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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FABIAN SANTILLAN,

Defendant - Appellant.

No. 14-50069

D.C. No. 3:13-cr-03519-BEN

MEMORANDUM*

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

Submitted November 18, 2014**

Before: LEAVY, FISHER, and N.R. SMITH, Circuit Judges.

Fabian Santillan appeals from the district court's judgment and challenges the 16-month sentence imposed following his guilty-plea conviction for attempted reentry of a removed alien, 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).

Santillan contends that the district court erred by refusing to grant the government's motion for a recommended fast-track departure under U.S.S.G. § 5K3.1. "In analyzing challenges to a court's upward and downward departures . . . under Section 5K, we do not evaluate them for procedural correctness, but rather, as part of a sentence's substantive reasonableness." *United States v. Ellis*, 641 F.3d 411, 421 (9th Cir. 2011). The 16-month sentence is substantively reasonable in light of the 18 U.S.C. § 3553(a) factors and the totality of the circumstances, including Santillan's criminal and immigration history. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Santillan also contends that the district court failed to use the correctly calculated Guidelines as a starting point because it had already arrived at its preferred sentence before calculating the Guidelines range. We review for harmless error, *see United States v. Munoz-Camarena*, 631 F.3d 1028, 1030 & n.5 (9th Cir. 2011) (per curiam), and we find no error. The record reflects that the district court used the correctly calculated Guidelines as its starting point when determining the sentence. *See United States v. Evans-Martinez*, 611 F.3d 635, 643 (9th Cir. 2010) ("[I]t is the pre-departure Guidelines sentencing range that the district court must correctly calculate.").

AFFIRMED.