

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 31 2017

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 16-50175

Plaintiff-Appellee,

D.C. No. 3:15-cr-03207-GPC

v.

MEMORANDUM*

FRANCISCO MARTINEZ-DIAZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Submitted May 24, 2017**

Before: THOMAS, Chief Judge, and SILVERMAN and RAWLINSON,
Circuit Judges.

Francisco Martinez-Diaz appeals from the district court's judgment and challenges the 37-month sentence imposed following his guilty-plea conviction for being a removed alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand for

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

resentencing.

Martinez-Diaz contends that the district court erred by basing the sentence on an incorrect characterization of his criminal history. The record reflects that, while Martinez-Diaz had prior drug arrests, he did not sustain a drug conviction in 2006 or at any other time. However, the district court referred to a 2006 drug conviction, and Martinez-Diaz's history of "drug trafficking," in the course of explaining why a downward variance was not warranted. Because there is a reasonable probability that the district court would have imposed a lower sentence had it not mistakenly believed that Martinez-Diaz had prior drug convictions, we vacate and remand for resentencing. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc) (selection of sentence based on clearly erroneous facts constitutes procedural error).

VACATED and REMANDED for resentencing.