

JAN 18 2008

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

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN PAUDENCIO-CASTANEDA,

Defendant - Appellant.

No. 06-50642

D.C. No. CR-05-02291-TJW

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Martin Paudencio-Castaneda appeals from his sentence of 21 months in prison and three years of supervised release for being a deported alien found in the

* 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).

United States, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Paudencio-Castaneda contends that the district court erred by making factual findings concerning the date of removal in order to increase his sentence pursuant to 8 U.S.C. § 1326. We conclude that there was error, but it was harmless. *See United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006).

Paudencio-Castaneda also contends that the district court violated his Sixth Amendment rights by imposing a sentence above the advisory Guidelines range of 6-12 months pursuant to U.S.S.G. § 2L1.2 based on facts that were neither found by a jury nor admitted by him. This contention lacks merit. *See United States v. Booker*, 545 U.S. 220, 233 (9th Cir. 2005).

In addition, Paudencio-Castaneda contends that it was error for the district court to increase his sentence pursuant to 8 U.S.C. § 1326(b) because the indictment did not allege that he was previously removed subsequent to his prior conviction. We conclude there was error, but it was harmless. *See United States v. Salazar-Lopez*, 506 F.3d 748, 751-55 (9th Cir. 2007).

The Government's motion to supplement the record is denied.

AFFIRMED.