

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i>
v.
JOHNNIE WILSON DALE, <i>Defendant-Appellant.</i>

No. 02-4471

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge.
(CR-01-52)

Submitted: November 21, 2003

Decided: January 5, 2004

Before MICHAEL, MOTZ, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

R. Edward Hensley, Jr., SMATHERS & NORWOOD, Canton, North Carolina, for Appellant. Robert J. Conrad, Jr., United States Attorney, Thomas R. Ascik, Assistant United States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Johnnie Wilson Dale appeals from his guilty plea conviction for conspiracy to possess with intent to distribute at least five kilograms of cocaine and at least fifty grams of methamphetamine. On appeal, he alleges that his trial counsel provided ineffective assistance and that the Government engaged in prosecutorial misconduct. For the reasons that follow, we affirm.

Dale claims his trial counsel was ineffective for failing to request a continuance at sentencing. Generally, claims of ineffective assistance of counsel are not cognizable on direct appeal. To allow for adequate development of a record, a defendant must bring his claim in a 28 U.S.C. § 2255 (2000) motion, unless the record conclusively establishes ineffective assistance. *United States v. Richardson*, 195 F.3d 192, 198 (4th Cir. 1999); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997). Here, Dale has failed to meet the high burden necessary to raise ineffective assistance of counsel in his direct appeal.

Next, Dale claims that the Government engaged in prosecutorial misconduct because it failed to make a motion for a downward departure for substantial assistance under *U.S. Sentencing Guidelines Manual* § 5K1.1 (2001). We find nothing improper regarding the Government's failure to make the motion. The Government did not promise to make such a motion in its plea agreement with Dale, *United States v. Snow*, 234 F.3d 187, 190 (4th Cir. 2000), and there is no evidence that it refused to make the motion for an improper motive. *Wade v. United States*, 504 U.S. 181, 185-86 (1992).

Accordingly, we affirm Dale's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED