

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8697

Summary Calendar

THOMAS G. RUTHERS, II,

Petitioner-Appellant,

v.

CARLOS ORTIZ, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CV-823)

(July 11, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Thomas G. Ruthers II appeals from the district court's dismissal of the case in which he had petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Finding no error, we affirm.

I.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Ruthers is a federal prisoner incarcerated in the Federal Corrections Institution in Bastrop, Texas. Ruthers was originally the subject of an indictment returned by the Grand Jury in Monongalia County, West Virginia, charging him with three counts of first degree sexual abuse. On May 8, 1986, the Grand Jury returned a second indictment charging Ruthers with eight counts of first degree sexual assault. Ruthers entered into a plea agreement with the State of West Virginia and the United States Government on July 14, 1986. Under the agreement, Ruthers pleaded guilty to one count of first degree sexual assault in Monongalia County, West Virginia. He further agreed to plead guilty in federal court to one count of conspiracy to transport minors in interstate commerce for immoral purposes in violation of 18 U.S.C. § 371, and one count of transportation of minors in interstate commerce for immoral purposes in violation of 18 U.S.C. § 2423. All other charges were dismissed. As part of the plea agreement, Ruthers agreed "to be completely forthright and truthful with . . . all federal agents and state agents with regard to all inquiries made of him." The agreement further stated that "[n]othing contained in any statement given by Mr. Ruthers will be used against him in any further criminal proceedings"

In the West Virginia state court, Ruthers received a sentence of between fifteen and twenty-five years imprisonment, to be served concurrently with any federal sentence; however, he was not to be subject to parole for at least fifteen years. On

August 2, 1988, Ruthers was sentenced to twelve years and six months in prison on federal charges by the United States District Court for the Northern District of West Virginia.

Ruthers applied for an initial parole hearing on April 23, 1990. In the pre-hearing assessment, the investigator rated Ruthers' offense as category 6 severity and rated his salient factor score at 9, giving him an estimated guideline range of 40-52 months of incarceration before parole eligibility. The assessment noted that Ruthers had been charged in other cases involving sexual abuse of children and had used several places of employment to gain access to children.

A parole panel held an initial hearing on August 14, 1990. At the hearing, the panel discussed the pre-hearing assessment results with Ruthers, who contested the description of the offense behavior but agreed with the salient factor score and the guidelines. The panel found that Ruthers was "a poorer parole risk than indicated by the salient factor score, in that he has a history of sexual offense involving young children, and he admits to having sexual relations with at least 40 minor males." The panel thus gave Ruthers a presumptive parole date of June 13, 1995, "with a special mental health aftercare condition."

After exhausting his administrative remedies, see Fuller v. Rich, 11 F.3d 61, 62 (5th Cir. 1994), Ruthers filed a petition for writ of habeas corpus in the United States District Court for the Western District of Texas pursuant to 28 U.S.C. § 2241 on the grounds that the Parole Commission violated the plea agreement by

using statements made in the plea agreement to deny him parole and failed to give him an opportunity during the hearing to dispute the information used to increase his severity offense level. The case was referred to a magistrate judge, and Ortiz, the respondent in this case, filed a motion to dismiss, or, alternatively, for summary judgment. On February 10, 1992, the magistrate recommended that the district court grant the respondent's motion for summary judgment and deny the petitioner's application for writ of habeas corpus. By order filed June 18, 1993, the district court formally referred the matter to the magistrate for an amended report and recommendation. The magistrate concluded that Ruthers had failed to state claims involving federal constitutional violations and repeated his earlier recommendations. On September 29, 1993, after a de novo review, the district court adopted the magistrate's amended recommendation. Ruthers filed a timely notice of appeal.

II.

In considering a federal habeas corpus petition, we review the district court's findings of fact for clear error, but review any issues of law de novo. Barnard v. Collins, 958 F.2d 634, 636 (5th Cir. 1992), cert. denied, 113 S. Ct. 990 (1993). A federal court may not reverse the decision of the United States Parole Commission unless the decision involves flagrant, unwarranted, or unauthorized action. Page v. United States Parole Comm'n 651

F.2d 1083, 1085 (5th Cir. 1981). Appellate courts "approach Parole Commission conclusions with extreme deference, reviewing them only to determine 'whether there is "some evidence" in the record to support the Commission's decision.'" Simpson v. Ortiz 995 F.2d 606, 608 (5th Cir. 1993) (citing Maddox v. United States Parole Comm'n, 821 F.2d 997, 1000 (5th Cir. 1987)).

III.

Ruthers raises four issues on appeal. He argues that (1) the district court erred by finding that the Parole Commission did not violate the terms of the plea agreement, (2) the district court erred by not transferring the case to the Northern District of West Virginia, (3) the district court unreasonably delayed referring the case back to the magistrate judge, and (4) the Parole Commission violated Ruthers' privilege against self-incrimination under the Fifth Amendment by considering statements obtained as part of the plea agreement. We address each of these arguments in turn.

A.

Ruthers first argues that the Parole Commission violated the plea agreement by using statements that he made during the plea-bargaining process to enhance the time to be served before parole. Ruthers relies on the sentence in the plea agreement that states, "Nothing in any statement given by Mr. Ruthers will be used against him in any further criminal proceedings."

Ruthers contends that the information contained in the presentence report (PSR) regarding his admissions of sexual misconduct with more than forty minor males was improperly used to require that he serve longer than the 52-80 month incarceration period recommended by the guidelines before being eligible for parole.

The Parole Commission did not violate the plea agreement because it did not use Ruthers' statements against him in "any further criminal proceedings." Parole arises after the end of the criminal prosecution; thus, a parole proceeding is not part of a criminal proceeding. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972); Cruz v. Skelton, 543 F.2d 86, 94, n. 7 (5th Cir. 1976) ("[T]he granting or withholding of parole is not a criminal proceeding or part of a criminal prosecution."). Furthermore, there were no promises in the plea agreement regarding Ruthers' eligibility for parole. Thus, the Parole Commission was not bound by the plea agreement but was free to consider any of the information available to it. See Augustine v. Brewer, 821 F.2d 365, 369, n. 2 (7th Cir. 1987). As the court in Augustine explained,

because the determination of parole eligibility is a separate phase of the criminal justice process, plea agreements that bind the prosecution with respect to the filing of additional criminal charges or sentencing recommendations do not, absent a clear intent to the contrary, constrain the broad discretion of the Parole Commission to consider all relevant facts and circumstances bearing upon an individual's eligibility for parole.

Id. at 369.

The panel's consideration of information found in the PSR was permissible under 28 C.F.R. §§ 2.19(a)(2) and (3). See Stroud v. U.S. Parole Comm'n, 668 F.2d 843, 846-47 (5th Cir. 1982). In Stroud, the Commission's decision to deny Stroud parole was upheld despite the Commission's heavy reliance on the PSR and on Stroud's prior criminal record. Further, "the Commission may consider dismissed counts of an indictment, hearsay evidence, and allegations of criminal activity for which the petitioner has not even been charged." Maddox v. U.S. Parole Comm'n, 821 F.2d 997, 999 (5th Cir. 1987).

Ruthers also argues that the district court erred by upholding the use of "prior convictions" by the Appeals Board to take him outside the recommended guidelines. We find his argument without merit. The pre-hearing assessment explicitly states that Ruthers had no prior convictions, and the Parole Commission was aware of this fact. The Appeals Board's misstatement was obviously a reference to Ruthers' prior sexual involvement with minors as opposed to any prior convictions.

B.

Ruthers argues that the district court erred by not transferring the case to the Northern District of West Virginia, the original sentencing court. We disagree.

A petition for writ of habeas corpus under 28 U.S.C. § 2241 must be filed in the district where the claimant is incarcerated. See U.S. v. Mares, 868 F.2d 151, 151-52 (5th Cir. 1989). When

Ruthers filed the § 2241 petition at issue, he was incarcerated in Bastrop, Texas. Thus, the district court did not err by not transferring the case.

C.

Ruthers asserts that the district court violated his right to a speedy resolution of his § 2241 petition and denied him due process by taking fourteen months to direct the magistrate to amend the original report and recommendation. Ruthers argues that he was prejudiced by the court's delay because he has been deprived of two prior parole dates. He asserts that, had the Parole Board not been permitted to extend his incarceration period beyond the 52-80 month range indicated by the guidelines, he would have been eligible for release in August 1992. Again, we disagree.

In analogous cases, in which the appellants complained that they were denied due process because the Parole Commission failed to hold a timely parole-revocation hearing, we held that the applicants were not entitled to habeas relief because they had not shown that they were prejudiced by the delay. See Villarreal v. U.S. Parole Comm'n, 985 F.2d 835, 837-39 (5th Cir. 1993); Frick v. Quinlin, 631 F.2d 37, 39-40 (5th Cir. 1980). Ruthers' presumptive release date is June 13, 1995. Because that date has not yet arrived, the district court's fourteen month delay in referring the case back to the magistrate has not extended Ruthers' period of incarceration. Furthermore, there is no

evidence in the record that the Commission would have considered Ruthers eligible for release any earlier in light of the nature of Ruthers' offense, and his history of sexual abuse of young children. Thus, Ruthers has not shown that he has been prejudiced.

D.

Relying on Williams v. Turner, 702 F.Supp. 1439 (W.D. Mo. 1988), Ruthers argues that the Parolee Commission's consideration of the statements that Ruthers made during the plea agreement process violated his Fifth Amendment right against self-incrimination. This issue was not raised in the district court, so it is not subject to review on appeal. See U.S. v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.