IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20788
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
September 12, 2017
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CRISTIAN ERIC VASQUEZ-AGUILAR, also known as Crestian Eric Vasquez, also known as Cristian E. Vasquez-Aguilar, also known as Christian Eric Vasquez Aguilar,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CR-289-1

Before KING, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

On December 19, 2016, Cristian Eric Vasquez-Aguilar pleaded guilty of being found in the United States without permission, following removal. His 18-month, within-guidelines sentence, imposed on January 4, 2017, included an eight-level adjustment because the district court determined that Vasquez-Aguilar, prior to his first deportation in 2014, had "sustained a conviction for

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

a felony offense for which the sentence imposed was two years or more." U.S.S.G. § 2L1.2(b)(2)(B). Specifically, Vasquez-Aguilar's 2014 deportation followed his 2013 conviction and two-year deferred adjudication probationary sentence, under Texas law, for manufacturing/ delivering between one and four grams of cocaine. After Vasquez-Aguilar returned to the United States illegally in 2015, the state court adjudicated his probation for two years of imprisonment. On appeal, Vasquez-Aguilar contends that the district court reversibly erred by applying the challenged adjustment because, contrary to the mandate of § 2L1.2, his two-year custodial sentence on the 2013 Texas cocaine conviction was not imposed until after he "was ordered deported or ordered removed from the United States for the first time." § 2L1.2(b)(2).

We review the district court's interpretation of the guidelines de novo and its factual determinations for clear error. *See United States v. Solis-Garcia*, 420 F.3d 511, 514 (5th Cir. 2005). During the pendency of this appeal, we decided *United States v. Franco-Galvan*, __ F.3d __, No. 16-41556, 2017 WL 2713434, at *4 (5th Cir. June 22, 2017), in which we held that our prior holding in *United States v. Bustillos-Pena*, 612 F.3d 863 (5th Cir. 2010), still governs the interpretation of the current version of § 2L1.2(b)(2). Pursuant to *Franco-Galvan* and *Bustillos-Pena*, the district court erred by applying § 2L1.2(b)(2)(B) to Vasquez-Aguilar's 2015 sentence, which was issued post-deportation.

As argued by Vasquez-Aguilar, the imposed sentence exceeded the 10-to-16 month range applicable without the district court's erroneous application of the § 2L1.2(b)(2)(B) adjustment. The Government has not attempted to prove that the district court's guidelines error was harmless, and the record is not amenable to such an argument. Although Vasquez-Aguilar also challenges the procedural reasonableness of the sentence based on the adequacy of the district

court's reasons for the sentence, we need not consider that issue in light of the disposition of this appeal.

We VACATE the sentence and REMAND to the district court for resentencing.