

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

United States Court of Appeals
Fifth Circuit

FILED

January 28, 2011

Lyle W. Cayce
Clerk

No. 09-41037
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HEBER ELEAZAR GARZA-ARELLANO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:08-CR-1626-1

Before KING, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Heber Eleazar Garza-Arellano appeals the sentence imposed following his conviction for illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a). The district court imposed a sentence of 46 months of imprisonment, to be followed by a three-year term of supervised release. Garza-Arellano contends that the sentence is illegal because it exceeds the statutory maximum sentence of two years of imprisonment and one year of supervised release. He notes that he was not charged with a violation of 8 U.S.C. § 1326(b), which would have

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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increased the statutory maximum sentence to ten years or twenty years of imprisonment and three years of supervised release. The Government concedes error.

Garza-Arellano is correct that the district court plainly erred by imposing an illegal sentence of 46 months of imprisonment and two years of supervised release. *See United States v. Vera*, 542 F.3d 457, 459 (5th Cir. 2008). The statute under which Garza-Arellano was convicted has a statutory maximum of two years of imprisonment and one year of supervised release. *See* 8 U.S.C. § 1326(a); 18 U.S.C. §§ 3583(b)(3), 3559(a)(5); *United States v. Velasquez-Torrez*, 609 F.3d 743, 746 (5th Cir.), *cert. denied*, 131 S. Ct. 438 (2010).

Accordingly, Garza-Arellano's sentence is VACATED. The case is REMANDED. The court is INSTRUCTED to resentence Garza-Arellano within the statutory range.