

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50009
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMIRO GARZA-HERNANDEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-93-CR-215
- - - - -
(July 21, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Ramiro Garza-Hernandez appeals from the imposition of a 30-month term of imprisonment, following his bench-trial conviction for willfully being in the United States unlawfully, after having been previously arrested and deported. He contends that his 30-month sentence violated due process because the Government's indictment did not allege the prior-felony element of the statute of conviction, 8 U.S.C. § 1326(b)(2). The indictment alleged only a violation of § 1326(a), which has a maximum penalty of two

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

years. As such, he argues, his 30-month sentence must be vacated and the case remanded for resentencing.

As the Government argues, and Garza concedes, however, this Court has specifically rejected this exact challenge to § 1326 in United States v. Vasquez-Olvera, 999 F.2d 943, 946-47 (5th Cir. 1993), cert. denied, 114 S.Ct. 889 (1994). Garza urges this Court to reconsider its decision in Vasquez-Olvera, in light of the dissent in that case, contrary authority in the Ninth Circuit, and recent decisions in the Supreme Court regarding the "rule of lenity."

As evidenced by the final decision in Vasquez-Olvera, however, the majority of the panel was not persuaded by the dissent. Moreover, the Vasquez-Olvera panel was aware of the contrary holding by the Ninth Circuit in United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992), but concluded that that Court relied on earlier caselaw interpreting § 1325, rather than § 1326, and therefore declined to adopt its reasoning. Vasquez-Olvera, 999 F.2d at 946-47. In addition, as en banc reconsideration of this issue has been rejected by a majority of this Court, see id. at 943 n.*, and as one panel of this Court may not overrule the decision of a prior panel, United States v. Sherrod, 964 F.2d 1501, 1507 (5th Cir.), cert. denied, 113 S.Ct. 832 (1992), Vasquez-Olvera and its explicit rejection of the argument posited by Garza remains the law of this Circuit.

Finally, neither of the two Supreme Court cases cited by Garza mandate a different result in the instant case. Both cases involve an interpretation of the rule of lenity, but as the

Supreme Court has noted, the rule of lenity applies to cases where the "text, structure, and history" of a statute are ambiguous. United States v. Granderson, ____ U.S. ____, 114 S.Ct. 1259, 1267, 127 L.Ed.2d 611 (1994). This Court has already held that § 1326(b) is not ambiguous. Vasquez-Olvera, 999 F.2d at 945-46. Therefore, the rule of lenity and the Supreme Court decisions in Granderson and Ratzlaf v. United States, ____ U.S. ____, 114 S.Ct. 655, 657, 126 L.Ed.2d 615 (1994), do not apply.

AFFIRMED.