

UNITED STATES COURT OF APPEALS

JUL 28 2003

TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCO ANTONIO BARRERA-
BASILIO,

Defendant - Appellant.

No. 02-1455
(D. Ct. No. 02-CR-178-B)
(D. Colorado)

ORDER AND JUDGMENT*

Before **TACHA**, Chief Circuit Judge, **McKAY** and **McCONNELL**, Circuit Judges.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Marco Antonio Barrera-Basilio pled guilty to one count of unlawful reentry into the United States after having previously been deported, in violation of 8

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This 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.

U.S.C. § 1326(a) and (b)(1). The district court sentenced him to 30 months imprisonment, the minimum sentence within the applicable guideline range under the United States Sentencing Guidelines. Mr. Barrera-Basilio now appeals the district court's refusal to grant him a downward departure. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and DISMISS the appeal.

On appeal, Mr. Barrera-Basilio's counsel filed an *Anders* brief and moved to withdraw as appellate counsel. *See Anders v. California*, 386 U.S. 738, 744 (1967) (counsel who considers an appeal to be wholly frivolous should advise the court of that fact, request permission to withdraw from the case, and submit a brief to the court and to his or her client referring to portions of the record that arguably support the appeal). In the *Anders* brief, counsel argues that Mr. Barrera-Basilio's sentence was not imposed contrary to the law, as a result of an incorrect application of the Sentencing Guidelines, or in excess of the applicable Guideline range, and that Mr. Barrera-Basilio's appeal is therefore wholly without merit. Mr. Barrera-Basilio was given an opportunity to respond on the merits but did not file a response.

After fully examining the proceedings as required by *Anders*, we conclude that Mr. Barrera-Basilio's appeal is indeed without merit. Moreover, we lack jurisdiction to review a district court's failure to depart downward in sentencing absent a claim that the court misunderstood its authority to depart. *United States*

v. Coddington , 118 F.3d 1439, 1441 (10th Cir. 1997). We find no such misunderstanding on the part of the district court in this case. The transcript of defendant's sentencing hearing includes the sentencing court's thorough discussion of its discretionary authority to depart from the guidelines and its reasons for declining to exercise that authority.

For the foregoing reasons, counsel's motion to withdraw is GRANTED and Mr. Barrerra-Basilio's appeal is DISMISSED.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Chief Circuit Judge