

DEC 27 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HECTOR HERAS-RUBIO,

Defendant - Appellant.

No. 09-10486

D.C. No. 2:09-cr-01113-NVW

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Submitted December 14, 2010**

Before: GOODWIN, WALLACE, and W. FLETCHER, Circuit Judges.

Hector Heras-Rubio appeals from the 43-month sentence imposed following his guilty-plea conviction for re-entry after deportation, in violation of 8 U.S.C. § 1326(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Heras-Rubio contends that the sentence is substantively unreasonable because it was the result of a Guidelines range enhancement that is not based on empirical evidence, does not account for the staleness or nature of his underlying offense, and improperly double counted his criminal history. The record reflects that the district court carefully considered the sentencing factors under 18 U.S.C. § 3553(a) and that, in light of the totality of the circumstances, the sentence was substantively reasonable. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc); *United States v. Valencia-Barragan*, 608 F.3d 1103, 1108-09 (9th Cir. 2010) (sentence not substantively unreasonable under *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009)); *see also United States v. Luna-Herrera*, 149 F.3d 1054, 1055 (9th Cir. 1998) (prior conviction may properly be counted for both offense level and criminal history category).

AFFIRMED.