

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS **October 25, 2007**

TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANDRE CURTIS,

Defendant - Appellant.

No. 07-5115

(N.D. Oklahoma)

(D.C. No. 01-CR-00003-TCK)

ORDER AND JUDGMENT*

Before **LUCERO**, **HARTZ**, and **GORSLUCH**, Circuit Judges.

Andre Curtis, a federal prisoner, appeals the denial of his motion to modify his 2,271-month sentence. Because the district court lacked jurisdiction to modify Mr. Curtis's sentence under 18 U.S.C. § 3582(c), we affirm.

On December 21, 2001, Mr. Curtis was convicted by a jury on eight counts of robbery, *see* 18 U.S.C. § 1951, and eight counts of using a firearm during a crime of violence, *see id.* § 924(c). Sentences imposed under § 924(c) must run

*After examining the briefs and 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 case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

consecutively to each other and to any other sentence imposed. *See id.* § 924(c)(1)(D). On April 4, 2002, the United States District Court for the Northern District of Oklahoma sentenced Mr. Curtis to the statutory minimum of 2,184 months' imprisonment for his firearm convictions and to 87 months for his robbery convictions, at the bottom of the sentencing range under the United States Sentencing Guidelines (USSG), for a total of 2,271 months.

On direct appeal this court affirmed Mr. Curtis's conviction and sentence, *United States v. Curtis*, 344 F.3d 1057 (10th Cir. 2003), and the United States Supreme Court denied Mr. Curtis's petition for a writ of certiorari, *Curtis v. United States*, 540 U.S. 1157 (2004). On January 12, 2005, Mr. Curtis filed a motion for relief under 28 U.S.C. § 2255, which the district court denied on March 8, 2007. Mr. Curtis did not seek to appeal that decision.

On March 23, 2007, Mr. Curtis filed a motion under 18 U.S.C. § 3582(c)(2) to modify his sentence. The district court denied this motion on July 9, 2007. Mr. Curtis then filed a request for a certificate of appealability, which the court construed as a timely notice of appeal.

As this court has previously noted,

18 U.S.C. § 3582(c) provides only three jurisdictional grants under which a court may "modify a term of imprisonment once it has been imposed." A court may modify a sentence: (1) in certain circumstances "upon motion of the Director of the Bureau of Prisons"; (2) "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure"; or (3) in cases where the applicable sentencing range "has subsequently been

lowered by the Sentencing Commission.” *Id.* at § 3582(c)(1)(A), (c)(1)(B), (c)(2).

United States v. Green 405 F.3d 1180, 1184 (10th Cir. 2005) (footnote omitted).

Mr. Curtis relies on the third basis for jurisdiction. He claims that he is entitled to a reduction of his sentence because of the adoption of Amendment 599 to the Guidelines Manual. Amendment 599 amended Application Note 2 to USSG § 2K2.4 to state in part: “If a sentence under [USSG §2K2.4] is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.”

USSG app. C (Supp. 2001). One purpose of the amendment is to avoid duplicative punishment for the use of a firearm. *See id.*

Amendment 599 went into effect on November 1, 2000. *See id.* Thus it was in effect at the time of Mr. Curtis’s April 2002 sentencing. Amendment 599 did not *subsequently* lower his sentencing range, and consequently the district court had no jurisdiction to consider a modification to his sentence under 18 U.S.C. § 3582(c)(2). Moreover, it appears that Mr. Curtis did in fact receive the benefit of Amendment 599 at his sentencing. The presentence report notes that it was prepared using the 2001 edition of the Guidelines Manual and expressly states that according to Application Note 2 of USSG § 2K2.4, the offense level “[was] not increased by the six-levels that would ordinarily be

applicable for discharge of a firearm under USSG 2B3.1(b)(2)(B).” R. Supp. Vol. I at 15.

The judgment of the district court is therefore AFFIRMED.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge