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United States Court of Appeals for the Fifth Circuit

No. 22-50853
CONSOLIDATED WITH
No. 22-50860
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
June 20, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

AMADO ALVAREZ-ALVARADO,

Defendant—Appellant.

Appeals from the United States District Court
for the Western District of Texas
USDC Nos. 4:22-CR-235-1, 4:22-CR-417-1

Before HIGGINBOTHAM, GRAVES, AND HO, *Circuit Judges*.

PER CURIAM:[*]

Amado Alvarez-Alvarado appeals his conviction and sentence for illegal reentry into the United States, as well as the judgment revoking his term of supervised release for a prior offense. He has not briefed, and therefore has abandoned, any challenge to the revocation of supervised

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

release or his revocation sentence. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

First, Alvarez-Alvarado argues the district court erred in entering a judgment reflecting that his conviction was under 8 U.S.C. § 1326(b)(2) because none of his prior convictions were aggravated felonies. Because he did not raise this issue in the district court, our review is limited to plain error. *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *United States v. Rodriguez-Flores*, 25 F.4th 385, 387 (5th Cir. 2022). To show plain error, he must demonstrate there is a clear or obvious error that affects his substantial rights. *Puckett*, 556 U.S. at 135. If he makes this showing, we have discretion to correct that error but should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks and citation omitted). The Government agrees that the judgment is incorrect and moves to reform the judgment to reflect the correct statute of conviction, § 1326(b)(1).

Alvarez-Alvarado has a 2009 Nevada conviction for attempted burglary. The Nevada burglary statute does not require breaking as an element of burglary and does not require that the entry be forcible. *See State v. White*, 330 P.3d 482, 485 (Nev. 2014); NEV. REV. STAT. ANN. § 205.060(1) (2005). Because it does not require the use, attempted use, or threatened use of force, it is not a crime of violence under § 1101(a)(43)(F). *See* 18 U.S.C. § 16(a). The Nevada burglary statute also does not require unlawful or unprivileged entry and reaches more structures than generic burglary. *See* NEV. REV. STAT. ANN. § 205.060(1) (2005). For these reasons, it does not constitute generic burglary under § 1101(a)(43)(G) or an aggravated felony under § 1326(b)(2). *See Descamps v. United States*, 570 U.S. 254, 277 (2013) (holding that a very similar California burglary statute was non-generic burglary because it did not require breaking and entering);

see also Covarrubias-Sotelo v. Holder, 570 F. App'x 704, 704 (9th Cir. 2014); *United States v. Hiser*, 532 F. App'x 648, 648-49 (9th Cir. 2013).

Neither of Alvarez-Alvarado's other felony convictions qualify as aggravated felonies under § 1326(b)(2). Because his conviction for unauthorized absence constituting escape does not have as an element the use, attempted use, or threatened use of physical force against a person or property of another, *see* § 16(a), it does not constitute a crime of violence under § 1101(a)(43)(F) or an aggravated felony under § 1326(b)(2). *See* NEV. REV. STAT. ANN. § 212.095(1). Given that the attempted burglary and unauthorized absence convictions do not constitute aggravated felonies, his prior federal conviction for reentry of a removed alien does not constitute an aggravated felony. *See* § 1101(a)(43)(O). Therefore, based on a straightforward application of the caselaw, the district court's judgment stating that the conviction was under § 1326(b)(2) is plainly erroneous. *See Puckett*, 556 U.S. at 135; *Rodriguez-Flores*, 25 F.4th at 390. A conviction under § 1326(b)(2) carries collateral consequences because it "is itself an aggravated felony, rendering the defendant permanently inadmissible to the United States." *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017) (internal quotation marks, brackets, and citation omitted). Accordingly, we exercise our discretion to correct the error. *See Rodriguez-Flores*, 25 F.4th at 390-91.

Next, Alvarez-Alvarado argues § 1326(b) is unconstitutional because it permits a sentence above the otherwise applicable statutory maximum based on facts that are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. He acknowledges this argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), but seeks to preserve it for possible Supreme Court review. The Government moves for partial summary affirmance on this issue, and in the alternative, an extension of time to file an appellate brief.

Summary affirmance is proper where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Subsequent Supreme Court decisions such as *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not overrule *Almendarez-Torres*. *See United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019); *United States v. Wallace*, 759 F.3d 486, 497 (5th Cir. 2014). Thus, partial summary affirmance is appropriate. *See Groendyke Transp., Inc.*, 406 F.2d at 1162.

Accordingly, the Government's motion to reform the judgment is DENIED, and its alternative motion to remand the case to reform the judgment is GRANTED. The case is REMANDED to the district court for the limited purpose of reforming the judgment to reflect conviction and sentencing under § 1326(b)(1). Further, the Government's motion for partial summary affirmance is GRANTED, and its alternative motion for an extension of time to file a brief is DENIED. The judgments are otherwise AFFIRMED.

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission

of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence. or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.