United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-3039 **September Term, 2013**

FILED ON: MAY 16, 2014

UNITED STATES OF AMERICA,
APPELLEE

v.

YARCY RAZO-NUNEZ,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cr-00056)

Before: GARLAND, *Chief Judge*; SRINIVASAN, *Circuit Judge*; and GINSBURG, *Senior Circuit Judge*.

J U D G M E N T

Upon consideration of the record from the United States District Court for the District of Columbia, the briefs submitted by the parties, and the oral argument held on May 2, 2014, the Court has determined the issues in this appeal do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and ADJUDGED that the sentence of the district court be vacated and the case be remanded to the district court for resentencing.

Appellant Yarcy Razo-Nunez has twice entered the United States unlawfully. The second entry violated the terms of the supervised release he was serving for the first entry. This gave rise to two proceedings: one for the second unlawful entry and one for violating the terms of his supervised release. This appeal is from the sentence for violating his supervised release. Razo-Nunez argues the record makes clear the district court based his sentence, at least in part, upon two misapprehensions.

First, Razo-Nunez contends the district court decided not to consider his status as a deportable alien, which status would make him ineligible for certain benefits in prison, because

the court was mistaken about which of the United States Sentencing Guidelines was at issue. Razo-Nunez correctly points out, and the Government concedes, that § 7B1 is the Guideline applicable to this case; that Guideline applies to all convicted persons who violate the terms of their supervised release. Razo-Nunez argues that when the district court considered his request for a downward adjustment based upon his status as a deportable alien, however, it thought the applicable Guideline was § 2L1.2, which is for the offense of unlawful re-entry, and so denied the request because the defendant's status as a deportable alien is inherent in that Guideline. He maintains this mistake is material because our decision in *United States v. Smith*, 27 F.3d 649 (1995), requires the district court at least to consider whether a deportable alien's sentence fairly accounts for the severity of the situation he will face in prison. The Government argues the district court did consider *Smith* and exercised its discretion to deny a departure. We think the record is clear that the district court denied Razo-Nunez's request for a *Smith* departure based not upon its discretion but upon the mistaken ground that the applicable Guideline applied only to deportable aliens.

Second, Razo-Nunez contends the district court thought his violation marked the third time he had unlawfully entered the United States; as he points out, it was in fact the second time. The Government argues that although the district court said "this is not the first or second time that he's entered illegally," Sentencing Tr. 18:15-16, Apr. 17, 2013, the court might have meant this was not the first or second offense committed by the defendant. The Government points to nothing in the record to support this speculation about the district court's understanding. Hence, we conclude the court meant what it said, which was a potentially material mistake of fact.

Because the record, fairly read, reveals the district court proceeded under the two misapprehensions Razo-Nunez has identified, and because these errors are plain and infected the district court's reasoning in determining his sentence, we conclude that Razo-Nunez must be resentenced based upon a correct understanding of both the considerations inherent to the Guideline applicable in his case and the number of times Razo-Nunez has entered the United States unlawfully.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Ken R. Meadows
Deputy Clerk