

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4677
Conference Calendar

FOLORUNSHO OGUNDIPE,

Petitioner-Appellant,

versus

UNITED STATES PAROLE COMMISSION and
KEITH HALL,

Respondents-Appellees.

- - - - -
Appeal from the United States District Court
for the Western District of Louisiana
USDC No. CA-92-90-LC
- - - - -

March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

The Parole Commission has very broad discretion in making parole release decisions. Ceniceros v. United States Parole Com'n, 837 F.2d 1358, 1361 (5th Cir. 1988). Consequently, this Court cannot disturb a decision by the Commission setting the time for parole release absent a showing that the action is flagrant, unwarranted, or unauthorized. Id.

Ogundipe contends that his category eight offense-severity rating is unwarranted because the sentencing court ruled that the

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

total amount of heroin involved in the conspiracy was three kilograms of unknown purity. He contends that the Commission may not use the Government's pre-sentencing memorandum which indicates that six kilograms of heroin were involved in the offense as evidence for sentencing because it has been "directly controverted by the sentencing court." He relies on a colloquy between the sentencing court and the Government wherein the Government asked that the court make a finding that the conspiracy involved over three kilograms of heroin. The sentencing court ordered the finding.

If six or more kilograms of heroin of unknown purity are involved in a distribution offense, a category eight severity rating is mandated. See 28 C.F.R. § 2.20 ¶ 901(a), note 4 (1987). Because the record in this case indicates that the heroin was of unknown purity, the Parole Commission, in order to assign a category eight severity rating, must have determined that six or more kilograms of heroin were involved.

The Parole Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating. Maddox v. United States Parole Com'n, 821 F.2d 997, 999 (5th Cir. 1987). Judicial review of the Commission's decision is limited to whether there is "some evidence" in the record to support the Commission's decision. Id. at 1000. A review of the record in this matter indicates that there is clearly "some evidence" in the Parole Commission's file supporting its decision. Although the trial court may have held that there were at least three kilograms of heroin of

unknown purity involved in this conspiracy, this finding did not preclude the Parole Commission from viewing the evidence and determining that six or more kilograms of heroin of unknown purity could be assessed to this defendant. The evidence at trial showed that up to 17 kilograms of heroin were involved in this distribution network. The record also reflects that Ogundipe's role was a distributor and wholesaler to street-level dealers. The Commission's decision that Ogundipe could fairly be assessed with at least six kilograms of heroin was not flagrant, unwarranted, or unauthorized; therefore, the district court's denial of Ogundipe's habeas petition is AFFIRMED.