

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

DARRYL LAMONTE HERNDON,)	
)	
Petitioner,)	Civil Action No. 7:01CV00148
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
UNITED STATES OF AMERICA,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Respondant.)	

This is a motion pursuant to 28 U.S.C. § 2255 by Darryl Lamonte Herndon challenging his conviction on two counts of distributing more than five grams of a mixture or substance containing cocaine base. The court finds that Herndon’s claims lack merit and denies his motion.

I.

Herndon was charged in a two count indictment with distributing more than five grams of cocaine base on October 8 and 22, 1998, in violation of 21 U.S.C. § 841(a)(1). Two informants, Maurice Harris and Donald Stokes made two controlled purchases of cocaine base from Herndon. The two transactions were tape-recorded surreptitiously. The first sale occurred on October 8, 1998. Initially, Harris and Stokes met Herndon at Herndon’s business, Automotive Excellence, in Collinsville, Virginia. Herndon provided them with cocaine powder. Harris told Herndon that he wanted crack cocaine instead of cocaine powder. Herndon “cooked” the powder and met Harris and Stokes at a local restaurant where he sold Harris 26.3 grams of crack for \$1050.

The second sale occurred on October 22, 1998. Herndon met Harris and Stokes at the

Wal-Mart parking lot in Martinsville, Virginia. Herndon parked his vehicle next to Harris' and Stokes' vehicle. Harris and Stokes entered Herndon's vehicle and Herndon sold Harris 26.6 grams of crack for \$1050. During the transaction Herndon indicated that he would sell powder more cheaply and that he would reduce the price once Harris started buying more.

II.

Herndon first claims that the government used unlawfully intercepted wire, electronic and oral communications to convict him. Herndon failed to raise this claim on direct review. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in the federal habeas proceeding only if the defendant can show both cause for an actual prejudice from the default [citations omitted], or that he is actually innocent [citations omitted]." *United States v. Harris*, 183 F 3d 313, 317 (4th Cir. 1999). Ineffective assistance of counsel can constitute cause and prejudice. However, since there is nothing that remotely suggests that the government obtained a conviction by using unlawfully intercepted wire, electronic, or oral communications, Herndon can show neither cause nor prejudice. Moreover, Herndon has offered nothing demonstrating his actual innocence. It follows, that Herndon has procedurally defaulted the claim.

III.

Herndon claims that the evidence was insufficient to support the conviction because the government failed to prove the quantity of crack cocaine involved in the two sales.¹ Herndon procedurally defaulted the claim because he did not raise it on direct appeal. More fundamentally,

¹ Herndon also seems to complain that the government used against Herndon a proffer Herndon made in plea negotiations. Herndon procedurally defaulted this claim, as well. Moreover, he offers nothing demonstrating that the claim has any merit.

the claim is frivolous.

Each count of the indictment charged Herndon with distributing more than five grams of a mixture or substance containing cocaine base. Under 21 U.S.C. § 841(a)(1) a sale of more than five grams is punishable by imprisonment of from five to forty years. The evidence established and counsel stipulated at trial that the first sale involved 26.3 grams, and the second sale involved 26.6 grams. Accordingly, the government met its burden of proving that each sale involved more than five grams of cocaine base. It also follows that the evidence was sufficient to support the court's conclusion in determining Herndon's guidelines that Herndon sold more than fifty grams of cocaine base.

IV.

Herndon also complains about the racial makeup of the jury. He claims the government improperly struck two black jurors who "were closer to defendant's age" and that the "only two black jurors were two elderly men" who slept during most of the trial.

Nothing at trial suggested that the government improperly exercised its peremptory challenges, and the court so found. On appeal the Court of Appeals found no error in this court's ruling. This court's previous ruling, therefore, estops Herndon from relitigating the issue.

V.

Herndon maintains that the government entrapped him. The court submitted Herndon's entrapment claim to the jury, and the jury rejected it. Herndon appealed the issue to the Court of Appeals, and the Court of Appeals affirmed. That prior resolution estops Herndon from relitigating the issue in this proceeding.

VI.

Herndon maintains that he was denied the effective assistance of counsel at sentencing because his counsel failed to challenge the lawfulness of the government’s “electronic or other surveillance,” failed to show that lab reports contained inconsistencies concerning drug weights, failed to object to the presentence report, and failed to move for consideration under the “safety valve.” The court finds that the claims lack merit.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-part test for deciding ineffective assistance of counsel claims. First, the defendant “may show that counsel’s performance was deficient.” *Id.* at 687. To prove deficiency, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. Second, the defendant must show that the deficient performance actually prejudiced him. A showing of prejudice requires the defendant to prove that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

Herndon’s effective assistance claims lack merit because the claims he maintains his counsel should have raised lack merit. In short, Herndon has not shown that the government subjected him to unlawful surveillance, that the drug weights attributed to Herndon were not accurate, that there were prejudicial errors in his presentence report, and that he was entitled to consideration under the “safety valve.” Herndon, therefore, has satisfied neither part of *Strickland’s* two-part test.

VII.

Herndon maintains that he was denied the effective assistance of counsel on appeal. He complains that appellate counsel failed to meet and confer with him about issues he wanted to raise on appeal. He claims he would have raised on appeal the issues he now raises in this § 2255

motion. However, Herndon has not identified a single issue that would have benefited him if raised on appeal. He, therefore, cannot prevail on the claim.

VIII.

For the reasons stated, the court denies Herndon's § 2255 motion.

ENTER this March 15th, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
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DARRYL LAMONTE HERNDON,)

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Petitioner,)	Civil Action No. 7:01CV00148
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v.)	<u>FINAL ORDER</u>
)	
UNITED STATES OF AMERICA,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Respondant.)	

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that petitioner’s motion to vacate his conviction pursuant to 28 U.S.C. § 2255 is **DENIED**. This action is stricken from the active docket of the court.

Darryl Herndon is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal in this court within sixty (60) days of the date of entry of this Order.

The Clerk is directed to send certified copies of this Order and the accompanying Memorandum Opinion to all parties.

ENTER: This March 15, 2002.

CHIEF UNITED STATES DISTRICT JUDGE