

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

February 7, 2007

Elisabeth A. Shumaker
Clerk of Court

DANA ARDRY,

Petitioner-Appellant,

v.

HECTOR A. RIOS (Warden),

Respondent-Appellee.

No. 06-1388

D. Colorado

(D.C. No. 06-CV-1240-ZLW)

ORDER AND JUDGMENT*

Before **MURPHY, SEYMOUR, and McCONNELL**, Circuit Judges.

After examining Appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The court therefore orders the case submitted without oral argument.

Dana Ardry, proceeding *pro se*, appeals the district court's denial of the habeas corpus petition he filed pursuant to 28 U.S.C. § 2241. Ardry has provided documentation he has been approved to participate in the Bureau of Prisons'

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

(“BOP”) Residential Drug and Alcohol Program (“RDAP”) but was advised he would not be eligible for a sentence reduction under 18 U.S.C. § 3621(e) even if he successfully completed the program. Ardry challenges the BOP’s determination. Exercising jurisdiction under 18 U.S.C. § 1291, we **affirm** the district court’s denial of relief.

Pursuant to 18 U.S.C. § 3621(e), the BOP has discretion to reduce a federal inmate’s sentence up to one year upon the successful completion of an RDAP. Section 3621(e)(2)(B) denies the sentence reduction to inmates convicted of violent offenses. In addition, the BOP has promulgated a regulation categorically denying the sentence reduction to inmates whose current offense is a felony involving, *inter alia*, the “carrying, possession, or use of a firearm or other dangerous weapon.” 28 C.F.R. § 550.58(a)(1)(vi)(B). This regulation was upheld by the Supreme Court in *Lopez v. Davis*, 531 U.S. 230, 244 (2001).

In his § 2241 petition, Ardry states he was convicted of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. In his appellate brief, he implies he was also convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He then argues he is eligible for the § 3621(e) sentence reduction because (1) his conviction is nonviolent and (2) his offense conduct did not involve the use or possession of a firearm during the commission of a separate felony, and thus *Lopez* does not

apply. Accordingly, he asserts the BOP's categorical denial of the sentence reduction was error.

Ardry's assertion he was convicted of being a felon in possession of a firearm is incorrect.¹ He pleaded guilty to conspiracy to distribute methamphetamine and received a sentencing enhancement for possessing a firearm during the commission of that offense. *Ardry v. United States*, No. 06-0393, 2006 WL 2349929 (W.D. Mo. 2006). Accordingly, Ardry's situation is identical to that of the petitioner in *Lopez*, compelling the conclusion the BOP did not act impermissibly when it concluded he was categorically ineligible for the § 3621(e) sentence reduction.²

¹A large number of other inmates currently incarcerated at the federal penal institution in Florence, Colorado have filed appeals raising the same arguments Ardry raises in this appeal. We assume the error in Ardry's appellate brief arose because he and these other appellants, some of whom were in fact convicted of being felons in possession of firearms, have filed what appear to be photocopies of the same appellate brief.

²Any reliance Ardry places on *Ward v. Booker*, 202 F.3d 1249, 1256 (10th Cir. 2000) is misplaced because *Ward* was abrogated by *Lopez*. *Lopez v. Davis*, 531 U.S. 230, 238, 244 (2001) (specifically referencing *Ward* and holding to the contrary that the BOP may categorically deny a sentence reduction to inmates whose current offense is a felony involving a firearm).

Upon de novo review of Ardry's appellate brief, the district court's order, and the entire record on appeal, this court **affirms** the denial of Ardry's § 2241 petition. Ardry's motion to proceed *in forma pauperis* on appeal is **denied**.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge