

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8273
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HERIBERTO RIVAS-GAYTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 92 CR 439 B)

(November 12, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

The Government charged Appellant with illegal reentry into the United States after an arrest, conviction and deportation in violation of 8 U.S.C. § 1326(b)(2). It gave notice of its intention to seek a penalty enhancement based on his prior conviction. Appellant entered a conditional guilty plea. The district court adopted the factual findings of the presentence report (to which Appellant made no objection), departed upward, and sentenced Appellant to sixty months imprisonment. Appellant now

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

complains of his sentence. We affirm.

Appellant first alleges that it was error to impose upon him an enhanced sentence when the indictment did not charge his prior offense as an element of the crime charged. We have recently rejected this precise argument. United States v. Vasquez-Olvera, 999 F.2d 943 (5th Cir. 1993).

While admitting that § 1326 provides adequate notice concerning the possible penalties for its violation, Appellant urges that the imposition of an enhanced punishment upon him violates his due process rights because the I-294 form provided him by the INS advised him that, upon any illegal reentry into the United States, he would be subjected to a two year maximum term of imprisonment. In the district court Appellant did not object to the presentence report either to the recommendation for an enhancement of his sentence, the recommendation for upward departure, nor to the sentence actually imposed. Claims of error regarding sentences may generally not be raised for the first time on appeal. United States v. Garcia-Pillado, 898 F.2d 36, 40 (5th Cir. 1990). Accordingly, this issue is untimely. Additionally, if we were to consider the merits of his argument, the amended § 1326 provides ample notice of the maximum possible penalty and this notice satisfies the due process requirements. See United States v. Camacho-Dominquez, 905 F.2d 82, 84 (5th Cir. 1990).

Finally, Appellant argues that the district court departed upward based upon its erroneous consideration of impermissible factors, stale convictions, and a conviction already taken into

consideration by the Commission. He also contends that the district court failed to consider a factor that the policy statements of the guidelines direct, that is that the nature and not the number of his prior convictions is significant. Again he failed to object to any of this in the presentence report and, therefore, his objection here is untimely. See Garcia-Pillado, 898 F.2d at 40. Failure to timely raise the issue restricts our review to whether the issues raised involve purely legal questions and whether the failure to consider them would result in manifest injustice. Id. at 39. We find no injustice, manifest or otherwise, in the upward departure in this case.

AFFIRMED.