

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July 14, 2011

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD WALLACE, a/k/a Chico,
a/k/a Pone,

Defendant-Appellant.

No. 10-3074

(D. of Kan.)

(D.C. No. 2:07-CR-20168-JWL-13)

ORDER AND JUDGMENT*

Before **O'BRIEN, McKAY, and TYMKOVICH**, Circuit Judges.**

Harold Wallace, a federal prisoner, appeals his sentence on the grounds of ineffective assistance of counsel. But both parties agree this claim should properly be raised in a habeas proceeding. Exercising jurisdiction under 28 U.S.C. § 1291, we DISMISS this appeal.

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel.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.

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

I. Background

Wallace pleaded guilty to conspiracy to possess with intent to distribute, and to distribute, cocaine base and cocaine. He also pleaded guilty to an attempt to possess with intent to distribute cocaine. The district court sentenced Wallace to 300 months for the first charge and 240 months for the second charge, to run concurrently.

Wallace's trial counsel filed a notice of appeal, but withdrew shortly thereafter. Wallace's new counsel now argues this direct appeal should be dismissed so that he can raise ineffective assistance of counsel claims in a collateral attack in district court.

II. Analysis

The parties agree that ineffective assistance of counsel claims must ordinarily be raised in a collateral 28 U.S.C. § 2255 proceeding. *See United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995). There are some instances where an ineffective assistance of counsel claim will be entertained on direct appeal: for example, "where the record is sufficient, or where the claim simply does not merit further factual inquiry." *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993). Neither Wallace nor the government raise this exception, and we decline to do so sua sponte.

III. Conclusion

Accordingly, we DISMISS this appeal.

ENTERED FOR THE COURT

Timothy M. Tymkovich
Circuit Judge