

FEB 23 2011

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NOT FOR PUBLICATION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.

JOSE MARIA HERNANDEZ ROJAS,

Defendant - Appellant.

No. 10-30208

D.C. No. 2:10-cr-00012-WFN

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, District Judge, Presiding

Submitted February 15, 2011**

Before: CANBY, FERNANDEZ, and M. SMITH, Circuit Judges.

Jose Maria Hernandez Rojas appeals from the 42-month sentence imposed following his guilty-plea conviction for being an alien in the United States after

* 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).

deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Rojas argues that his above-Guidelines sentence is substantively unreasonable because it is greater than necessary to accomplish the goals of sentencing. The record reflects that the sentence imposed is substantively reasonable in light of the totality of the circumstances and the factors set forth in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 51-52 (2007); *see also United States v. Orlando*, 553 F.3d 1235, 1239 (9th Cir. 2009) (sentence with upward variance was substantively reasonable where the district court reasonably found the Guideline sentence insufficient to provide the necessary deterrence, to address the need for the defendant to learn respect for the law, and to reflect the nature of the defendant's criminal history).

Rojas further contends that his prior conviction sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(D) is per se unreasonable. This argument is foreclosed by *United States v. Barsumyan*, 517 F.3d 1154, 1159 (9th Cir. 2008) (policy-based argument against the Guidelines must be asserted on the ground that its operation in a particular case results in a sentence that is unreasonable under § 3553(a)).

AFFIRMED.