

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20223
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PRATAP SINGH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-88-0190-1; CA-93-2970)

(March 9, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Singh was charged along with Ashok Khanna and Lekh Khanna with multiple violations of U.S. drug laws for their attempt to import ten kilos of heroin at the urging of a DEA confidential informant. Singh was tried and convicted on all counts and sentenced to concurrent 302 month sentences and five years supervised release. His conviction was affirmed by this

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court. United States v. Singh, 922 F.2d 1169 (5th Cir. 1991). In this § 2255 proceeding, Singh has raised a number of additional challenges to his conviction. The district court did not err, however, in denying relief.

We first note that, contrary to the government's argument, Singh's notice of appeal was timely under amended Fed. R. App. Proc. 4(a)(2). See Burt v. Ware, 14 F.3d 256, 260 (5th Cir. 1994) (amended rule given retroactive application).

Federal habeas corpus proceedings are not intended to serve as an additional avenue of appeal for a convicted defendant. Instead, their purpose is to permit the assertion of constitutional claims. Several of Singh's issues fail this initial test of habeas review. First, Singh's entrapment argument was disposed of in his initial appeal, because he challenged the sufficiency of evidence to convict and the court had given an entrapment instruction to the jury. Entrapment "is in essence a challenge to the sufficiency of the government's evidence." United States v. Byrd, 31 F.3d 1329, 1335 (5th Cir. 1994). According to the law of the case doctrine, this court will not re-examine issues previously decided on appeal. Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1150 (5th Cir. 1993). To the extent that Singh re-characterizes his entrapment challenge as one predicated on the government's alleged outrageous conduct in procuring his participation in the heroin importation conspiracy, it is meritless. As explained in the facts recounted in the direct appeal, see Singh, 922 F.2d at 1171, Singh's behavior included active participation in the importation

scheme, and this precludes the availability of the outrageous government conduct defense. United States v. Arditti, 955 F.2d 331, 343 (5th Cir.), cert. denied, 113 S.Ct. 597 (1992).

Second, Singh's fourth amendment issues are meritless. The tape recording of telephone calls between the confidential informant in the United States and Singh in India did not violate the Federal wire tap law. See 18 U.S.C. § 2511(2)(c). There is no constitutional violation by a government agent's recording the conversation between himself and an individual. See United States v. Caceres, 99 S.Ct. 1465 (1979). If Singh is also suggesting that the government lacked probable cause to arrest him, that argument is frivolous.

Third, Singh's complaint about the application of the sentencing guidelines to his offense may not be raised in this § 2255 proceeding. United States v. Faubion, 919 F.3d 226, 233 (5th Cir. 1994).

Finally, Singh argues that he received ineffective assistance of counsel, who allegedly failed to assert the defenses of entrapment or outrageous government conduct and failed to challenge various sentencing issues. Counsel did in fact request a jury instruction on entrapment and addressed the government agents' conduct snaring Singh in the government-created drug scheme. In addition, counsel objected to the four-point adjustment to his offense level under guidelines § 3B1.1(a), contrary to Singh's argument. Finally, because the government agents' conduct was not outrageously overreaching and Singh actively participated

in the drug activity, counsel could not have been ineffective for failing to assert an outrageous government conduct defense.

The remaining ineffective-assistance claims concern counsel's failure to raise certain issues on appeal. The key to a constitutional ineffectiveness claim on appeal is "whether the failure to raise an issue worked to the prejudice of the defendant." Sharp v. Puckett, 930 F.2d 450, 453 (5th Cir. 1991). If the sentencing guideline issues would not have been successful on direct appeal, prejudice cannot be shown. Singh focuses primarily on the four-point adjustment to his offense level under § 3B1.1(a), which required a finding that he was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. Testimony at trial relating Singh's own description of his activities was sufficient to support this finding. Singh also argues that the ten kilos of heroin attributed to his offense level were not reasonably foreseeable to him because he was in jail when the shipment actually arrived in Houston, and he was not reasonably capable of importing this amount. The court noted that the drug conspiracy guidelines, § 2D1.4, provided for the offense level to include the drug amounts under negotiation, not just the amount of actual delivery. The record shows that Singh claimed to government agents that he could produce much more than ten kilos of heroin. This self-promotion, together with the actual shipment for which Singh arranged, rendered the district court's finding reasonable. Because neither of Singh's sentencing issues had a chance of

success on appeal, he cannot challenge the effectiveness of his counsel.

The judgment of the district court is AFFIRMED.