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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>JUAN DE DIOS MEDINA- HERNANDEZ,</p> <p>Defendant - Appellant.</p>
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No. 06-10536

D.C. No. CR-03-00083-LRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted July 22, 2008**

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

Juan de Dios Medina-Hernandez appeals from the 77-month sentence imposed on resentencing following his guilty-plea conviction for unlawful reentry

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

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

by a deported, removed and/or excluded alien, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Medina-Hernandez contends that, at resentencing, the district court treated the Guidelines range as the presumptive sentence and failed to consider the factors set forth in 18 U.S.C. § 3553(a). We conclude that the district court did not commit procedural error and that the sentence imposed is substantively reasonable. *See Gall v. United States*, 128 S. Ct. 586, 598-602 (2007); *United States v. Carty*, 520 F.3d 984, 994-95 (9th Cir. 2008) (en banc).

Medina-Hernandez also contends that the district court erred under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by enhancing his sentence beyond two years based on facts not alleged in the indictment, admitted, or proven to a jury beyond a reasonable doubt. We conclude that any *Apprendi* error was harmless. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751-56 (9th Cir. 2007). Medina-Hernandez's contentions regarding the continuing viability of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), are foreclosed. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir. 2006).

AFFIRMED.