

DEC 13 2007

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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NOT FOR PUBLICATION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>FRANCISCO NAVARRO,</p> <p>Defendant - Appellant.</p>

No. 06-50618

D.C. No. CR-05-1642-J

MEMORANDUM*

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

Argued and Submitted October 16, 2007
Pasadena, California

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

Francisco Navarro appeals the district court’s decision that he was not safety-valve eligible. Navarro did not waive his ability to appeal safety-valve eligibility in his plea agreement because that appellate waiver was contingent on

* 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.

Navarro's safety-valve eligibility.

We review a district court's interpretation of the Sentencing Guidelines de novo and its application of the Sentencing Guidelines to the facts for abuse of discretion. *United States v. Kilbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005).

The district court improperly awarded Navarro three criminal history points. A sentence for a misdemeanor listed under U.S.S.G. § 4A1.2(c)(1) counts as a criminal justice sentence only if the term of probation actually imposed is more than one year. *See U.S. v. Gonzalez*, No. 04-30007, slip op. 14589 (9th Cir. Nov. 5, 2007) (en banc). At the time of his arrest, Navarro was serving a three year probation sentence for driving without a license imposed by the state court. However, at the time of the sentencing the state court had terminated the sentence *nunc pro tunc* to the day before he was arrested. As a result of the *nunc pro tunc* order, Navarro received only six-month probation for driving without a license. A six month probation sentence for driving without a license is not a criminal justice sentence. *See* U.S.S.G. § 4A1.2(c)(1)(A). Therefore, Navarro never served a countable criminal justice sentence and hence could not commit the instant offense under a criminal justice sentence. *See* U.S.S.G. § 4A1.1(d). As such, Navarro should have been awarded zero criminal history points and found safety-valve eligible.

Therefore, we **VACATE** Navarro's sentence and **REMAND** to the district

court for resentencing.