

DEC 22 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NOT FOR PUBLICATION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.

KELLY J. MICHAEL,

Defendant - Appellant.

No. 11-10235

D.C. No. 2:10-cr-00283-KJM

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Submitted December 19, 2011**

Before: GOODWIN, WALLACE, and McKEOWN, Circuit Judges.

Kelly J. Michael appeals from his sentence of 12 months of probation imposed following his guilty-plea conviction for possession of a controlled substance, in violation of 21 U.S.C. § 844(a). We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand for resentencing.

* 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. Appellant. P. 34(a)(2).

Michael contends that the district court erred by denying his request for pre-judgment probation under 18 U.S.C. § 3607(a) (allowing for a term of probation and dismissal of the proceedings “before the expiration of the term of probation, if the person has not violated a condition of his probation”). It is undisputed that Michael qualified for pre-judgment probation. The district court denied Michael pre-judgment probation based on the mistaken belief that Michael was required to make the request before sentencing. Accordingly, we vacate and remand for resentencing to determine whether pre-judgment probation should be imposed under section 3607(a). *See United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (“[A] district court abuses its discretion when it makes an error of law.”).

VACATED and REMANDED.