

JAN 24 2008

CATHY A. CATTERSON, CLERK
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NOT FOR PUBLICATION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>LUIS MADRIGAL-ESPINOZA, a.k.a. Sergio Carlon,</p> <p>Defendant - Appellant.</p> |
|--|

No. 05-30557

D.C. No. CR-05-06006-LRS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Submitted January 14, 2008**

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

Luis Madrigal-Espinoza appeals from the 57-month sentence imposed following his guilty-plea conviction for being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326, and making a false claim to United

* 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).

States citizenship, in violation of 8 U.S.C. § 911. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate the sentence and remand for resentencing.

Madrigal-Espinoza contends that, under the doctrine of constitutional avoidance, § 1326 should be construed to require proof beyond a reasonable doubt that he was deported subsequent to his prior felony conviction. He also contends that the district court engaged in impermissible judicial fact-finding in violation of the Fifth and Sixth Amendments when it found that he was removed subsequent to his prior conviction. These contentions are foreclosed and belied by the record. *See United States v. Grisel*, 488 F.3d 844, 846-47 (9th Cir. 2007) (en banc); *see also United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1094 (9th Cir. 2007).

Madrigal-Espinoza's contention that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), has been overruled is foreclosed by *United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

Finally, we agree that the district court erred by assessing one criminal history point for Madrigal-Espinoza's 2003 conviction for driving with a suspended license and his 2005 conviction for false reporting because both offenses resulted in wholly suspended sentences. *See United States v. Gonzales*, 506 F.3d 940, 943-45 (9th Cir. 2007) (en banc). Accordingly, we vacate the sentence and remand for re-sentencing consistent with *Gonzales*. *See id.*

All pending motions are denied.

Sentence VACATED and REMANDED.