

NOT FOR PUBLICATION

DEC 12 2014

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GUADALUPE DIAZ-CRUZ,

Defendant - Appellant.

No. 13-50621

D.C. No. 3:13-cr-02485-BEN

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted December 9, 2014**

Before: WALLACE, LEAVY, and BYBEE, Circuit Judges.

Guadalupe Diaz-Cruz appeals from the district court's judgment and challenges the 36-month sentence imposed following his guilty-plea conviction for being a removed alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Diaz-Cruz contends that his sentence is substantively unreasonable because the court failed to grant a downward departure under U.S.S.G. § 4A1.3(b), which authorizes the district court to depart when the defendant's criminal history category overstates the seriousness of his criminal history. Our review of a district court's decision whether to depart under section 4A1.3 is limited to determining whether the court imposed a substantively reasonable sentence. *See United States v. Ellis*, 641 F.3d 411, 421-22 (9th Cir. 2011). The district court did not abuse its discretion in imposing Diaz-Cruz's sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). The record reflects that the court varied upwards from the parties' sentencing recommendation in light of Diaz-Cruz's history of driving under the influence and immigration violations. The sentence, 12 months above the top of the advisory Guidelines range, is substantively reasonable in light of the 18 U.S.C. § 3553(a) sentencing factors and the totality of the circumstances. *See id.*

AFFIRMED.