

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 11 2007

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS ANGEL GARCIA,

Defendant - Appellant.

No. 06-50582

D.C. No. CR-06-00221-LAB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted October 16, 2007
Pasadena, California

Before: FERNANDEZ and WARDLAW, Circuit Judges, and COLLINS**,
District Judge.

Jesus Angel Garcia, a citizen of Mexico, petitions for review of the district

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

court's denial of his motion to dismiss the indictment against him and the district court's subsequent imposition of an eighty-four month sentence. We deny the petition.

We review de novo the denial of a collateral attack on a prior deportation order based on alleged due process defects. United States v. Velasco-Medina, 305 F.3d 839, 847 (9th Cir. 2002). An attack based on a sentence violating Apprendi v. New Jersey, 530 U.S. 466 (2000) is also reviewed de novo. United States v. Smith, 282 F.3d 758, 771 (9th Cir. 2002).

A defendant collaterally attacking a deportation order must show: (1) exhaustion of remedies; (2) deprivation of an opportunity for judicial review; and (3) that the entry of the removal order was "fundamentally unfair." 8 U.S.C. § 1326(d). A removal process is "fundamentally unfair" if (1) the alien's due process rights were violated by defects in his removal hearing, and (2) he suffered prejudice. United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004).

Garcia's due process rights were violated in his 1994 deportation hearing because the waiver of his right to counsel was obtained through a mass waiver and thus there is no showing that his individual waiver was considered and intelligent. United States v. Ahumada-Aguilar, 295 F.3d 943, 949 (9th Cir. 2002). However, Garcia has failed to show any error in his subsequent 1997 deportation. Garcia

claims that 1997 deportation hearing was invalid due to the invalidity of his first 1994 deportation. However, Garcia effectively waived both his right to counsel and his right to appeal during the 1997 deportation hearing. Because the 1997 deportation is sufficient to sustain his conviction, Garcia has suffered no prejudice as a result of the errors in his 1994 deportation.

The district court also correctly applied the twenty-year statutory maximum under 8 U.S.C. § 1326(b)(2) as opposed to the two-year statutory maximum of 8 U.S.C. § 1326(a). Garcia is correct that the indictment's failure to specify the date of his removal was Apprendi error. United States v. Salazar-Lopez, No. 06-50438, slip op. 14167, 14172–73 (9th Cir. Oct. 24, 2007). However, Garcia pled to his dates of conviction and deportation, so the Apprendi error was harmless. Id. at 14179.

AFFIRMED.