

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4754

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FELIPE RICARDO HERRERA-BARCENAS,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Chief District Judge. (CR-02-94)

Submitted: June 27, 2005

Decided: July 19, 2005

Before WILKINSON, WILLIAMS, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Lisa S. Costner, LISA S. COSTNER, P.A., Winston-Salem, North Carolina, for Appellant. Gretchen C. F. Shappert, Interim United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

PER CURIAM:

Felipe Ricardo Herrera-Barcenas appeals from his convictions and 120-month sentence entered after his guilty plea to conspiracy to possess with intent to distribute cocaine and marijuana and use of a firearm during a drug trafficking crime. On appeal, Herrera-Barcenas' attorney has filed a brief in accordance with Anders v. California, 386 U.S. 738 (1967), finding no meritorious issues for appeal. Herrera-Barcenas has filed a pro se supplemental brief, raising several claims of ineffective assistance of counsel.

The Government has filed a motion to dismiss the appeal based on the appellate waiver in the plea agreement. Although we find that the waiver was valid, it expressly exempted appellate claims based on ineffective assistance of counsel and prosecutorial misconduct. Because Herrera-Barcenas seeks to raise claims of ineffective assistance, we deny the motion to dismiss.

An allegation of ineffective assistance should not proceed on direct appeal unless it appears conclusively from the record that counsel's performance was ineffective. United States v. Richardson, 195 F.3d 192, 198 (4th Cir. 1999). Here, there is no evidence in the record supporting Herrera-Barcenas' claims. Nonetheless, if Herrera-Barcenas possesses other evidence on these issues, he is free to assert his claims in a 28 U.S.C. § 2255 (2000) motion.

In accordance with Anders, we have reviewed the entire record in this case, and we have found no meritorious issues for appeal. We therefore affirm Herrera-Barcenas' convictions and sentence. This court requires that counsel inform her client, in writing, of his right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client. 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