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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 14, 2023
Lyle W. Cayce
Clerk

No. 22-50798
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RAMON UMBERTO CORTEZ-RODRIGUEZ,

Defendant—Appellant,

CONSOLIDATED WITH

No. 22-50801

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RAMON HUMBERTO CORTEZ-RODRIGUEZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 4:18-CR-910-1, 4:22-CR-90-1

Before HIGGINBOTHAM, STEWART, and SOUTHWICK, *Circuit Judges*.

PER CURIAM:[*]

Ramon Humberto Cortez-Rodriguez appeals the 96-month sentence he received following his guilty plea conviction for illegal reentry. Although he also appealed the revocation of his supervised release and the consecutive 14-month sentence imposed following revocation, he has abandoned any challenge to his revocation or revocation sentence by failing to brief it. *See United States v. Still*, 102 F.3d 118, 122 n.7 (5th Cir. 1996); *Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986).

Cortez-Rodriguez argues that the district court's application of a two-level sentencing enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 was error because the district court failed to make the requisite findings to support its application. He asserts that the Presentence Report's (PSR) finding that his testimony was untruthful and intended to mislead the jury was conclusional, that it did not identify any specific perjured testimony, and that the jury's guilty verdict does not automatically equate to a finding of perjury. Cortez further complains that the district court's general finding that he testified untruthfully was insufficient to encompass the necessary findings underlying a perjury determination as the court never specifically found that he willfully lied about a material matter, and he urges that it is not obvious from the record what the court believed he had lied about.

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

We assume without deciding that Cortez-Rodriguez's objection to the obstruction enhancement was sufficient to preserve his appellate arguments and thus that the district court's finding of obstruction is reviewed for clear error. *United States v. Mora-Carrillo*, 80 F.4th 712, 716 (5th Cir. 2023); *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020). "Where, as here, the finding hinges on the credibility of a witness, the district court's determination is given particular deference." *Mora-Carrillo*, 80 F.4th at 716 (internal quotation marks and citation omitted).

Although the district court did not make a specific finding of willfulness, it adopted the PSR, which made such a finding. *See Mora-Carrillo,* 80 F.4th at 717; *see also United States v. Perez-Solis*, 709 F.3d 453, 470 (5th Cir. 2013); *United States v. Miller*, 607 F.3d 144, 152 (5th Cir. 2010). Additionally, the materiality of Cortez-Rodriguez's untruthful testimony is obvious from the record. *See Mora-Carrillo,* 80 F.4th at 717. The district court disbelieved his testimony that he returned to the United States because he feared for his life in Mexico after his brother had been killed in 2008 and he had been stabbed in 2016 and that he did not tell arresting officers about his fear at the time of his arrest because he had told immigration officials about his fear at the time of his 2018 apprehension and those officials did nothing. His testimony that he previously told immigration officials about his fear and that the officials failed to act was refuted by the records and testimony the Government provided in rebuttal, which showed that he told immigration officials in 2018 that he had no fear of returning to Mexico and that he entered the United States to find work. Cortez-Rodriguez's untruthful testimony was material, as it was designed to establish or bolster a duress defense and to show his lack of intent to enter the United States illegally. *See United States v. Cabral-Castillo*, 35 F.3d 182, 187 (5th Cir. 1994); *see also Perez-Solis*, 709 F.3d at 470. Accordingly, the district court's obstruction finding encompassed the requisite factual predicates for a finding

of perjury, and the enhancement will be upheld. *See United States v. Dunnigan*, 507 U.S. 87, 95 (1993); *Mora-Carrillo,* 80 F.4th at 717.

Cortez-Rodriguez also challenges the constitutionality of 8 U.S.C. § 1326(b) in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As he concedes, that argument is foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See United States v. Pervis*, 937 F.3d 546, 553-54 (5th Cir. 2019).

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.