

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-5005
Summary Calendar

SALVATORE SALAMONE,

Plaintiff-Appellant,

VERSUS

KEITH E. HALL,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

92 CV 0221

March 19, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Salvatore Salamone was convicted in the "Pizza Connection" case in the southern district of New York. See United States v. Badalamenti, Crim. No. 84-236 (S.D.N.Y. 1984). He was found guilty of conspiracy to violate federal currency laws, filing false

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

statements, and failure to file currency reports. Salamone was sentenced to five years on each count--to run concurrently. The jury returned a special verdict that Salamone did not commit these crimes in violation of federal controlled substances laws.

Salamone was also convicted of possession of an illegally made firearm, possession of an unregistered firearm, conspiracy to falsify firearms transaction records, and falsification of firearms transaction records in the middle district of Pennsylvania. He was sentenced to 16 years imprisonment--to run consecutively to the five-year sentence from the "Pizza Connection" case.

Salamone's initial parole hearing was held on 17 November 1990. The panel rendered a split decision regarding the extent of departure but was in agreement that a departure from the parole guidelines was warranted.

On 12 February 1991, the Parole Commission issued a Notice of Action which stated that Salamone's offense behavior had been rated at category six and his salient factor score was ten. In accordance with the guidelines established by the Commission, Salamone was to serve between 40 to 52 months imprisonment before release. Nevertheless, after review of "all relevant factors and information presented," the Commission opted to depart upwardly because of: (1) "the amount of money involved in the money laundering conspiracy was in excess of 30 times the threshold amount for Category Six severity rating"; (2) the multiple firearms illegally purchased for persons "later convicted of a drug conspiracy operating from 1979 through 1984 generating at least \$60

million in drug revenue"; and (3) Salamone's "integral role in the perpetuation of criminal activity which negatively effects [sic] the financial and moral fabric of the nation." Salamone was ordered to serve out his 21-year sentence to expiration.

Salamone appealed the decision to the National Appeals Board. On 3 June 1991, the Appeals Board affirmed the decision of the Commission. The Appeals Board found that Salamone had suffered no prejudice as a result of not receiving the updated Form USA-792. The Board also found that Salamone's offense category was correctly calculated at six. The Board stated:

[Y]ou were shown, by the evidence at your trial, to be an integral player in a Mafia enterprises, money laundering operation between the U.S. and Europe. You were involved in the total conspiracy of well over one million dollars although we acknowledge that you seem to have had direct control of only \$290.000 [sic: intended \$290,000]. It is found that with your degree of involvement in the various activities representing your conviction, that it is reasonable to believe you foresaw [sic] the scope of money laundering to be well in excess of \$ 1 million.

The magistrate judge found that there was "some evidence" to support the Commission's decision. The district court adopted the findings of the magistrate judge and determined that Salamone was not a victim of an ex post facto exercise of amended guideline 28 C.F.R. § 2.19(c). Salamone filed a timely notice of appeal.

OPINION

Salamone contends the district court erred by: (1) applying the amended version of 28 C.F.R. § 2.19(c) and (2) by affirming the Commission's determination that Salamone could reasonably foresee the \$1 million in illegal currency transactions. His contentions are unavailing.

"[T]he prohibition of ex post facto laws does not extend to every change of law that may work to the disadvantage of a defendant.'" Portley v. Grossman, 444 U.S. 1311, 1312, 100 S. Ct. 714, 62 L. Ed. 2d 723 (Rhenquist, Circuit Justice 1980), quoting Dobbert v. Florida, 432 U.S. 282, 293, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). Because the change in 28 C.F.R. § 2.19(c) "neither deprive[d] [Salamone] of any pre-existing right nor enhance[d] the punishment imposed," there was no violation of the ex post facto clause. Portley, 444 U.S. at 1312-1313. The retroactive application of the Parole Commission Guidelines does not raise ex post facto issues. Sheary v. U.S. Parole Com., 822 F.2d 556, 557 (5th Cir. 1987). It is also "most dubious that parole guidelines are to be viewed as `laws.'" Salamone's ex post facto challenge must fail.

In making parole release determinations, the Parole Commission has very broad discretion. Ceniceros v. U.S. Parole Com., 837 F.2d 1358, 1361 (5th Cir. 1988). Its decisions "may be predicated on facts gleaned from any number of sources." Id. In making parole decisions, the Parole Commission may consider any "relevant, available information in making parole determinations," including "dismissed counts of an indictment, hearsay evidence, and allegations of criminal activity for which the prisoner had not even been charged." Maddox v. U.S. Parole Com., 821 F.2d 997, 999 (5th Cir. 1987) (footnotes omitted); 28 C.F.R. § 2.19(c).

The Parole Commission may take into account any substantial information available to it in establishing the prisoner's offense-

severity rating. Maddox, 821 F.2d at 999. 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. 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. Ceniceros, 837 F.2d at 1361.

The Parole Commission, pursuant to 18 U.S.C. § 4203(a)(1) (repealed), has promulgated guidelines for the determination of presumptive parole dates based on offense characteristics (based on the severity of an offense) and offender characteristics (based on the prisoner's salient-factor score). See 28 C.F.R. § 2.20. The Commission may depart outside the range provided by its guidelines to determine a presumptive parole date so long as good cause exists and "the prisoner is furnished written notice stating with particularity the reasons for [the Commission's] determination, including a summary of the information relied upon." 18 U.S.C. § 4206(c) (repealed), cited in Maddox, 821 F.2d at 1000. "[G]ood cause" means substantial reason and includes only those grounds put forward by the Commission in good faith and which are not arbitrary, irrational, unreasonable, irrelevant or capricious.'" Maddox, 821 F.2d at 1000 (citation omitted).

Salamone obtained a letter from the U.S. Attorney for the Southern District of New York, Louis J. Freeh, which stated that "there was no direct evidence that Mr. Salamone had direct control over any currency in excess of \$290,000." Salamone argues that

this letter contradicts the district court's finding that there was "some evidence" to support the Commission's decision to upwardly depart. He is incorrect.

The National Appeals Board responded to this assertion as follows: "You were involved in the total conspiracy of well over \$1 million although we acknowledge that you seem to have had direct control of \$290.000 [sic: intended \$290,000]." It is not the function of this Court to review the Commission's discretion in a parole denial or to review the credibility of reports the Commission used in making its determination. Maddox, 821 F.2d at 999-1000. The letter from Attorney Freeh can be harmonized with the Board's findings because, although there may not be direct evidence of Salamone's knowledge of a conspiracy involving over \$1 million, there was ample circumstantial evidence of Salamone's knowledge of the conspiracy.

The decision of the district court is affirmed.