

January 7, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50768
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFREDO MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-03-CR-74-ALL-PRM

Before HIGGINBOTHAM, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:*

Alfredo Martinez was sentenced to a total of 24 months imprisonment and three years supervised release following his guilty-plea conviction for importation and possession of marijuana. See 21 U.S.C. §§ 841, 952, 960. Martinez appeals only the district court's imposition of a \$300 fine. At sentencing, Martinez objected to the fine in light of the probation officer's finding that he lacked the ability to pay any

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

court imposed fine. The Government has filed an unopposed motion to waive the briefing requirement, vacate the judgment as to the fine, and affirm the judgment as modified.

Where, as in this case, the district court adopts a presentence report (PSR) showing limited or no ability to pay a fine, the Government must come forward with evidence showing that a defendant can, in fact, pay a fine before one can be imposed. See United States v. Fair, 979 F.2d 1037, 1041 (5th Cir. 1992). The Government admits that no such evidence was adduced, and the district court did not make specific findings regarding Martinez's ability to pay a fine. Consequently, this court cannot uphold the district court's imposition of the fine. See United States v. Hodges, 110 F.3d 250, 251 (5th Cir. 1997).

The Government's motion to waive the briefing requirement is GRANTED. Given our determination that the fine cannot be upheld, we hereby GRANT the Government's motion to VACATE the \$300 fine imposed on Martinez and MODIFY the district court's judgment accordingly. As modified herein, the judgment of the district court is AFFIRMED.

VACATED and MODIFIED in part; and as modified, AFFIRMED.