

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

F I L E D

February 18, 2010

No. 09-40570
Summary Calendar

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE MAYA-DUARTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:09-CR-54-1

Before GARZA, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Jose Maya-Duarte is appealing the 70-month sentence imposed following his guilty-plea conviction for being found unlawfully in the United States following his deportation. He argues that the district court plainly erred in enhancing his sentence based on his prior conviction for aggravated assault of a peace officer because the offense did not fall within the definition of a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii).

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

After reviewing the record and the applicable law, we agree that the district court committed plain error by using Maya-Duarte's Texas aggravated-assault conviction to increase his sentence. *See United States v. Fierro-Reyna*, 466 F.3d 324, 329-30 (5th Cir. 2006); *United States v. Munoz-Ortenza*, 563 F.3d 112, 116 (5th Cir. 2009). Accordingly, we vacate Maya-Duarte's sentence and remand for resentencing.

* * *

SENTENCE VACATED; CASE REMANDED.