

June 7, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HUMBERTO FIERRO-RASCON,
a/k/a Fernando Ramirez, a/k/a
Humberto Fierro, a/k/a/ Humberto
Aragon-Rascon,

Defendant-Appellant.

No. 09-1127

(D.C. No. 08-CR-00245-WYD-1)

(D. Colo.)

ORDER AND JUDGMENT*

Before **KELLY, McKAY**, and **LUCERO**, Circuit Judges.

After examining defense counsel’s *Anders* brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

Appellant Humberto Fierro-Rascon, a federal prisoner represented by counsel, pled guilty to unlawfully reentering the country as a deported alien previously convicted of an aggravated felony. The district court denied

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appellant's motion for a downward departure from the sentencing guidelines and imposed a sentence of thirty-three months, at the bottom of the applicable guideline range. Appellant then filed a *pro se* notice of appeal and requested the appointment of counsel for his appeal. On appeal, appointed counsel has filed an *Anders* brief and motion to withdraw as counsel. *See Anders v. California*, 386 U.S. 738 (1967). Counsel concludes there are no potentially meritorious issues that may be raised on appeal.

As required by *Anders*, we have conducted a full examination of the record before us. *See id.* at 744. We agree with defense counsel that any potential issues regarding the effectiveness of Appellant's counsel should be raised in collateral proceedings, *see United States v. Brooks*, 438 F.3d 1231, 1242 (10th Cir. 2006), and the record reveals no other basis for an attack on the entry of Appellant's plea of guilty. As for the sentence imposed, the record indicates the district court was aware of its discretion to depart downward but determined a downward departure was not warranted in this case. Under these circumstances, we lack jurisdiction to review the court's denial of Appellant's motion for a downward departure. *See United States v. Sierra-Castillo*, 405 F.3d 932, 936 (10th Cir. 2005). The record also reveals no procedural defects in the district court's calculation of the applicable guideline range. Finally, as to the substantive reasonableness of Appellant's sentence, we agree with defense counsel that the record contains nothing that would rebut the presumption of

reasonableness attached to Appellant's within-guidelines sentence. *See United States v. Haley*, 529 F.3d 1308, 1311 (10th Cir. 2008).

After thoroughly reviewing the record on appeal, we conclude that Appellant has no non-frivolous grounds to raise on appeal. We therefore **GRANT** counsel's motion to withdraw and **DISMISS** the appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge