

DEC 18 2007

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NOT FOR PUBLICATION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.

JOSE ANGEL CERVANTES-
SANTANA,

Defendant - Appellant.

No. 05-30435

D.C. No. CR-05-02018-LRS

MEMORANDUM*

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

Submitted December 3, 2007**

Before: GOODWIN, WALLACE, and FISHER, Circuit Judges.

Jose Angel Cervantes-Santana appeals from the 30-month sentence imposed following his guilty-plea conviction for being an alien in the United States after

* 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).

deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we vacate and remand.

Cervantes-Santana contends that the district court erred by assessing one criminal history point for his 1993 conviction for driving with a suspended license which resulted in a wholly suspended sentence. In light of recent clarifying law, we agree. *See United States v. Gonzales*, No. 04-30007, 2007 WL 3244006, at *2-3 (9th Cir. Nov. 5, 2007) (en banc). We further conclude that this error was not harmless. *See United States v. Alvarez-Hernandez*, 478 F.3d 1060, 1067-68 (9th Cir. 2007). Accordingly, we vacate the sentence and remand for re-sentencing consistent with *Gonzales*. *See Gonzales*, 2007 WL 3244006, at *2-3.

Cervantes-Santana next contends that the district court erred by increasing his sentence pursuant to 8 U.S.C. § 1326(b)(2) based on a prior conviction that he did not admit, and a jury did not find beyond a reasonable doubt. As he concedes, this contention is foreclosed. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

VACATED and REMANDED.