprisonment.

Ramirez argues that the district court erred by failing to use the guidelines in effect on the date of the offense of conviction, that is, when he was found illegally present in this country in 1990. This Court reviews the district court's factual findings for clear error and its application of the guidelines de novo. U.S. v. Suarez, 911 F.2d 1016, 1018 (5th Cir. 1990).

"The guidelines in effect at the time of sentencing are the appropriate source for determining a sentence absent an ex post facto problem." U.S. v. Gonzales, 988 F.2d 16, 18 (5th Cir.), cert. denied, 114 S.Ct. 170 (1993); see § 1B1.11. If using the guidelines in effect on the date of sentencing gives rise to an ex post facto violation, the district court is directed to apply the guidelines "in effect on the date that the offense of conviction was committed." § 1B1.11(b)(1). "A criminal law is ex post facto if it is retrospective and disadvantages the offender by altering substantial personal rights." Gonzales, 988 F.2d at 18. If application of the amended version of § 2 L 1.2 is retrospective, Ramirez's substantial rights are adversely affected because applying the amendment results in a greater sentence than he would receive under the guidelines in effect at the time of the offense of conviction. See id.; see also R. 3, 4-5 (district court acknowledging that the sentencing range from 46 to 57 months would be reduced to a 10-to-16-month range if Ramirez's argument would prevail on appeal).

The district court premised its application of the amendment on its assumption that Ramirez continued to reside in this country until his arrest in February 1993. By making this assumption, the district court sought to eliminate any ex post facto problem. See Gonzales, 988 F.2d at 18. This assumption was legally incorrect, however, because Count One, the offense of conviction, stated that Ramirez's offense occurred on December 13, 1990, when he was apprehended. Ramirez could have been indicted for continuing to reside in the United States after he was first deported in 1989, but he was not. The government chose instead to indict him for bifurcated crimes, and the sentencing determination is based on that choice.

The Government argues that the district court's sentence can be affirmed by analysis under U.S.S.G. § 1B1.2(c), the guideline providing for the defendant to be treated as if convicted of additional offenses when the plea agreement contains stipulations that specifically establish commission of those additional offenses. Not only has the government raised this justification for the first time on appeal, but as appellant points out, the guidelines do not permit conduct after the offense of conviction to extend the controlling date for ex post facto purposes. § 1B1.11, Application note 2.

For these reasons, the district court erred in applying a 1991 amendment to enhance appellant's sentence for his offense committed in December, 1990. The sentence is **VACATED** and the case **REMANDED** for resentencing.