

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 8, 2006 *
Decided March 24, 2006

Before

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 05-3093

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ALEJANDRO GALICIA-CARDENAS,
Defendant-Appellee.

Appeal from the United States
District Court for the Eastern District
of Wisconsin

No. 05-CR-18

J.P. Stadtmueller, *Judge.*

No. 05-3486

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTELMO VEGA-LOPEZ,
Defendant-Appellant.

Appeal from the United States
District Court for the Western District
of Wisconsin

No. 05-CR-068-S

John C. Shabaz, *Judge.*

* These two cases were scheduled to be argued before our panel on February 8, 2006. On February 2, 2006, we vacated the arguments after concluding that they were unnecessary. Thus, the appeals are submitted on the briefs and the records. See Fed. R. App. P. 34(a)(2).

ORDER

We consolidate these two cases for decision because they raise the same issue. In the first case, Alejandro Galicia-Cardenas was charged in a single-count indictment alleging that he entered the United States without permission after having previously been deported following a 1994 conviction for an aggravated felony--second degree robbery in Los Angeles. Galicia-Cardenas entered a guilty plea to the charge in the Eastern District of Wisconsin. Vega-Lopez was charged with the same offense, but his aggravated felony was a 1997 conviction for possession of marijuana for sale, ironically (we assume) also in Los Angeles. He entered a guilty plea to the charge in the Western District of Wisconsin. Vega-Lopez appeals his sentence. The government appeals the sentence Galicia-Cardenas received.

Both judges in these post-Booker cases appropriately consulted the guidelines and treated them as advisory. Vega-Lopez's properly calculated guideline range was 27 to 33 months. The court imposed a sentence of 30 months. Galicia-Cardenas, who had a prior conviction for a crime of violence, fared worse under the guidelines as his properly calculated advisory range was 41 to 51 months. His sentence, however, was 27 months, 3 months less than the term Vega-Lopez received.

In sentencing Mr. Galicia-Cardenas, the judge concluded that because the Eastern District of Wisconsin has not implemented a fast-track program to prosecute illegal reentry cases, the use of such programs in other districts created an unwarranted sentencing disparity between Galicia-Cardenas and other immigration offenders. As a result, the judge adjusted Galicia-Cardenas's sentence downward the equivalent of 4 levels and arrived at the 27-month sentence. In sentencing Mr. Vega-Lopez, the district court declined to bestow a similar benefit on him because a fast-track program is not used in Wisconsin.

In 1994, the Southern District of California--a district which saw more than 600,000 arrests annually at its border with Mexico in the early 1990s--adopted an early disposition or "fast-track" program. See Alan D. Bersin, Reinventing Immigration Law Enforcement in the Southern District of California, 8 Fed. Sentencing Rep. 254 (1996). Soon, other "border" states followed suit with fast-track programs of their own.

In 2003, Congress formally approved the use of fast-track programs. As part of the "Prosecutorial Remedies & Other Tools to End the Exploitation of Children Today Act" (the "PROTECT Act"), Congress granted the Attorney General the sole authority to create and implement fast-track programs. See Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

Although the general goal of the PROTECT Act was to reduce downward departures, Congress directed the Sentencing Commission to promulgate a policy statement authorizing a departure of not more than 4 levels when a defendant resolved his case through a fast-track program authorized by the Attorney General.

In a decision issued yesterday, United States v. Martinez-Martinez, we rejected a claim that the defendant's 41-month sentence (the low end of the advisory guideline range) was unreasonable because Indiana does not have a fast-track program. We went on to observe, "Given Congress' explicit recognition that fast-track procedures would cause discrepancies, we cannot say that a sentence is unreasonable simply because it was imposed in a district that does not employ an early disposition program." By the same logic, we cannot say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program. Because Martinez controls these cases, we must affirm the sentence imposed in Vega-Lopez's case (he raises no other arguments suggesting that his sentence is unreasonable) and vacate the sentence Mr. Galicia-Cardenas received. Mr. Galicia-Cardenas must be resentenced without a credit for Wisconsin's lack of a fast-track program. Whether he deserves a sentence below the advisory guideline range based on other factors is left to the discretion of the district court.

IT IS SO ORDERED.