



NO. 01-2302

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,

vs.

JOSE MANUEL GARCIA-GARCIA,
Appellant.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HONORABLE RICHARD G. KOPF, JUDGE,
UNITED STATES DISTRICT COURT

BRIEF OF APPELLANT
(Filed pursuant to Anders v. California)

JOSE MANUEL GARCIA-GARCIA, Appellant,

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SUMMARY AND WAIVER OF ORAL ARGUMENT

Jose Manuel Garcia-Garcia appeals his sentence for illegal reentry into the United States following a prior deportation. Taking into account Mr. Garcia-Garcia's offense and prior convictions under the sentencing guidelines, the district court assigned Mr. Garcia-Garcia a total offense level offense level of 21 and a criminal history category of VI, yielding a guideline range of 77 to 96 months. Mr. Garcia-Garcia had no objections to these calculations, but did argue that he had demonstrated an extraordinary recognition and affirmative acceptance of responsibility which removed his case from the heartland of illegal reentry cases, warranting a downward departure from the applicable guideline range. Despite this plea for downward departure, the district court sentenced Mr. Garcia-Garcia to 77 months imprisonment.

Mr. Garcia-Garcia requests that this court vacate his sentence. However, because Mr. Garcia-Garcia believes that the issues in this appeal can be resolved on the basis of the briefs and record alone, Mr. Garcia-Garcia does not request oral argument.

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JURISDICTIONAL STATEMENT

1. Jose M. Garcia-Garcia appeals from the judgment including sentence imposed by the Honorable Richard G. Kopf, Chief United States District Judge for the District of Nebraska, following Mr. Garcia-Garcia's guilty plea. The case number below is 8:00CR325.

2. Federal jurisdiction over the subject matter of this case is proper pursuant to 18 U.S.C. § 3231 and 8 U.S.C. § 1326.

3. The United States Court of Appeals for the Eighth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which provides for jurisdiction over a final order subject to appeal, and 18 U.S.C. § 3742, which provides for review of a federal sentence.

4. The judgment and sentence were entered on May 22, 2001. Mr. Garcia-Garcia filed a timely notice of appeal on May 29, 2001.

STATEMENT OF THE ISSUE

- I. WHETHER THE DISTRICT COURT ERRED IN DENYING GARCIA-GARCIA A DOWNWARD ADJUSTMENT FOR AN EXTRAORDINARY ACCEPTANCE RESPONSIBILITY ATYPICAL OF ILLEGAL RE-ENTRY CASES.

Koon v. United States, 518 U.S. 31 (1996)

United States v. Loud Hawk, 245 F.3d 667 (8th Cir. 2001)

United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992)

United States v. Williams, 74 F.3d 872 (8th Cir. 1996)

18 U.S.C. § 3551

U.S.S.G. § 3E1.1

STATEMENT OF THE CASE

Jose M. Garcia-Garcia was indicted for illegal reentry into the United States following deportation, a violation of 8 U.S.C. § 1326. Pursuant to a plea agreement, Mr. Garcia-Garcia pled guilty to the charge. In return, the government agreed to make no recommendation to the court as to the defendant's sentence within the United States Sentencing Guideline, unless the defendant was successful in moving for downward departure.

After Mr. Garcia-Garcia entered his guilty plea, a Presentence Investigation Report ("PSR") was prepared for sentencing. The PSR assigned Mr. Garcia-Garcia an offense level of 8 under U.S.S.G. § 2L1.2, but then subtracted three levels for his acceptance of responsibility. Mr. Garcia-Garcia's criminal record amounted to 16 criminal history points, which placed him in criminal history category VI. As such, Mr. Garcia-Garcia's guideline range was 77 to 96 months imprisonment.

Mr. Garcia-Garcia did not object to the PSR, but did request that the district court depart downward for the reason that the facts of his case took it outside the heartland of cases in that the Mr. Garcia-Garcia had demonstrated extraordinary acceptance of responsibility, warranting departure under U.S.S.G. § 2K2.0 and § 3E1.1. The district did not grant Mr. Garcia-Garcia's request for downward departure,

sentencing Mr. Serrano-Sanchez to 77 months imprisonment. The district court's sentence forms the basis of this appeal.

STATEMENT OF FACTS

Mr. Garcia-Garcia was born in Valle Banderas, Nayarit, Mexico in 1954, and is the youngest of five children. (PSR ¶ 73) After receiving only a fifth grade education and working menial jobs, Mr. Garcia-Garcia began to travel between Mexico and the United States in the mid-1980s.

While in the United States, Mr. Garcia-Garcia developed a criminal record, including convictions for conspiracy to commit delivery of a controlled substance and possession with intent to deliver a controlled substance which are considered “aggravated felonies” under U.S.S.G. § 2L1.2(b)(1)(A). (PSR ¶¶ 30, 43, 45) Mr. Garcia-Garcia also came into contact with the Immigration and Naturalization Service (“INS”), which reportedly deported him six times between 1989 to 1994. (PSR ¶ 67-72) However, until now, Mr. Garcia-Garcia had never been prosecuted for his reentry into the country following his deportation.

With regard to the current incident, Mr. Garcia-Garcia was arrested on March 24, 2000 by the Hamilton County Sheriff’s Department on unrelated charges. (PSR ¶ 1) After sentencing, Mr. Garcia-Garcia was transferred to the State of Nebraska Lincoln County Probation Office, District 8 for supervision. (PSR ¶ 1) The probation officer believed Mr. Garcia-Garcia was in the United States illegally and Mr. Garcia-Garcia admitted as much to the probation officer. (PSR ¶ 1) On October 17, 2000,

INS was contacted and took Mr. Garcia-Garcia into custody. (PSR ¶ 1) The INS linked Mr. Garcia-Garcia to his previous deportations and discovered that he had not obtained permission to reenter the United States. (PSR ¶ 2) This evidence was presented to a grand jury, which indicted Mr. Garcia-Garcia for his illegal reentry. On November 22, 2000, Mr. Garcia-Garcia was arrested by the U.S. Marshal.

On January 29, 2001, Mr. Garcia-Garcia entered into a plea agreement with the United States. In exchange for Mr. Garcia-Garcia's plea of guilty, the government stipulated that Mr. Garcia-Garcia notified the government of his intent to enter the guilty plea, provided he demonstrated acceptance of responsibility to the probation office and the Court. (PSR ¶ 6) Further, the government agreed to make no recommendation regarding Mr. Garcia-Garcia's sentence, unless the defendant successfully moved for downward departure. (PSR ¶ 6). The judge then set the case for sentencing and ordered that a presentence report be prepared.

In accordance with § 2L1.2 of the Sentencing Guidelines, the probation office assigned a base offense level of 8, and then added sixteen levels for Mr. Garcia-Garcia's earlier aggravated felony convictions. (PSR ¶ 30) After adjusting for Mr. Garcia-Garcia's acceptance of responsibility, Mr. Garcia-Garcia's total base offense level was 21. (PSR ¶ 31) Mr. Garcia-Garcia's prior convictions placed him in criminal

history category VI. Accordingly, Mr. Garcia-Garcia's guideline range was 77 to 96 months imprisonment. (PSR ¶ 79)

Mr. Garcia-Garcia did not object to the PSR, so the district court adopted the information contained in the report as its findings of fact. (Sent. Tr. 4-5)¹ Mr. Garcia-Garcia filed a motion for downward departure from the sentencing guidelines based upon the facts removing his case from the heartland of cases and for extraordinary acceptance of responsibility. Specifically, Defense counsel argued that Mr. Garcia-Garcia knew that he faced arrest for illegal reentry the next time he reported to his probation officer as required, but, nevertheless, he did report to his probation officer and was arrested. (Sent. Tr. 5) Counsel pointed out that Mr. Garcia-Garcia, knowing he faced deportation, could have assumed another identity and fled, however, Mr. Garcia-Garcia accepted responsibility; doing more than a normal person in the same situation would have done. (Sent. Tr. 5-6) Counsel also noted that although Mr. Garcia-Garcia had illegally entered the country before, he had never been prosecuted for reentering but had instead always been deported. (Sent. Tr. 8) For these reasons, Mr. Garcia-Garcia urged the court to downward depart from the applicable guideline

¹"Sent. Tr." refers to the transcript of Mr. Garcia-Garcia's sentencing hearing held on May 22, 2001.

range. (Sent. Tr. 9) Finally, Mr. Garcia-Garcia apologized for his actions. (Sent. Tr. 11)

Despite these arguments, the district court was not sympathetic to Mr. Garcia-Garcia's request for downward departure given Mr. Garcia-Garcia's criminal history and prior deportations. (Sent. Tr. 9) The district court sentenced Mr. Garcia-Garcia to 77 months imprisonment, the lowest possible sentence within the guideline range. Mr. Garcia-Garcia appeals.

SUMMARY OF THE ARGUMENT

Mr. Garcia-Garcia argues that the judge abused his discretion in not granting his request for downward departure and sentencing him to 77 months imprisonment. Mr. Garcia-Garcia contends that, in light of his background, the fact that this is his first conviction for illegal reentry, and the fact that he continued to report to his probation officer even after the probation officer advised Mr. Garcia-Garcia that he was in the country illegally, the sentence imposed by the court was simply too severe for his crime. Mr. Garcia-Garcia believes that the court should have granted his request for downward departure based upon the facts of the case being outside the heartland of cases in which acceptance of responsibility reduction is granted.

STANDARD OF REVIEW

When review of a federal sentence is available, this Court reviews the district court's interpretation of the sentencing guidelines *de novo*, and the factual findings supporting its sentencing conclusions for clear error. *United States v. VanBrocklin*, 115 F.3d 587 (8th Cir. 1997).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING GARCIA-GARCIA A DOWNWARD ADJUSTMENT FOR EXTRAORDINARY ACCEPTANCE OF RESPONSIBILITY ATYPICAL OF ILLEGAL RE-ENTRY CASES.

A defendant who has been found guilty of a federal offense must be sentenced in accordance with the Federal Sentencing Guidelines. 18 U.S.C. § 3551 *et seq.* These guidelines “establish a range of determinate sentences for categories of offenses and defendants according to various specified factors.” *Mistretta v. United States*, 488 U.S. 361, 368 (1989). The guidelines are binding on the district court, and greatly restrict a sentencing court's discretion. *Id.* A sentencing judge may depart from the guideline range only if the judge identifies extraordinary circumstances not adequately accounted for by the United States Sentencing Commission. *Koon v. United States*, 518 U.S. 31, 93 (1996).

Mr. Garcia-Garcia seeks reversal of his 77-month sentence on the grounds that it is too severe for his offense. He contends that his act of extraordinary acceptance of responsibility falls outside the heartland of illegal reentry cases and was not properly taken into account by the district judge. Moreover, Mr. Garcia-Garcia points out that he has never before served jail time for illegally reentering the United States. Therefore, to the extent that a sentence is designed to deter undesirable conduct, there is no reason to believe that a lower sentence will not adequately deter Mr. Garcia-Garcia from repeating this offense. *United States v. Rodriguez*, 979 F.2d 138, 139-40 (8th Cir. 1992) (no clear error in denying acceptance-of-responsibility reduction where defendant had history of repeated illegal reentries into the United States; noting “demonstrated propensity” to repeatedly commit same crime can be considered in evaluating present claim of contrition).

Mr. Garcia-Garcia did not object to the guideline range established by the PSR, however, which makes the district court’s adoption of that range fully acceptable in this circuit. *United States v. Montayne*, 996 F.2d 190, 192-93 (8th Cir. 1993) (in the absence of objection from a defendant, the district court may simply rely on the PSR). Mr. Garcia-Garcia filed a motion for a downward departure asking that the court go below the range for the reason that the facts of his case removed it outside the heartland of cases in which acceptance of responsibility reductions are granted.

Although Mr. Garcia-Garcia may simply believe that a lower sentence below the established range would be more appropriate, this court has no authority to review a sentence within the applicable guideline range. *See, e.g., United States v. Williams*, 74 F.3d 872, 872 (8th Cir. 1996) (sentence imposed within guideline range not reviewable). This court further lacks the power to review the district court's decision because the district court understood its power to depart. *United States v. Loud Hawk*, 245 F.3d 667, 670 (8th Cir. 2001); *United States v. Jones*, 145 F.3d 959, 965 (8th Cir. 1998). Nevertheless, Mr. Garcia-Garcia requests that this Court remand his case for the district court's imposition of a lower sentence.

CONCLUSION

For the reasons discussed, Mr. Garcia-Garcia respectfully requests that this Court vacate his sentence. However, the undersigned counsel concludes that there are no non-frivolous issues on appeal and requests permission to withdraw from representation pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988).

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B

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CERTIFICATE OF SERVICE

DAVID R. STICKMAN, after being first duly sworn states:

1. He is the attorney for Appellant herein.
2. On the ____ day of June, 2001, he served by prepaid, first class United States mail, two copies of the Brief of Appellant on Daniel Morris, Assistant United States Attorney, at 1620 Dodge Street, Suite 1400, Omaha, NE 68102-1506.

JOSE MANUEL GARCIA-GARCIA,
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CERTIFICATE OF COMPLIANCE

DAVID R. STICKMAN, after being first duly sworn, states:

1. The diskette accompanying the filing of the Appellant's Brief in this matter has been scanned for viruses and is virus-free.
2. Appellant's Brief in this matter is ___ pages in length, excluding the Certificate of Service and Certificate of Compliance, which complies with the page limit option found at Fed. R. App. P. 32(a)(7)(A).

3. Appellant's Brief in this matter was prepared using WordPerfect for Windows 6.1, with a 14-pt, proportionally-spaced Times New Roman font face, in compliance with Fed. R. App. P. 32 (a)(5).

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