

UNPUBLISHED

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIE PERNELL BURTON,
Defendant-Appellant.

No. 01-7625

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CR-00-16-HO, CA-01-299-5-H)

Submitted: January 23, 2002

Decided: February 7, 2002

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

Willie Pernell Burton, Appellant Pro Se. Rudolf A. Renfer, Jr., Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

OPINION

PER CURIAM:

Willie Pernell Burton seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West Supp. 2001). We have reviewed the record and the district court's opinion and find no reversible error.

As to Burton's claim that the indictment was so defective as to render his guilty plea invalid, we find that the indictment adequately stated the elements of the offense (prior to the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2001)), and Burton's co-conspirators did not need to be named in the indictment. *United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996) (en banc); *United States v. American Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987). Further, as the district court correctly concluded, Burton's *Apprendi* challenges are not cognizable in the collateral review proceeding. *United States v. Saunders*, 247 F.3d 139, 146-51 (4th Cir.), cert. denied, ___ U.S. ___, 122 S. Ct. 573 (2001). Burton failed to establish that counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688-91 (1984). Additionally, as the district court noted, the Government is not required to file a notice pursuant to 21 U.S.C. § 851 (1994) where, as here, any increase in sentence was due to the calculations under the Sentencing Guidelines. *United States v. Foster*, 68 F.3d 86, 89 (4th Cir. 1995). Finally, the district court did not err in declining to conduct an evidentiary hearing. *United States v. Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988). Accordingly, we deny a certificate of appealability and dismiss the appeal substantially on the reasoning of the district court. See *United States v. Burton*, Nos. CR-00-16-HO; CA-01-299-5-H (E.D.N.C. Aug. 7, 2001).

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.

DISMISSED