

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20201
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEKH KHANNA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-88-0190-2; CA-93-3161)

(March 9, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Lekh Khanna, currently incarcerated on a number of drug charges arising from the importation of ten kilos of heroin into the United States, filed the instant § 2255 petition raising numerous challenges to his conviction. The district court denied relief, and we affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The facts underlying this conviction, which was the product of a government sting operation, are reported in United States v. Singh, 922 F.2d 1169 (5th Cir.), cert. denied, 112 S.Ct. 260 (1991). On direct appeal, Khanna was found to have been an active participant in the scheme to import heroin from India. Notwithstanding that finding, Khanna now asserts that his conviction was the product of outrageous government conduct. Not only is this defense successfully invoked in the rarest of cases, however, see United States v. Arditti, 955 F.2d 331, 343 (5th Cir. 1992), cert. denied, 113 S.Ct. 597 (1992), but it is not available to a defendant who was actively involved in the criminal conduct. Id. Khanna's behavior prevents a finding of a due process violation here.

Khanna next asserts that the evidence was insufficient to prove a conspiracy among Singh, Ashok Khanna and himself. The government properly observes that sufficiency of the evidence was treated in the previous appeal, where this court found the evidence to be overwhelming. Sing, 922 F.2d at 1173. In light of this prior decision, the issue presented by Khanna is foreclosed from review under the law of the case doctrine. Chevron U.S.A. Inc. v. Traillour Oil Co., 987 F.2d 1138, 1150 (5th Cir. 1993).

Khanna also asserts that the Sentencing Guidelines were incorrectly applied to his offense. This is a claim that may not be heard in habeas proceedings. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).

Khanna finally contends that his trial counsel rendered ineffective assistance under the constitutional standard, which requires a showing of serious professional incompetence and prejudice. Strickland v. Washington, 104 S.Ct. 2052 (1984). Khanna asserts that his counsel should have raised the defense of outrageous government conduct. As stated, however, that defense had no merit. Khanna also contends his attorney should have argued more strenuously that he was not involved in a conspiracy. But his attorney did argue to the jury that the confidential informant had virtual free rein in orchestrating the importation of the heroin, that Khanna was an unwitting dupe in the scheme, that Khanna believed that the buyer-seller agreement was for imported watches and not heroin, and that it was the confidential informant who actually imported the heroin. To that extent, counsel did assert that the evidence was insufficient to prove conspiratorial involvement by Khanna. Appellant cannot contend that his attorney's performance was constitutionally deficient in this regard.

Khanna also complains that his attorney did not object to the guidelines § 3B1.1(a) upward adjustment for his status as an organizer or leader. At sentencing, defense counsel did not object to this adjustment. The PSR, not in the record on appeal, was adopted by the trial court and presumably contains a recommendation for such an adjustment. Khanna has not shown how his attorney's oversight prejudiced him, because he asserts no facts that, if presented to the trial court, would have overcome the PSR's

recommendation. On all these claims, Khanna has not met his burden in showing ineffective assistance of counsel.

For these reasons, the judgment of the district court denying relief is AFFIRMED.