

FILED

February 26, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40022

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAGDALENO REYES-BAUTISTA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:04-CR-1494-ALL

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:*

In our previous opinion in this case, we affirmed Defendant-Appellant Reyes-Bautista's conviction but vacated his sentence and remanded his case for resentencing consistent with United

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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

States v. Booker and United States v. Fanfan.¹ Although we vacated Reyes-Bautista's sentence, we rejected his argument that the district court mischaracterized his state felony conviction for possession of a controlled substance as an "aggravated felony" for purposes of U.S.S.G. § 2L1.2(b)(1)(C).²

After Lopez v. Gonzalez³ was decided, the Supreme Court vacated our judgment and remanded this case for reconsideration in light of Lopez. Upon reconsideration and in light of Lopez, we conclude that, in addition to the Fanfan error, the district court erred by characterizing Reyes-Bautista's state felony as an "aggravated felony" and enhancing his sentence under U.S.S.G. § 2L1.2(b)(1)(C).⁴

The conviction is AFFIRMED, but we VACATE Reyes-Bautista's sentence and REMAND the case for resentencing consistent with our opinion on February 21, 2006 and the Supreme Court's decision in Lopez.

¹See United States v. Reyes-Bautista, 167 F. App'x 996, 997 (5th Cir. 2006) (unpublished) (per curiam).

²Id.

³127 S.Ct. 625 (2006)

⁴See United States v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007).