

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4183

UNITED STATES OF AMERICA

v.

FRANKLIN BENITO ROPER-PRICE,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 04-cr-00592)
District Judge: Honorable James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
September 27, 2007

Before: McKEE, BARRY and FISHER, *Circuit Judges*.

(Filed: September 28, 2007)

OPINION OF THE COURT

FISHER, *Circuit Judge*.

Following his deportation, Franklin Benito Roper-Price pleaded guilty to one count of illegal reentry into the United States in violation of 8 U.S.C. §§ 1326(a) and (b)(2). In August 2005, the District Court sentenced Roper-Price to 48 months

imprisonment, and he now challenges the enhancement of his sentence based on his prior aggravated felony conviction. He argues that his Fifth and Sixth Amendment rights were violated because the prior conviction was not charged as an element in the indictment, and because the Government did not prove the prior conviction to a jury beyond a reasonable doubt. As it was not improper for the District Court to use Roper-Price's prior aggravated felony conviction for enhancement purposes, we will affirm the sentence.

I.

Because we write only for the parties who are familiar with the factual context and the procedural history of the case, we set forth only those facts necessary to our analysis. Roper-Price was originally arrested on February 23, 1993, and later convicted for felony possession of a controlled substance. As a result, Roper-Price was deported on April 10, 2001.¹

Roper-Price was subsequently arrested by the Philadelphia Police Department on unrelated charges on August 26, 2004. As a result of this arrest and resulting fingerprint and identification analysis, his previous deportation was discovered. Consequently, Immigration and Customs Enforcement ("ICE") agents interviewed Roper-Price, and he admitted that he had previously been deported and that he walked across the Mexican border in 2002 to reenter the United States.

¹Roper-Price is a citizen of Panama.

On September 23, 2004, Roper-Price was charged with illegal reentry following deportation, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). That indictment also included a “Notice of Prior Convictions” that set forth the February 1993 conviction, and a “Notice of Additional Factors” that referenced the United States Sentencing Guidelines (“Guidelines”) § 2L1.2(b)(1)(A). *See* U.S.S.G. § 2L1.2(b)(1)(A).²

Roper-Price pleaded guilty on May 4, 2005. During his plea hearing, he admitted to the fact of his prior conviction of an aggravated felony, and was informed that this fact enhanced his maximum sentence from 2 to 20 years under 8 U.S.C. §§ 1326(a) and (b)(2).

Prior to the sentencing hearing, the United States Probation Office submitted a Presentence Investigation Report recommending a Guidelines range of 57 to 71 months. On August 24, 2005, the District Court sentenced Roper-Price to 48 months imprisonment and a three-year period of supervised release.³ The District Court explained that its below-Guidelines deviation was a result of Roper-Price’s extensive cooperation with the Government. This appeal followed.

II.

We exercise jurisdiction pursuant to 28 U.S.C. § 1291. We have jurisdiction to review the sentencing judgment of the District Court under 18 U.S.C. § 3742(a)(1). *See*

²This calculation included a 16-level enhancement pursuant to Guidelines § 2L1.2(b)(1)(A), because Roper-Price was previously deported after a felony conviction for a drug trafficking offense, of which the sentence exceeded 13 months.

³A \$100 fine and a \$100 special assessment were also included in the sentence.

United States v. Cooper, 437 F.3d 324, 327 (3d Cir. 2006). We review the District Court's interpretation of the Guidelines *de novo*. See *United States v. Pojilenko*, 416 F.3d 243, 246 (3d Cir. 2005).

III.

Roper-Price argues that the Constitution requires prior convictions that enhance the statutory penalty of a crime be treated as elements of that crime. Therefore, he claims that prior convictions must be charged in the indictment and proven to a jury beyond a reasonable doubt. Specifically, Roper-Price contends that his Fifth Amendment right to due process was violated because the Government did not include his prior conviction in the indictment and because he was not informed during the plea colloquy that his prior conviction was an element of the crime. Furthermore, he argues that his Sixth Amendment right to a trial by jury was violated because his prior conviction was not proven to a jury beyond a reasonable doubt.

The Fifth Amendment claim fails. As Roper-Price acknowledges, his contention is contrary to the premise of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), where the Supreme Court held that the government is not required to charge the fact of a prior conviction of an aggravated felony in an indictment, when the fact is used merely for sentencing enhancement purposes. *Id.* at 246. The Court determined that Congress has the constitutional authority to treat a prior conviction of an aggravated felony as a

sentencing factor for the particular offense of illegal reentry. *Id.*⁴ Thus, Roper-Price's Fifth Amendment rights were not violated even though his prior conviction for an aggravated felony was not charged in the indictment.

Likewise, Roper-Price's Sixth Amendment argument also fails, because the prior conviction is not an element of the underlying offense of illegal reentry; thus, there is no need to prove it to a jury beyond a reasonable doubt. *Id.* at 228. Furthermore, a prior conviction need not be proven to a jury beyond a reasonable doubt before a judge may use it for sentencing enhancement purposes. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In *Apprendi*, the Supreme Court held that the Constitution requires any fact, other than the fact of a prior conviction, which increases the maximum statutory penalty for a crime to be proven to a jury beyond a reasonable doubt. *Id.* We have confirmed the continuing vitality of this rule by holding that with regard to sentencing, the use of judge found facts concerning prior convictions does not violate the Sixth Amendment. *See United States v. Ordaz*, 398 F.3d 236, 241 (3d Cir. 2005).⁵ Thus, Roper-Price's prior

⁴At issue in that case was the precise statute we are dealing with here, 8 U.S.C. § 1326(b)(2), which authorizes a maximum prison term of 20 years for a deported alien, if such deportation was subsequent to an aggravated felony conviction. *Almendarez-Torres*, 523 U.S. at 226.

⁵Moreover, during the plea colloquy, Roper-Price admitted to his prior conviction for an aggravated felony. This admission further provides the factual basis upon which the District Court could make the necessary finding of the prior conviction before using it to enhance the sentence. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (finding that a judge may impose the statutory maximum sentence based solely on facts admitted by the defendant).

conviction did not need to be proven to a jury beyond a reasonable doubt before the District Court could use it as a fact to enhance his sentence.⁶

IV.

For the foregoing reasons, we will affirm the District Court's judgment of sentence.

⁶Roper-Price did not raise a claim on appeal that his sentence was unreasonable. The District Court considered the 18 U.S.C. § 3553(a) factors and sentencing grounds raised by the parties. *See Cooper*, 437 F.3d at 332. Therefore, we find that the sentence is reasonable.