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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DALE A. BUSH,

Petitioner - Appellant,

v.

JEAN HILL, Superintendent of the Snake
River Correctional Institution,

Respondent - Appellee.

No. 08-35921

D.C. No. 6:06-cv-00166-ALA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, Chief District Judge, Presiding

Submitted February 16, 2010**

Before: FERNANDEZ, GOULD, and M. SMITH, Circuit Judges.

* 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).

Dale A. Bush, who is currently serving a two-year term of supervised release, appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Bush contends his Sixth Amendment right to a jury trial under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was violated when the trial court found that his drug convictions arose from separate criminal episodes and used that fact when calculating his sentences. Bush has not shown that the state court's rejection of this claim was either contrary to, or an unreasonable application of, clearly established federal law, or that it was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

The trial court's fact finding did not implicate Bush's Sixth Amendment rights. *See Oregon v. Ice*, 129 S. Ct. 711, 717-18 (2009) (holding that *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004) do not apply to findings of fact necessary for the imposition of consecutive sentences). In addition, even if the trial court's recalculation of Bush's criminal history score for certain counts implicated *Blakely*, that decision does not apply retroactively to Bush's conviction, which became final before *Blakely* was announced. *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005).

AFFIRMED.