

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUL 31 2001

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS OJEDA-SIERRA, also
known as Carlos Garcia-Sierra,

Defendant-Appellant.

No. 01-4000

(D. Utah)

(D.C. No. 00-CR-243-J)

ORDER AND JUDGMENT *

Before **HENRY**, **BRISCOE**, and **MURPHY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for decision on the briefs without oral argument. See Fed. R. App. P. 34(f). The case is therefore submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Mr. Ojeda-Sierra pleaded guilty to one count of illegal reentry following deportation in violation of 8 U.S.C. § 1326(a). He was sentenced to fifty-seven months' imprisonment, followed by thirty-six months' supervised release. The district court increased Mr. Ojeda-Sierra's base offense level by sixteen points pursuant to USSG § 2L1.2(b)(1)(A) because of his prior conviction for an aggravated felony. Mr. Ojeda-Sierra objected to the sixteen-level enhancement for having previously sustained an aggravated felony. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm.

The basis for Mr. Ojeda-Sierra's argument is Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). There the Supreme Court held that facts used to enhance the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Specifically he argues that, because he was neither charged with, nor pleaded guilty to, the prior felony conviction, the sentencing court erred in relying on the prior conviction to enhance his sentence under 28 U.S.C. § 1326(b)(2).

Mr. Ojeda-Sierra concedes that his argument is foreclosed for the time being by Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998), see Aplt's Br. at 3-4, but seeks to preserve his argument for review by the Supreme Court in anticipation that Almendarez-Torres will be overruled. He has done so. "Nevertheless, Almendarez-Torres has not been overruled and directly controls

our decision in this case.” United States v. Dorris, 236 F.3d 582, 587 (10th Cir. 2000), cert. denied, 121 S. Ct. 1635 (2001).

Accordingly, we AFFIRM Mr. Ojeda-Sierra’s sentence.

Entered for the Court,

Robert H. Henry
Circuit Judge