

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10215
Summary Calendar

UNITED STATES of AMERICA,

Plaintiff-Appellant,

versus

GABRIEL SALAS-MUNIZ

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-241-D)

(October 20, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Gabriel Salas-Muniz (Salas-Muniz) appeals the district court's enhancement of his sentence for a state court conviction, asserting that the prior guilty plea cannot be considered because it is invalid. Specifically, he argues that his bilingual counsel in the state proceedings was an inadequate interpreter, rendering his guilty plea unknowing and involuntary. Based on the findings made by the district court after a hearing, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Gabriel Salas-Muniz pleaded guilty to one count of illegal reentry after deportation following a felony conviction. The probation officer recommended a 16-level increase in the offense

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

level for being deported after an aggravated felony conviction. See U.S.S.G. § 2L1.2(b)(2). To compute Salas-Muniz's criminal history score, the probation officer counted four prior convictions consisting of three convictions of driving while intoxicated and one conviction of delivery of a controlled substance.

Salas-Muniz filed an objection to the inclusion of his prior aggravated-felony conviction to increase his base offense level and to compute his criminal history score. He argued that his prior conviction was unconstitutional because his guilty plea was involuntary. Salas-Muniz admitted that he pleaded guilty on August 10, 1989, in Dallas County to delivery of a controlled substance. He stated that he is a native of Mexico who does not speak, read, write, or understand English, but that he was not provided an interpreter.

The court permitted Salas-Muniz to attack the prior conviction collaterally at the sentencing hearing. The following persons testified at the sentencing hearing in regard to the state court proceedings and Salas-Muniz' ability to comprehend the English language: Salas-Muniz, Erma Salas-Muniz (his wife), Brook Busbee (attorney who represented him during the state court proceeding), Assistant Dallas County District Attorney Keith Anderson, Deena Escobar (acquaintance of Salas-Muniz), and Pearl Reed (federal probation officer).

The court accepted as true that Busbee acted as an interpreter for Salas-Muniz. The court then determined that Busbee's testimony was credible in that Salas-Muniz understood what was being interpreted at his guilty plea hearing in state court. The court concluded that Salas-Muniz understood the consequences of his plea and that his plea was voluntarily, intelligently, and knowingly

entered. The court further concluded that, as a matter of law, Salas-Muniz's attorney could act as an interpreter for him and that her simultaneous translation was adequate. Thus, the court declared that the prior aggravated-felony conviction was not unconstitutional. After reducing the offense level for acceptance of responsibility, the court sentenced Salas-Muniz to 60 months of imprisonment with a three-year term of supervisory release.

II. CONSTITUTIONALITY OF PRIOR GUILTY PLEA

Salas-Muniz challenges the district court's conclusion that his prior guilty plea was not invalid. The government argues that the district court erred when it allowed Salas-Muniz to attack his state convictions collaterally in federal court.¹ However, as Salas-Muniz points out, the government did not argue to the district court that it was precluded from considering the validity of the prior conviction. Rather, the government argued to the court below that, while it had discretion to do so, it should not reach that claim. The government has waived this argument. Moreover, the integrity of the sentencing proceeding is not affected by the court's purported error in permitting Salas-Muniz to attack his prior conviction collaterally because the district court did not err when it determined that the prior conviction was

¹ The government relies on Custis v. United States, ___ U.S. ___, 114 S.Ct. 1732, 1738, 128 L.Ed.2d 517 (1994), which was decided subsequent to Salas-Muniz' sentencing hearing and during the appeal of this case. Custis held that a defendant in a federal sentencing proceeding had no right to attack collaterally the validity of a previous state conviction being used to enhance his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), unless he did so on the basis that he was denied counsel in the prior proceeding. 114 S.Ct. at 1735-39. The government asserts that, like the ACCA, the statute violated by Salas-Muniz contains no language authorizing collateral attacks. The government contends that the similarity in the statutes and certain modifications of the sentencing guidelines in 1993 require the same interpretation and result reached in Custis.

valid. See United States. v. Olano, ___ U.S. ___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993).

Salas-Muniz had the burden of proving the constitutional invalidity of the prior conviction. See United States v. Howard, 991 F.2d 195, 199 (5th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 395, 126 L.Ed.2d 343 (1993). Whether a prior conviction is covered under the sentencing guidelines is reviewed de novo, but factual matters concerning the prior conviction are reviewed for clear error. Id. This Court affirms under the clear-error standard if the district court's account of the evidence is plausible in light of the record viewed in its entirety, notwithstanding that the court of appeals might have weighed the evidence differently to reach a different conclusion had it been sitting as the trier of fact. Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

We have reviewed the record in its entirety and conclude that the district court's finding that the bilingual attorney was an adequate interpreter is supported by the record and thus, not clearly erroneous.² Thus, the district court properly found that Salas-Muniz had not proven that his guilty plea was involuntary.

III. CONCLUSION

For the foregoing reasons, the sentence imposed is **AFFIRMED**.

² Busbee testified that she speaks Spanish on a daily basis; that it was her practice to translate guilty plea proceedings for her clients as they occurred; and that, had Salas-Muniz not understood the proceedings, she would have requested help.