



TATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 01-2166

UNITED STATES OF AMERICA,

Appellee,

Vs.

ZENAIDO VASQUEZ,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

HONORABLE ROBERT PRATT

APPELLANT'S BRIEF AND ADDENDUM

JAMES A. BENZONI
BENZONI & MAINS, P.L.C.
2912 Beaver Avenue
Des Moines, Iowa 50310
Telephone (515) 271-5730

FAX: (515) 271-5757

ATTORNEY FOR APPELLANT

SUMMARY OF THE CASE

The case is an appeal to the United States Court of Appeals for the Eighth Circuit from a Judgment and Sentence entered on May 2, 2001, by the United States District Court for the Southern District of Iowa. Zenaido Vasquez pled guilty to one count of illegal reentry after deportation for a felony in violation of 8 U.S.C. § 1326 (a) and 1326 (b) (2).

Attorney James A. Benzoni, attorney for the defendant, filed a timely Application and Notice of Appeal seeking a remand for re-sentencing on May 11, 2001. Mr. Vasquez bases his appeal on the ground that the Court abused its discretion under the United States Sentencing Guidelines by not considering the unfavorable burdens he will suffer within the Bureau of Prisons system as a result of his status as a deportable alien.

REQUEST FOR ORAL ARGUMENT

Due to the unique questions presented by the issue to the court, Mr. Vasquez respectfully requests the court allow ten (10) minutes for oral argument.

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PRELIMINARY STATEMENT

This is an appeal from a Judgment and Sentence by the United States District Court for the Southern District of Iowa, Judge Robert Pratt presiding, for denying as a matter of law a one-level downward departure for alienage under U.S.S.G. § 5K2.0 in Zenaido Vasquez's sentence. Jurisdiction of the United States District Court for the Southern District of Iowa is provided by criminal provision 18 U.S.C. § 3231. Mr. Vasquez timely filed a Notice of Appeal to the United States Court of Appeals for the 8th Circuit on May 11, 2001.

STATEMENT OF THE ISSUE

- I. WHETHER THE SENTENCING COURT ERRED IN DENYING AS A MATTER OF LAW DEFENDANT'S MOTION TO DEPART DOWNWARD.

CASES:

STATUTES:

STATEMENT OF THE CASE

NATURE OF THE CASE:

This case is an appeal to the United States Court of Appeals for the Eighth Circuit from a Judgment and Sentence entered on May 2, 2001 by the United States District Court for the Southern District of Iowa, arising from the District Court's declination to grant a downward departure for defendant's alienage.

COURSE OF PROCEEDINGS:

On January 23, 2001 Mr. Vasquez pled guilty to the charge of illegal reentry after deportation for a felony. (Clerk's Minutes, May 2, 2001). At sentencing, Mr. Vasquez requested a one level downward departure for disparate treatment with the Bureau of Prisons due to his alien status. (Clerk's Minutes, May 2, 2001). The court denied the one level downward departure as a matter of law. (Clerk's Minutes, May 2, 2001).

On May 11, 2001, attorney for defendant filed a notice of appeal on behalf of Mr. Vasquez.

STATEMENT OF THE FACTS

Zenaido Vasquez was previously convicted in California state court of sale/transportation/offer to sell controlled substance and possession for sale of controlled substance in 1995. He was sentenced to three years probation with the condition of 180 days in jail, \$200 restitution, and a \$50 fine. (Presentence

Investigation Report, p. 6). His parole was revoked on April 6, 1995, and he was subsequently deported on July 24, 1996. (Presentence Investigation Report, p. 6).

In February of 1997, Zenaido Vasquez returned to the United States. (Presentence Investigation Report, p. 3). He was arrested at an INS legal permanent resident interview after a fingerprint check showed his past record. (Presentence Investigation Report, pp. 3-4).

Mr. Vasquez has children, ages 18, 16, and 15. All three reside in Mexico. (Presentence Investigation Report, p. 9). He married to Teresa Ann Van Dyke Dale, an American citizen, on January 11, 1998. (Presentence Investigation Report, p. 9).

Mr. Vasquez received a 16 level upward adjustment for illegal entry after prior deportation for an aggravated felony. The base level for his offense was level 8. Accordingly, his criminal history is category III. Following his plea on the charge of illegal entry, the Court calculated his guideline level to be 21, with a criminal history category III, after a 3 level reduction for acceptance of responsibility. (Judgment in a Criminal Case, attached.)

At sentencing, Zenaido Vasquez applied for a one level downward departure under U.S.S.G. § 5K2.0, for circumstances not otherwise considered in the guidelines. The District Court, under Judge Robert Pratt, denied the downward departure as a matter of law. The Court ruled, pursuant to the U.S. v. Cardoza-Rodriguez, 241 F.3d

613 (8th Cir. 2001), the United States Sentencing Commission adequately considered the alienage of persons sentenced pursuant to U.S.S.G. § 2L1.2. Because Defendant's conviction in the present case was for an illegal alien entering the country, the Court ruled that the sentencing commission must have considered Defendant's alienage as a matter of course in adopting the sentencing guideline level appropriate to this case. Accordingly, the Court did not further consider Defendant's application for downward departure, other than to deny it as a matter of law.

On October 26, 2000, 37 year old Zenaido Vasquez was arrested for illegal reentry after deportation. Mr. Vasquez entered into a plea agreement with the government and pled guilty. The government agreed Mr. Vasquez was eligible for a two level reduction based on acceptance of responsibility, under § 3E1.1 (a), and a one level reduction for timely notification of his intent to plea guilty, under § 3E1.1(b).

The District Court found the total offense level with adjustments resulted in 21 with a criminal history category III, resulting in the Guideline Sentencing Range of 46 to 57 months. Mr. Vasquez was sentenced to 46 months, which he is currently serving, two years subsequent probation, and a \$100 mandatory assessment.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Eighth Circuit should remand the Sentence of the District Court, to allow consideration of an additional downward

departure for failure to consider defendant's alienage during sentencing.

Mr. Vasquez does not disagree with the presentence investigation report, except that he should get an additional one level downward departure for circumstances not contemplated by the Sentencing Guidelines. The district court denied Defendant's request for a one level downward departure as a matter of law, even though at least one Federal Circuit Court has held that the district court has legal discretion to depart downward because of the defendant's status as a deportable alien. See, e.g., United States v. Charry-Cubillos, 91 F.3d 1342 (9th Cir. 1996).

The defendant's situation was not adequately considered under the Sentencing Guidelines. Mr. Vasquez has an INS detainer as a deportable alien. He will be deported from the United States following his period of incarceration. As a result, Mr. Vasquez will be unable to participate in various Bureau of Prisons (BOP) programs. BOP programs include drug treatment programs, supervised release, or release to a halfway house. Participation in these programs may allow for a one year reduction in sentence, and/or an alleviation in conditions of confinement.

A court can depart from the applicable guideline range when it finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. §

3553 (b). Moreover, when a potential ground for departure is not mentioned in the guidelines, then the court must consider the structure and theory of applicable individual guidelines and the guidelines as a whole to decide whether the feature takes the case out of the heartland. U.S. v. Woods, 159 F.3d 1132, 1134 (8th Cir. 1998).

The defendant insists that his status as a deportable alien and his inability to participate and benefit from the Bureau programs removes his case from the “heartland.” See U.S.S.G. §5H & 5K. The proffered departure ground is not expressly forbidden, discouraged, or encouraged by the Sentencing Guidelines. United States v. Clase-Espinal, 115 F.3d 1054, 1057 (1st Cir.1997).

Finally, even in light of this Circuit’s decision in U.S. v. Cardoso-Rodriguez, 241 F.3d 613 (8th Cir. 2001), the Defendant argues that even if the Sentencing Commission did, by definition, consider alienage in framing the Guidelines for illegal reentry after deportation, there is no evidence that the Commission considered the post-sentencing treatment rendered by the Bureau of Prisons that results from alienage.

ARGUMENT

Standard of Review

The standard of review for this case is abuse of discretion. Koon v. United States, 518 U.S. 81,100 (1996).

I. WHETHER THE SENTENCING COURT ERRED IN DENYING AS A

MATTER OF LAW DEFENDANT'S MOTION TO DEPART
DOWNWARD.

A. Basic Caselaw and Argument

Mr. Vasquez accepted responsibility and timely notified the authorities of his intention to plea guilty. He received a three level downward adjustment for those reasons. Mr. Vasquez, however will be unable to serve the last 10% of his sentence in a minimum security facility because his status as a deportable alien makes him ineligible for more lenient confinement. See 18 U.S.C. § 3624 (c).

A prisoner in the BOP may serve the last part of his sentence in a community corrections center (CCC), or receive authorization to be transferred to home confinement. *Id.* In addition, the Bureau of Prison's Intensive Confinement Center (ICC) program provides inmates who have been sentenced to less than 60 months imprisonment, with the opportunity to serve their sentence in minimum security facilities and shorten their sentence by up to six months for completing a "boot camp" program. See Federal Bureau of Prisons, Program Statement 5390.07: Intensive Confinement Center Program, p.9 (May 28,1996).

Due to his alienage, Mr. Vasquez cannot participate in the Bureau drug treatment programs. Since he is unable to participate in the Bureau drug treatment programs, he must serve a harsher and longer sentence because of his INS detainer. Further, he will

lose the benefit of those programs, a penalty not exacted on non-alien. Under the Immigration and Naturalization Act, INA § 237 (a) (2) (A) (iii), 8 U.S.C. 1227 (a) (2) (A) (iii), Mr. Vasquez will be deported from the United States following his period of incarceration.

Defendant's sentence stands at 46 months. Mr. Vasquez's inability to participate in Bureau programs increases the severity of his punishment. A one level reduction in his sentence will allow a substantial portion of defendant's sentence to be reduced, and help ameliorate the overly harsh effects of BOP treatment due to his alienage.

Defendant's inability to participate in a drug treatment program will deny the defendant of the opportunity to reduce his sentence by one year. Mr. Vasquez's opportunity to be assessed for or benefit from the drug treatment program will be denied as a result of his status as a deportable alien. See *Federal Bureau of Prisons, Program Statement 5330.10: Drug Abuse Programs Manual, Inmate, ch. 6, p.3.*

Mr. Vasquez's case is different from other cases involving "1326" offenses, as Defendant argues his inability to receive Bureau drug treatment is a factor not adequately considered by the guidelines.¹ The district court in the instant case denied

¹The basis of the argument in United States v. Martinez-Ramos, 184 F.3d 1055, 1057 (1st Cir.1997), United States v. Gonzales-Portillo, 121 F.3d 122, 123 (7th Cir. 1997) was the defendant's inability to complete their sentences in a minimum security prison,

the departure as a matter of law. Furthermore, his opportunity to benefit from the Bureau programs is extinguished because of his alien status. This causes disparate treatment against defendants such as Mr. Vasquez because of their alien status.

Mr. Vasquez will be unable to be near his wife in Iowa as a result of the INS detainer and the inability to participate in the Bureau programs. This is a situation not contemplated under the sentencing guidelines. Mr. Vasquez cannot take advantage of the drug treatment programs, or partake in supervised release. This inability therefore denies him both the opportunity for drug treatment and for a one year reduction in his sentence.

In addition, the Bureau places deportees at specific holding facilities, continuing to restrict the defendant of his ability to be near his family. This is a substantial increase in the severity of the defendant's sentence as a result.

One purpose of the guidelines was to create as much uniformity as possible. The guidelines were essentially written with the unspoken assumption that the persons affected were U.S. citizens - without the additional burden of deportation and possible permanent separation from their loved ones. The circumstances, in the instant case, that defendant will face while with the BOP because of his deportable alien status, are circumstances not adequately addressed and taken into account in the sentencing

halfway house, or home confinement. They did not include the drug treatment program.

guidelines.

Sections 5H, 5K, and 2L1.2 of the Sentencing Guidelines, do not expressly forbid, discourage, or encourage such added burdens on deportable aliens. U.S.S.G. § 2L1.2 does not consider the factors involved in the instant case. Mr. Vasquez's case is different, unlike some cases involving "1326" offenses where defendants argued downward departure solely on the basis for their ineligibility to serve their sentences in a minimum security prison, halfway house, community confinement center, or on house arrest. See United States v. Martinez-Ramos, 184 F.3d 1055, 1057 (8th Cir. 1996); United States v. Gonzales-Portillo 121 F3d. 1122, 1123(7th Cir. 1997).

These cases do not specifically address the loss of drug treatment due to alienage, and the significant penalty that such loss in itself entails. It is well established that those who complete drug treatment are much more likely to be successful than those who are simply incarcerated.

There is a case authority supporting the proposition that the various hardships imposed upon a deportable alien are grounds permitting a downward departure. The Eighth Circuit has not directly addressed the question. However, in a closely related situation, the Eighth Circuit held in United States v. Cruz-Ochoa, 85 F.3d 325 (8th Cir. 1996), that the district court committed legal error by believing that it lacked the ability to depart downward on the basis of a deportable alien defendant's waiver and consent

to administrative deportation. Other circuits have addressed the situation more directly. In United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997), the Seventh Circuit held that the district court is “free to consider whether [the defendant’s] status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement” which would warrant a downward departure. See United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994) (“a downward departure may be appropriate where the defendant’s status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence”). Particular incidents of deportable alien status have also been found to be grounds for a downward departure. See United States v. Davoudi, 172 F.3d 1130, 1133-34 (9th Cir. 1999) (district court has power to depart downward because deportable aliens cannot receive home confinement under 18 U.S.C. §3625(c)); United States v. Bakeas, 987 F.Supp. 44, 51 (D.Mass. 1997) (departing downward because deportable alien status elevates security level); United States v. Ortega-Mendoza, 981 F.Supp. 694, 696 (D.D.C. 1997) (departing downward on both community confinement and security level grounds).

Courts are not unanimous in this area, however. Among cases holding that the collateral consequences which make deportable alien’s sentence more severe do not justify a downward departure are United States v. Nnanna, 7 F.3d 420, 422 (5th Cir. 1993); and United States v. Mendoza v. Lopez, 7 F.3d 1483, 1487 (10th Cir. 1993).

Mr. Vasquez submits, however, that authorities permitting downward departures on this ground are the more persuasive and should be followed here. First, as the Seventh Circuit noted in Farouil, the leading opinions denying downward departures based upon deportability predate Koon, and the case has broadened the scope of circumstances that a court may consider “unusual or exceptional” to justify a downward departure. Farouil, 124 F.3d at 847. Second, the Eighth Circuit’s willingness to consider a downward departure in Cruz-Ochoa suggests greater sympathy on the part of that court than others to the plight of deportable alien defendants. Accordingly, Mr. Vasquez asks this Court to find that a downward departure based upon his deportable alien status is not only permissible but warranted.

In United States v. Cruz-Ochoa, 85 F.3d 325 (8th Cir. 1996), this circuit held that “the district court had discretion to depart downward from the guidelines because of the defendant’s waiver and consent to deportation.” The Cruz-Ochoa case is indicative that the law of this circuit has acknowledged the substantial burden imposed on illegal aliens. See id. Consequently, such additional hardship as a deportable alien, places a substantial burden which is unwarranted on Mr. Vasquez. This substantial burden is not adequately considered by the guidelines.

B. Addressing U.S. v. Cardoso-Rodriguez, 241 F.3d 613 (8th Cir. 2001).

In United States v. Cardoso-Rodriguez, 241 F.3d 613 (8th Cir. 2001), this

Circuit found that alienage could not be considered by the judge as a factor “not adequately taken into consideration by the Sentencing Commission ...” in an illegal reentry case. 18 U.S.C. § 3553(b). The Court found that since alienage is an element of the crime of illegal reentry, the Commission “clearly took this factor into consideration.” Cardosa-Rodriguez, 241 F.3d. at 614. Although the United States will argue that this case controls, that case does not and should not preclude a departure for Mr. Vasquez.

This Court in Cardosa-Rodriguez found that, because the Commission considered by default deportable alien status in formulating the guidelines for illegal reentry sentencing, they must also have considered the adverse penal consequences of alien status. Id. But this confuses and combines two issues that are not one and the same. Alien status was necessarily considered in formulating the crime elements and sentencing guidelines for illegal reentry. It would be impossible to punish this crime if all elements of the offense were not included. But to extend this logic to say that because alienage status is a requisite of the crime, the Sentencing Commission considered the post-sentencing effects of BOP policy due to such alienage, is to infer a vast amount of study and consideration that there is simply no evidence the Sentencing Commission performed. Indeed, Cardosa-Rodriguez, failed to point out even one instance where the Guidelines Commission considered BOP treatment in

setting the guideline level for any crime.

Alien status as an element of a crime and the adverse affects *caused* by that alien status while actually in prison are two completely detached issues. That alien status is an element of a crime shows only that the Sentencing Guidelines Commission considered alienage when deciding on a reasonable starting point for punishment. It is not evident in logic, and there is no evidence in the Guidelines Commentary, that the Commission knew of or took any consideration of the treatment received after sentencing by the Bureau of Prisons. The Bureau of Prisons is an entirely different agency, in control at a different stage in the process. There is no evidence that the Sentencing Commission considered the kind of harshness that ensues once the power shifts from sentencing in the judicial system to actual application of punishment in the Bureau of Prisons.

The conspicuous absence of any discussion regarding disparate BOP treatment is further evidence that the issue was not fully considered by the Commission, when viewed in light of the statutory scheme. The very fact that section 3553(b) exists, is evidence that the Sentencing Commission recognized that there were certain aspects of individual cases that they could not adequately address in formulating the Guidelines.

The inclusion of the provision shows that the Commission intended these issues

to be considered by the sentencing judge in the search for justice and equity. The Commission was on notice that any issue not clearly evidenced as fully considered would be argued by numerous attorneys for consideration by the sentencing judge. Any factor the Commission viewed as important would be evidenced somewhere on the record. The failure of the Commission to mention the BOP treatment is evidence not that it was impliedly considered, but that it was in fact not considered at all.

Finally, the logical jump necessary to assume that the Commission considered BOP treatment, without evidence of such, requires activity unbecoming a frugal judiciary. Because the Sentencing Guidelines make no mention of disparate BOP treatment, assuming that such treatment was considered is essentially an attempt to read the minds of the Sentencing Commission. Judicial restraint dictates otherwise. The judiciary operates properly within its realm when it applies a statute as written and as can be clearly inferred from the purpose of the statute. But when the judiciary moves into the realm of guessing at the contents of administrative deliberation, and drawing connections which are logically attenuated at best, (as must be the case to find BOP treatment has been considered here), then the judiciary is usurping the function of the legislative body. Here, nothing in the statute tells the Court that the BOP treatment was considered in any manner. For the Court to assume that it was allows the Court to apply its own predilection instead of using cautious deference to the

quasi-legislative body in this most important realm.

The district court should have considered these substantial burdens not adequately considered in the guidelines and granted a downward departure.

CONCLUSION

Defendant Zenaido Vasquez was sentenced to 46 months in the Bureau of Prisons. His request for a one level downward departure under 5K2.0 was denied by the Court as a matter of law, based on the Court's reasoning that alienage was adequately considered in the sentencing guidelines for an illegal reentry by an alien.

However, the guidelines do not adequately consider the fact that Defendant is not eligible for the BOP drug treatment programs or other programs because of his alienage status. This is due to extra conditions of confinement placed upon aliens by BOP policy, and not on other inmates. This in turn deprives him of benefits other inmates under the BOP enjoy, including the benefit of drug treatment programs, and the consequent one year early release due to completion of such programs. This is an extremely important benefit. Numerous other programs, such as halfway house or community corrections are not available as well.

This circumstance is not one that was adequately considered by the Guidelines Sentencing Commission. It takes this case out of the heartland of cases covered by the guidelines. The District Court should have granted a one level downward

departure.

Defendant Mr. Vasquez respectfully requests that the United States Court for the Eighth Circuit remand this case to the district court for re-sentencing.

Respectfully submitted,

James A. Benzoni
2912 Beaver Avenue
Des Moines, Iowa 50310
(515) 271- 5730
FAX (515) 271-5757

CERTIFICATE OF SERVICE

I certify that I mailed two copies of this brief and a 3 ½ inch computer diskette containing the full document to Ed Kelly, Attorney for Appellee, United States Attorney's Office, United States Courthouse Annex, Suite 286, 110 East Court Avenue, Des Moines, Iowa 50309- 2053 on _____. The diskette has been scanned for viruses using McAfee Virus software, and the scan showed the diskette is virus free.

James A. Benzoni

CERTIFICATE OF FILING

I certify that I filed ten copies of this brief and a 3 ½- inch computer diskette containing the full document to the Clerk of the United States Court of Appeals, 511 United States Court and Custom House, 114 Market Street, St. Louis, MO 63101 by sending it via Federal Express on _____. The diskette has been scanned using McAfee Virus software, and that scan showed the diskette is virus- free.

James A. Benzoni

CERTIFICATE OF COMPLIANCE

I, James A. Benzoni, attorney for Appellant, certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 (a)(7)(B). The brief uses a proportionally spaced face, 14 point Times New Roman font.

James A. Benzoni

COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Brief and Addendum was the sum of \$_____.

James A. Benzoni