

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

February 12, 2008

No. 07-40561

Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ABELINO LOPEZ-CORTEZ

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:07-CR-87-ALL

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Abelino Lopez-Cortez appeals his conviction and sentence following his guilty plea to illegal reentry after deportation following a conviction for an aggravated felony, in violation of 8 U.S.C. § 1326. Lopez-Cortez argues that the district court erred by enhancing his sentence pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii) based on the determination that his 1991 conviction for indecency with a child under TEX. PENAL CODE § 21.11(a)(1) was a crime of violence.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

Sexual abuse of a minor is an enumerated offense which qualifies as a crime of violence under § 2L1.2(b)(1)(A)(ii). *United States v. Zavala-Sustaita*, 214 F.3d 601, 604-05 (5th Cir. 2000), held that a violation of § 21.11(a) is sexual abuse of a minor as that term is used in its “ordinary, contemporary, [and] common meaning.” As such, the district court did not clearly err in applying the enhancement under § 2L1.2(b)(1)(A)(ii). See *United States v. Villanueva*, 408 F.3d 193, 202-03 & n.9 (5th Cir. 2005).

In light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Lopez-Cortez* challenges the constitutionality of § 1326(b)'s treatment of prior felony and aggravated felony convictions as sentencing factors rather than elements of the offense that must be found by a jury. This argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1995). *United States v. Pineda-Arrellano*, 492 F.3d 624, 625 (5th Cir. 2007), cert. denied, 2008 WL 59441 (Jan. 7, 2008) (No. 07-6202). Accordingly, the judgment of the district court is AFFIRMED.