

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5501

Dennis Wayne Garrett,

Petitioner-Appellee,

VERSUS

U.S. Parole Commission,

Respondent-Appellant.

Appeal from the Determination of
the United States Parole Commission
(Determination under 18 U.S.C. § 4106A)

(December 6, 1994)

Before Judges REYNALDO G. GARZA, DeMOSS, BENAVIDES, CIRCUIT
JUDGES.

PER CURIAM:¹

Garrett was arrested and sentenced in Mexico for narcotics violations. Pursuant to a prisoner exchange treaty, he was transferred to the United States and incarcerated at the federal Correctional Institution at La Tuna, Texas. Garrett appeals the United States Parole Commission's determination of a release date

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and period of supervised release. We affirm.

I.

Garrett was arrested on August 12, 1988 for possession and transportation of marijuana and was sentenced to ninety-eight months' imprisonment. On April 16, 1993, Garrett was transferred to the United States pursuant to the Treaty on the Execution of Penal Sentences, November 26, 1976, United States--Mexico, 20 UST 7399, T.I.A.S. No. 8718. The Pre-Sentence Report ("PSR") found the equivalent offense in the United States to be possession with intent to distribute marijuana, which carries a base offense level of 36 under the Sentencing Guidelines. The PSR recommended a two-level downward adjustment for acceptance of responsibility and a two-level downward adjustment for Garrett's minor role in the offense.

In a July 27, 1993 hearing before an examiner panel, Garrett requested an additional two-level downward departure for his minor role in the offense. The panel recommended that the United States Parole Commission (the "Commission") grant this request, for a total offense level of 30, with a resulting Guideline range of 97-121 months. It then recommended a further downward departure based on torture endured by Garrett, resulting in a release date of eighty-eight months, or November 11, 1994. The panel then recommended a 15% reduction to reflect good conduct time credits, resulting in a final release date of seventy-five months. Finally, the panel recommended that Garrett serve a period of supervised release to the full term of the foreign sentence, in this case

twenty-three months.² The Commission concurred with the panel's assessment and set a release date after seventy-five months imprisonment and a supervised release period of twenty-three months to extend to the full term of the foreign sentence.³

At the time the Commission set this release date, the Bureau of Prisons had computed that Garrett was eligible for 384 good conduct time days, based upon 105 pre-transfer work credit days, resulting in a good conduct time release date of June 10, 1995. The examiner panel relied on that date in its recommendation to the Commission. However, the Bureau of Prison's initial calculation was erroneous. It later learned that Garrett was entitled to more pre-transfer work credit days and advanced his good conduct time release date to sixty-two months, or October 10, 1993.

Based upon this corrected information, the Commission reopened the case to modify its determination. The redetermination ordered that Garrett "continue to expiration" -- that is, until the good conduct time release date determined by the Bureau of Prisons, and thereafter serve a thirty-six month period of supervised release until the full term of his foreign sentence. Garrett appeals the modification of his period of supervised release.

II.

Under 18 U.S.C. § 4106A(b)(1)(A) (1985 & Supp. 1994), the

² There is some conflict in the record as to whether the supervised release period was 22 or 23 months. Because the Commission intended Garrett to serve until the full term of his foreign sentence, or 98 months, we assume that 23 months was the intended period and that 22 months was a typographical error.

³The Commission is authorized to determine a release date and period of supervised release, not to sentence a transferred prisoner. Navarrete v. U.S. Parol Commission, 34 F.3d 316, 319 (5th Cir. 1994).

Commission must set a release date and period of supervised release for a transferee as if the transferee had been "convicted in a United States district court of a similar offense." Section 4106A(b)(1)(c) provides that the combined periods of imprisonment and supervised release cannot exceed the term of imprisonment imposed by the foreign court.

When Garrett's release date was determined, transferees were entitled to two competing release dates, the earliest of which controlled.⁴ One was the good conduct time release date determined by the Bureau of Prisons pursuant to 18 U.S.C. § 4105 (the "4105 release date"), including pre- and post-transfer good conduct time credits. The other was the release date determined by the Commission pursuant to 18 U.S.C. § 4106A (the "4106A release date"), based upon the applicable Sentencing Guidelines. If the 4105A release date was earlier, the Commission would order the transferee to "continue to expiration," that is, until the 4105 release date. If the 4106A release date was earlier, the Commission would adjust its release date by 15% to reflect a United State's offender's typical good conduct time credit.

Here, the examiner panel concluded that the 4106A release date of seventy-five months was earlier, based upon the Bureau of Prison's erroneous calculation. To prevent the combined periods of imprisonment and supervised release from exceeding the foreign sentence, the panel truncated the supervised release date to

⁴ The regulatory scheme for calculating good conduct time credits has been amended since Garrett's determination was made. See 28 C.F.R. § 2.62 (as amended May 20, 1994). However, the amendments do not modify the supervised release period of anyone currently serving a supervised release term.

twenty-three months instead of the thirty-six month minimum required under the Guidelines. Upon learning that the good conduct time release date had been calculated from erroneous information, the Commission reopened its determination and ordered the transferee to "continue to expiration," followed by a thirty-six month term of supervised release. Thus, the Commission advanced Garrett's release date by thirteen months but increased his period of supervised release to the full term of his foreign sentence.

On appeal, Garrett claims that the Commission had no authority to reopen its determination and extend the period of supervised release. The Commission can reopen or modify a release date determination only in certain, enumerated circumstances. See 18 C.F.R § 2.62(k) (1993). Under (k)(1)(ii), a hearing is required under the circumstances listed in 2.62(k)(2),(3),(4) and (5), unless the action taken is favorable to the transferee and no factual issue must be resolved. No hearing is required under (k)(6), which provides that "[t]he Commission may modify a determination based upon a clerical mistake or other error in accordance with Federal Rules of Criminal Procedure Rule 36." Because we conclude that the Commission was authorized to reopen its determination under (k)(6), we do not reach the issue whether the redetermination was favorable to Garrett.

The Commission argues that it could reopen the case under section 2.62(k)(6) because the record omitted more than 600 days of pre-transfer work credit that the Commission otherwise would have considered in determining the period of supervised release. Garrett contends that this omission is not one recognized by

Federal Rule of Criminal Procedure Rule 36, which provides that "clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." According to Garrett, the calculation of work credits is not part of the record in the proceeding before the Commission because work credit calculations are the domain of the Bureau of Prisons.

While Garrett acknowledges that the Commission may consider good conduct time credits when it sets a release date and may set the date so that the actual time served plus supervised release equals the foreign sentence, see *Thorpe v. United States Parole Commission*, 902 F.2d 291, 292 (5th Cir.), cert. denied, 498 U.S. 868 (1990), he contends that once the Commission sets that date, it should to be left to the Bureau of Prisons to calculate the credits.⁵ However, if the Commission can consider good conduct time in determining an initial release date, that information must be in the record. Although the actual calculation is not part of the record, a Sentence Data Report in the record, dated June 8, 1993, indicated that Garrett was entitled to 384 good conduct time days based upon 105 days of pre-transfer work credits. A second Sentence Data Report, dated September 29, 1993, contains the

⁵ Garrett's interpretation runs counter to *Cannon v. United States Parole Commission*, 961 F.2d 82 (5th Cir. 1992), reh'g denied, 973 F.2d 1190 (5th Cir.), cert. denied, 113 S. Ct. 2354 (1993), which held that the Commission has the responsibility for calculating all pre-transfer work credits. However, after *Cannon* the regulations were amended to provide that the Bureau of Prisons shall make all good conduct time deductions. See 28 C.F.R. § 2.62(a)(5).

following notation: "Received Mexican document on 09-22-1993, correcting work credit days from 105 to 713." Moreover, 18 U.S.C. § 4106A(b)(1)(B)(ii) requires the Commission to consider "any documents provided by the transferring country" in making its determination.

Thus, there was an omission in the record that would have affected the Commission's determination. If the original 4105 release date had been calculated based upon correct information, it would have been in advance of the 4106A release date, and the Commission would have determined that Garrett should "continue to expiration" and thereafter serve a three-year supervised release period as required under the Guidelines. Garrett has never presented any mitigating factors that would entitle him to a departure from the three-year minimum. To prevent the Commission from modifying its supervised release determination based upon information it otherwise would have considered but for a mistaken pre-transfer work credit calculation would allow Garrett to reap a windfall benefit from a determination that was based upon an erroneous sentence computation.

We therefore affirm the Commission's modification of its determination of Garrett's release date and period of supervised release.

AFFIRMED.