

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10615
Summary Calendar

HILARY CLEASTER PRUITT,

Petitioner-Appellant,

versus

GEORGE E. KILLINGER, Warden,
FCI, Fort Worth,

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(4:93-CV-788-Y)

(February 14 1995)

Before POLITZ, Chief Judge, JOLLY and BENAVIDES, Circuit Judges.

PER CURIAM:*

Hilary Cleaster Pruitt appeals the rejection of his habeas challenge to the Parole Commission's denial of a parole date within the parole guideline range. We affirm.

Background

In 1991 Pruitt pleaded guilty to the charge of robbery of a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Customs Warehouse. After imposing two concurrent sentences of nine years imprisonment the district court recommended to the Parole Commission that Pruitt be released at a time beyond that calculated under the parole guidelines.¹

In its initial consideration of Pruitt's file the Commission assigned a severity rating of six and a salient factor of nine, resulting in a parole guideline range of 40-52 months. In setting the severity level at six, the Commission relied on the forcible detention of law enforcement officers during the robbery.² The Commission then ordered Pruitt to serve a period beyond the guideline range because:

[He was] a principal planner in a sophisticated robbery of a U.S. Customs Warehouse involving the overpowering of protected law enforcement officers at gun point who were taped, bound, and forced to lay face down on the floor. Further, . . . [he was] a fugitive for an extended period, nearly nine years, before . . . [his] arrest.

The National Appeals Board affirmed the Parole Commission.

The instant habeas action asserts that the Commission's decision to keep Pruitt in prison beyond the guideline range was

¹The court's AO-235 report identified four aggravating factors on which the court based its recommendation: (1) the robbery involved substantial planning and premeditation including the recruitment of insider cooperation, (2) the offense involved the use of firearms, (3) the theft amounted to \$472,290.34, none of which has been recovered and all of which was purportedly going to be used to purchase narcotics, and (4) the defendant was a fugitive for over nine years during which time the government's case was compromised.

²The Commission's report read:

Your offense behavior has been rated as Category six severity because it involved armed bank robbery during which victims were forcibly detained by being bound.

based on factors considered in the computation of the severity level and was, therefore, impermissible "double counting." The district court denied Pruitt's request for habeas relief and Pruitt timely appealed.³

Analysis

We begin our analysis by noting that the Commission may depart from the guideline range for good cause, provided that it gives the prisoner written notice of the aggravating factors upon which it based its decision.⁴ In reviewing the Commission's finding of good cause, we need only find some supporting evidence.⁵ The Commission abuses the great discretion it is accorded if it uses "aggravating factors to continue a prisoner beyond the guidelines when such factors were used initially to place the prisoner in a particular severity category. This amounts to impermissible double-counting."⁶

Pruitt contends that the Commission double counted his use of force in detaining law enforcement officials during the commission of the robbery, first considering this factor when it set the severity level of his offense and then again when ordering him

³The magistrate judge erroneously viewed the factors listed by the sentencing judge as the factors considered by the Commission, a situation exacerbated by the mislabeling of an attachment to Pruitt's petition. This leads to no reversible error; we affirm on the basis of two sufficient aggravating factors found in the sentencing judge's recommendation and in the Commission's departure litany.

⁴**Maddox v. U.S. Parole Comm'n**, 821 F.2d 997 (5th Cir. 1987).

⁵**Id.**

⁶**Id.** at 1001.

confined for a period beyond that calculated under the guidelines. While the record supports the contention that the Commission considered Pruitt's use of force in setting his severity level and in justifying its departure from the guidelines range, the record also reflects that the Commission articulated two other specific and independent reasons for ordering confinement beyond the guidelines: (1) Pruitt's fugitive status, and (2) his role in planning the sophisticated robbery of the Customs Warehouse.

The Commission did not consider either of these factors in setting Pruitt's offense severity level; it therefore acted within its discretion in considering them as aggravating factors when deciding to depart from the guidelines confinement range.⁷ That the Commission also considered Pruitt's use of force is not dispositive; Pruitt's role in planning the sophisticated robbery of the Customs Warehouse and his status as a fugitive for an extended period of time are independent aggravating factors sufficient to sustain the Commission's action.⁸

Pruitt insists that the reasons given by the Commission must be read collectively. The Commission articulates three separate reasons for its action. We perceive neither a factual nor an

⁷**Id.** ("[I]f the Parole Commission failed to take note of a particular element of the conviction in determining a severity category, it would not abuse its discretion by considering that element as an aggravating factor.").

⁸**Romano v. Baer**, 805 F.2d 268, 271 (7th Cir. 1986) (holding that despite question of double counting on certain aggravating factors, Commission's decision to continue sentence beyond guidelines range is proper because "remaining aggravating factors would be sufficient to sustain the . . . action.").

analytical basis to deem them interdependent.

AFFIRMED.