

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

DEC 20 2007

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALEJANDRO MERCADO-TAPIA, a.k.a.  
Alejandro T Mercado,

Defendant - Appellant.

No. 06-10673

D.C. No. CR-04-02019-DCB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
David C. Bury, District Judge, Presiding

Argued and Submitted December 6, 2007  
San Francisco, California

Before: BRIGHT,\*\* FARRIS, and THOMAS, Circuit Judges.

Alejandro Mercado-Tapia pled guilty to illegal re-entry after deportation under 8 U.S.C. § 1326. He appeals (1) the district court's denial of his motion to withdraw his guilty plea and (2) his sentence.

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

\*\* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

“Prior to sentencing, a defendant can withdraw his guilty plea only by showing a fair and just reason for withdrawal.” *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003) (citing Fed. R. Crim. P. 11(d)(2)(B)). Fair and just reasons include “inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason . . . that did not exist when the defendant entered his plea.” *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004).

The court did not abuse its discretion in denying Mercado Tapia’s motion. It found as fact that the plea “colloquy was adequate and fair under the rules, that Mercado-Tapia understood the nature of the charge, that the sentencing guidelines would apply, but the Court could sentence above or below those sentencing guidelines . . . [and] he understood that the sentence could be up to 20 years maximum.” These findings of fact were not clearly erroneous. At the change of plea hearing on January 18, 2006, Mercado-Tapia answered under oath that he understood the charge against him, that he understood that the guidelines could be applied to his case, and that the judge could go higher or lower than the guidelines. From Mercado-Tapia’s own sworn statements, the judge could have reasonably

concluded that Mercado-Tapia understood his charge and understood what his sentence might entail.

The district court's determination is bolstered by the record, which shows that (1) Mercado-Tapia received a thorough Rule 11 hearing, which "is strong evidence that the defendant comprehended the plea agreement," *Nostratis*, 321 F.3d at 1209 (citations omitted), and (2) Mercado-Tapia waited for seven months after pleading guilty, until the day he was to be sentenced, to move to withdraw his plea, *see United States v. Navarro-Flores*, 628 F.2d 1178, 1184 (9th Cir. 1980) (an unexplained delay suggests that the "withdrawal was intended to serve a different purpose than that avowed . . .").

## II

Mercado-Tapia challenges the manner in which his criminal history score was calculated arguing that (1) he was not represented by counsel during two of his misdemeanor convictions and, therefore, these convictions should not have been counted, and (2) four of his misdemeanor sentences were related and thus should have been counted as one misdemeanor sentence.

Under *Nichols v. United States*, 511 U.S. 738, 749 (1994), a sentencing court may rely on a valid un-counseled misdemeanor conviction that did not result in a sentence of imprisonment to increase the defendant's criminal history score. The

record indicates that Mercado-Tapia's two un-counseled convictions were misdemeanors that did not result in imprisonment, and Mercado-Tapia has failed to present any evidence to the contrary. The district court did not err in considering these convictions.

Mercado-Tapia's argument that four of his misdemeanor sentences were related also fails. While sentences imposed in related cases should be treated as one sentence, U.S. Sentencing Guidelines Manual §4A1.2(a)(2) (2006), "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S. Sentencing Guidelines Manual §4A1.2 cmt. n.3.<sup>1</sup> The pre-sentence report shows that the four sentences in question resulted from four separate arrests. The district court did not err in counting Mercado-Tapia's four misdemeanor sentences as separate sentences, nor did it err by relying on the pre-sentence report to reach this conclusion. *See United States v. Ellsworth*, 456 F.3d 1146, 1152 (9th Cir. 2006).

Further, even if the disputed criminal history points were removed, Mercado-Tapia would still fall well within Criminal History Category VI.

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<sup>1</sup> Sentencing Guideline §4A1.2 application note 3 was replaced in the 2007 amendments.

### III

Mercado-Tapia argues that his sentence was unreasonable because the judge did not consider the required factors under 18 U.S.C. § 3553(a). To comply with *United States v. Booker*, 543 U.S. 220 (2005), the district court must show that it considered the factors listed in § 3553(a), although it need not make “a specific articulation of each factor separately.” *United States v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir. 2006). Our review of the record satisfies us that the district court complied with this requirement.

**AFFIRMED.**