

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-13791
Non-Argument Calendar

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT FEBRUARY 6, 2009 THOMAS K. KAHN CLERK

D. C. Docket No. 08-10003-CR-KMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HECTOR MARQUEZ LEON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 6, 2009)

Before BIRCH, HULL and PRYOR, Circuit Judges.

PER CURIAM:

Hector Marquez Leon appeals his sentence of 36 months of imprisonment

for conspiracy to smuggle aliens. 8 U.S.C. § 1324(a)(1)(A)(v)(I). Leon argues that the district court erred when it enhanced his sentence for reckless endangerment during flight based on the conduct of his codefendant. The government agrees that the district court erred. We vacate and remand for resentencing.

We review de novo the application of the reckless endangerment enhancement to a sentence and review findings of fact related to that enhancement for clear error. United States v. Cook, 181 F.3d 1232, 1233 (11th Cir. 1999). A district court may enhance a sentence by two levels if the defendant created recklessly a substantial risk of death or bodily injury to another person while fleeing from law enforcement. United States Sentencing Guidelines § 3C1.2 (Nov. 1992). To apply the enhancement, “the district court ‘must make a specific finding, based on the record before it, that the defendant actively caused or procured the reckless behavior at issue.’” Cook, 181 F.3d at 1236 (quoting United States v. Conley, 131 F.3d 1387, 1390 (10th Cir. 1997)).

The district court erred by applying the enhancement for reckless endangerment. Leon urged his codefendant to stop the boat and surrender to the authorities as his codefendant threatened harm to the Coast Guard cutter. Leon is not accountable for the wrongful conduct of his codefendant. See U.S.S.G. §

3C1.2 cmt. n.5; Cook, 181 F.3d at 1235–36. We reverse and remand for the district court to recalculate Leon’s advisory guideline range without the enhancement for reckless endangerment.

We vacate Leon’s sentence and remand for further proceedings.

VACATED and **REMANDED**.