

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NOT FOR PUBLICATION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.

ALFREDO PORTILLO-ESCALANTE,

Defendant - Appellant.

No. 11-30080

D.C. No. 2:10-cr-00126-RMP

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Rosanna Malouf Peterson, Chief Judge, Presiding

Submitted December 19, 2011**

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

Alfredo Portillo-Escalante appeals from the 77-month sentence imposed following his guilty-plea conviction for being an alien in the United States after deportation, in violation of 8 U.S.C. § 1326. 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).

Portillo-Escalante contends that his sentence is substantively unreasonable. In light of the totality of the circumstances and the 18 U.S.C. § 3553(a) factors, the bottom-of-the-Guideline sentence is substantively reasonable. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

Portillo-Escalante further contends that his prior conviction sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(D) is per se unreasonable. His argument is foreclosed. *See 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)).

Lastly, Portillo-Escalante's contention that imposition of his 16-level enhancement is an *Apprendi* violation is foreclosed. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

AFFIRMED.