[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11661
Non-Argument Calendar

D.C. Docket No. 1:16-cr-00376-SCJ-JFK-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBA RUBIDIA GUZMAN-FUENTES,
a.k.a. Alba Rubidia Guzman De Calles,
a.k.a. Alba Guzman-Fuentes,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(March 13, 2019)

Before ED CARNES, Chief Judge, WILSON, and HULL, Circuit Judges.

PER CURIAM:

Alba Rubidia Guzman-Fuentes, a native and citizen of El Salvador, pleaded guilty to reentering the United States without permission after being removed, in violation of 8 U.S.C. § 1326(a). The district court sentenced her to 7 months in prison. Guzman-Fuentes does not challenge the length of that sentence. Instead, she challenges the court's finding that the applicable statutory maximum sentence was 20 years under 8 U.S.C. § 1326(b)(2) instead of 10 years under § 1326(b)(1).

I.

Guzman-Fuentes first entered the United States in November 2000 and was granted temporary protected status. That status expired in September 2013. She remained in the United States and, in March 2014, pleaded guilty to first-degree cruelty to children, a felony, in violation of section 16-5-70(b) of the Georgia Code.[1] Later that year Guzman-Fuentes was removed from the United States because her temporary protected status had expired and her felony conviction rendered her ineligible for a status extension. See 8 U.S.C. § 1254a(c)(2)(B). Yet in May 2016 law enforcement officers found her in Georgia, where she was arrested for failing to have a "license" on her person.

That arrest led to a federal indictment for reentering the United States without permission after being removed. 8 U.S.C. § 1326(a) makes that a

[1] Section 16-5-70(b) of the Georgia Code provides: "Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain." Ga. Code Ann. § 16-5-70(b).

crime and carries a maximum sentence of two years of imprisonment, while 8 U.S.C. § 1326(b) is a related penalty provision that permits longer prison sentences under certain conditions. United States v. Garcia-Sandobal, 703 F.3d 1278, 1280 (11th Cir. 2013). Section 1326(b)(1) permits "a maximum prison sentence of 10 years if the defendant was removed following a conviction of a non-aggravated felony," while section 1326(b)(2) permits "a maximum prison sentence of 20 years if the defendant was removed following a conviction of an aggravated felony." Id. (citing 8 U.S.C. § 1326(b)). An "aggravated felony" is, among other things, a "crime of violence" as defined in 18 U.S.C. § 16. 8 U.S.C. § 1101(a)(43)(F). Guzman-Fuentes' indictment states that her illegal reentry offense was a "violation of . . . [s]ections 1326(a) and (b)(2)." (Emphasis added).

Guzman-Fuentes pleaded guilty to the indictment. The district court had the following colloquy with her to ensure that she understood that she was pleading guilty to the illegal reentry offense and that the applicable statutory maximum sentence was 20 years under section 1326(b)(2):

> THE COURT: Do you understand what you are charged with?
>
> GUZMAN-FUENTES: Yes.
>
> THE COURT: In your own words, tell me what you understand you are charged with doing.
>
> GUZMAN-FUENTES: For having reentered the country.

> THE COURT: And did you have a legal right to reenter the country?
>
> GUZMAN-FUENTES: No.
>
> THE COURT: At this time I ask [the government] to state the maximum penalty . . . that can be imposed as a result of a guilty plea to this charge.
>
> THE GOVERNMENT: The statutory maximum is 20 years . . . .
>
> THE COURT: Ms. Guzman-Fuentes, do you understand the maximum penalty . . . that can be imposed as a result of you entering a plea of guilty to this charge?
>
> GUZMAN-FUENTES: Yes.

The district court also asked defense counsel whether it "agree[d] with that assessment of the maximum penalty . . . that can be imposed as a result of a plea of guilty to this charge," to which defense counsel responded: "That's my understanding, Your Honor."

The presentence investigation report recommended an advisory guidelines range of 10 to 16 months in prison. The PSR also stated that the applicable statutory maximum sentence was 20 years in prison under section 1326(b)(2) because of Guzman-Fuentes' 2014 Georgia felony conviction.

Guzman-Fuentes did not object to the guidelines calculation, but she did object to the PSR's statement that the applicable statutory maximum sentence was 20 years in prison under section 1326(b)(2). She argued that her 2014 Georgia

felony conviction under section 16-5-70(b) of the Georgia Code for first-degree cruelty to children did not count as an aggravated felony conviction under section 1326(b)(2) because it was not a crime of violence conviction under 18 U.S.C. § 16. As a result, she asserted that the applicable statutory maximum sentence was 10 years in prison under section 1326(b)(1), not 20 years in prison under section 1326(b)(2).

At the sentence hearing, the district court "reserved" deciding the aggravated felony issue, stating that the resolution of that issue would have no impact on the sentence that it would impose. The court otherwise accepted the PSR's recommendations, which yielded an advisory guidelines range of 10 to 16 months in prison. The court imposed a sentence of 7 months in prison after giving Guzman-Fuentes credit for the 3 months she had already served.

After the sentence hearing the district court issued a written order finding that the applicable statutory maximum sentence was 20 years in prison under section 1326(b)(2). It concluded that Guzman-Fuentes' felony conviction for first-degree cruelty to children under section 16-5-70(b) of the Georgia Code qualifies as a crime of violence conviction under 18 U.S.C. § 16, and, as a result, an aggravated felony conviction under section 1326(b)(2). This is Guzman-Fuentes' appeal.

II.

Guzman-Fuentes argues that the district court erred in finding that the applicable statutory maximum sentence was 20 years in prison under section 1326(b)(2). But Guzman-Fuentes "waived this argument when [s]he pleaded guilty to violating that section." Garcia-Sandobal, 703 F.3d at 1282.

The indictment alleged that the enhanced sentencing provision of section 1326(b)(2) applied to her case. Guzman-Fuentes' "'knowing and informed plea of guilty . . . amounted to an express admission that section 1326(b)(2) applied to [her] case,' and [s]he cannot now argue otherwise on appeal." Id. (quoting United States v. Covington, 565 F.3d 1336, 1345 (11th Cir. 2009) (brackets omitted). And her objection to the PSR's statement that section 1326(b)(2) applied to her case does not permit her to breathe life into that argument on appeal. Any argument about the applicable statutory maximum that Guzman-Fuentes may have had died, for good, when she entered into a knowing and informed plea of guilty. See Garcia-Sandobal, 703 F.3d at 1282–83; United States v. Bennett, 472 F.3d 825, 829, 832–33 (11th Cir. 2006). So her sentence under section 1326(b)(2) is due to be affirmed.

Finally, even if we could review, and were persuaded by, Guzman-Fuentes' argument that the district court erred in finding that the applicable statutory maximum sentence was 20 years in prison under section 1326(b)(2), her sentence

under that section would still be due to be affirmed because that error would be harmless. See Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). The district court explicitly stated both at the sentence hearing and in its written order that it would have imposed the same sentence under either § 1326(b)(1) or § 1326(b)(2). As a result, we would "say with fair assurance that the sentence was not substantially swayed by the error" — if error it was — and so the sentence would be "due to be affirmed." United States v. Mathenia, 409 F.3d 1289, 1292 (11th Cir. 2005) (quotation marks, brackets, and ellipsis omitted); see also United States v. Dean, 517 F.3d 1224, 1232 (11th Cir. 2008); United States v. Lozano, 490 F.3d 1317, 1323–24 (11th Cir. 2007); United States v. Keene, 470 F.3d 1347, 1349–50 (11th Cir. 2006).

AFFIRMED.