

June 22, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 04-50710  
Conference Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN PEDRO HIPOLITO-TREVINO,

Defendant-Appellant.

-----  
Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 2:03-CR-851-1-WWJ  
-----

Before WIENER, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:\*

Juan Pedro Hipolito-Trevino (Hipolito) appeals the 41-month sentence he received after pleading guilty to one count of illegal reentry into the United States after having been deported. See 8 U.S.C. § 1326.

Hipolito contends that his sentence violated due process and should have been limited to two years because his indictment failed to allege the prior drug-trafficking conviction. As he

---

\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

concedes, this contention is foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998).

Hipolito also contends that he is entitled to resentencing because the district court sentenced him under a mandatory application of the guidelines that has been prohibited by United States v. Booker, 125 S. Ct. 738, 756-57, 769 (2005). Because Hipolito did not raise this issue in the district court, we review for plain error. United States v. Valenzuela-Quevedo, 407 F.3d 728, 732 (5th Cir. 2005). Although there was an error under Booker, Hipolito fails to demonstrate that the district court would have imposed a different sentence under advisory guidelines. Id. at 733. He therefore fails to show that the error affected his substantial rights as is necessary under the plain-error standard. See id.; United States v. Mares, 402 F.3d 511, 521-22 (5th Cir. 2005), petition for cert. filed (Mar. 31, 2005) (No. 04-9517).

The judgment of the district court is AFFIRMED.