

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-41275
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

STEPHONE BURNETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:94-CR-50-1)

(May 31, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant Stephone Burnett pleaded guilty to a drug offense and appeals his sentence. He is represented by the Office of the Federal Public Defender which filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) and a motion to withdraw. Burnett, contending that he intends to raise the issue of ineffective assistance of counsel on direct appeal and that this creates a conflict of interest seeks the appointment of other counsel. We have carefully reviewed the record in this case and conclude that

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

there are no non-frivolous issues presented on appeal and, accordingly, we grant counsel's motion to withdraw and dismiss the appeal as frivolous. We do not normally address ineffective assistance of counsel claims on direct appeal unless the record contains sufficient facts for review. See United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991). This record does not, and, therefore, we deny Appellant's motion for the appointment of other counsel.

Of the issues noted in Appellant's Anders brief, the only one worthy of comment is the contention that the court should not have relied on the final drug transaction between Appellant and the undercover police officer in determining the amount of cocaine base to be used in the sentencing determination. The contention is frivolous. The same undercover officer made seven cocaine base purchases from Appellant in about one month. His incident reports identified Appellant as the seller in each case. At Appellant's request, the Government furnished a video tape allegedly depicting the final transaction which in fact does not depict the Appellant. It is perfectly clear, however, the error was not that the undercover officer who made the purchase misidentified Appellant, but was rather of the person who furnished the video tape to defense counsel. It was obviously the incorrect video tape. The incident reports submitted by the officer are above reproach and, in fact, Appellant points to no evidence whatsoever other than the wrong video tape to cast any doubt upon those reports whatsoever. The court was completely justified in relying upon the amount of

drug involved in that final transaction in determining Appellant's sentence.

Motion for leave to withdraw is GRANTED, motion for appointment of counsel is DENIED, and appeal is DISMISSED.