

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20835
Summary Calendar

MICHAEL ANDERSON GILBERT,

Petitioner-Appellant,

versus

PHILIP M. SPEARS, ETC., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 93-3357)

(June 6, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:*

Petitioner Michael Anderson Gilbert (Gilbert) brought a petition for relief under 28 U.S.C. § 2241, claiming that the Parole Commission (the Commission) committed constitutional error in refusing to consider parole until Gilbert had served almost

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

twice as long as his presumptive parole date under the parole guidelines. He appeals an order of the district court granting the Commission's motion for summary judgment. We affirm.

Facts and Proceedings Below

In 1990, Gilbert pleaded guilty to willful income tax evasion and conspiracy to possess with intent to distribute methamphetamine, offense committed prior to the effective date of the sentencing guidelines. He is currently serving a fifteen-year sentence on those charges at the Federal Corrections Institute in Three Rivers, Texas. In Gilbert's initial parole hearing on December 10, 1991, the panel determined that Gilbert's offense behavior warranted a rating of "Category Six" because he had been involved in manufacturing in excess of 200,000 doses of methamphetamine and that Gilbert's salient factor score was 6. Based on these calculations, Gilbert's presumptive parole range was 52-64 months' imprisonment. Nevertheless, the panel determined that Gilbert should serve 120 months of his sentence based on a number of aggravating factors: that Gilbert was continuously involved over a ten-year period as a major organizer/recruiter in a large-scale drug conspiracy; that ten to fifteen "cooks" were known to have been accomplished during the duration of the conspiracy; and that, during the execution in 1984 of a search warrant, enough precursor chemicals had been seized to produce 175 times the lower threshold of offense severity category six (387 pounds), which suggested an extremely large-scale drug operation.

Gilbert appealed the panel's decision to the National Appeals

Board (the Board). The Board rejected Gilbert's version of the offense in favor of that set forth in his presentence report (PSR). In its notice of decision, dated July 8, 1992, the Board found that there was sufficient information to show that Gilbert was involved in the conspiracy for ten years. It indicated, however, that, even if Gilbert was only involved in the conspiracy from 1978 to 1986, as stated in the PSR, that was still a significant period of time and could have been appropriately considered as an aggravating factor.¹

Gilbert filed a petition for writ of habeas corpus on October 22, 1993. He claimed that, in assessing his parole eligibility, the Parole Commission had failed to follow its own regulations and that its denial of his parole was arbitrary and capricious, thereby violating his due process liberty interest in parole. He further alleged that the Commission impermissibly double counted conduct used to assess his offense severity category to support the decision to depart from the parole guidelines. The Commission moved for summary judgment. The district court granted the motion and entered a final judgment on August 8, 1994. Gilbert timely appealed to this Court.

Discussion

I. Due Process Claims

Before the district court, and now on appeal, Gilbert argues

¹In addition, the Board noted that Gilbert had admitted in the PSR to manufacturing 300 to 400 pounds of methamphetamine during the duration of the conspiracy and that therefore the amount used to determine the offense severity category was appropriately applied.

that the Commission violated his due process rights by failing to follow its own regulations with respect to the initial parole hearing and his appeals from that decision. We have held that the federal parole statute creates a protected liberty interest in parole.² *Kindred v. Spears*, 894 F.2d 1477, 1481 (5th Cir. 1990). In the instant case, however, the Commission clearly complied with the requirements of the federal parole statute. The panel and the Board both provided Gilbert with written notices clearly articulating the particular reasons for the denial of parole. See 18 U.S.C. § 4206(c). This argument is without merit.

Gilbert also claims that the Commission's decision was arbitrary and capricious in that it was based on factors that do not constitute "good cause" for a departure from the otherwise applicable guideline range. We recently reaffirmed the well-established rule that "the Parole Commission has absolute discretion concerning matters of parole and may use all relevant, available information in making parole determinations." *Simpson v. Ortiz*, 995 F.2d 606, 608 (5th Cir.), *cert. denied*, 114 S.Ct. 486 (1993) (citations and internal quotation marks omitted). The

²This is so because, under the federal parole statute, parole is mandatory when the necessary prerequisites have been found to exist. *Kindred*, 894 F.2d at 1481. As we also noted in *Kindred*, the finding of a protectible liberty interest in parole is not inconsistent with the Commission's broad discretion in determining whether to grant parole. *Id.* (citing *Board of Pardons v. Allen*, 107 S.Ct. 2415, 2419 (1987)). Whether *Kindred's* enforcement of the procedural aspects of the parole statute and regulations properly rests in part on due process or only on the statute and regulations themselves is ultimately immaterial here. See *Kindred*, 894 F.2d at 1482. *Cf.* *Board of Curators v. Horowitz*, 98 S.Ct. 948, 956 n.8 (1978).

Commission is not limited in the type of information it can consider in determining parole, provided the information is substantial and the prisoner has notice of it and an opportunity to respond. *Id.*; 28 C.F.R. § 2.19(c). In addition, the Commission may go outside the guideline range when it determines that there is "good cause" for doing so, i.e., "substantial reason . . . includ[ing] only those grounds put forward by the Commission in good faith and which are not arbitrary, irrational, unreasonable, irrelevant or capricious." *Maddox v. U.S. Parole Commission*, 821 F.2d 997, 1000 (5th Cir. 1987) (footnote and internal quotation marks omitted). Our review of the Commission's decision is extremely deferential; we reverse only if the decision is "flagrant, unwarranted, or unauthorized." *Id.* (internal quotation marks and citation omitted). If there is "some evidence" supporting the Commission's determination, we will not disturb it. *Id.*; see also *Simpson*, 995 F.2d at 608.

We conclude that the factors on which the Commission relied to depart in this case constitute good cause and that its decision was not arbitrary or capricious.³ The fact that Gilbert admitted in

³Gilbert's argument that the Board did not adopt all the reasons articulated by the panel, but relied only on the amount of drugs and the duration of the conspiracy, is inaccurate and unavailing in any event. The Board did not specifically reject any of the reasons relied on by the panel, but stated simply that it rejected Gilbert's version of events in favor of that set forth in the PSR, which contains all the reasons on which the panel, and later the district court, relied. Nevertheless, even if we could only consider the Board's articulated reasons, we would uphold the decision here. The extended duration of the conspiracy was clearly sufficient to support the decision to depart. See *infra* note 9.

the PSR to involvement in a large-scale, continuing criminal conspiracy is sufficient to support the decision to depart from the parole guidelines.⁴ See *Maddox*, 821 F.2d at 1000-01 & n.16 (citing H.R. CONF. REP. No. 94-838, 94th Cong., 2d Sess. 27, reprinted in 1976 U.S.C.C.A.N. 351, 359). Although Gilbert argues that the Commission relied on the "wrong" list of aggravating factors in deciding to depart, pointing to those factors listed in 28 C.F.R. § 2.20, Chapter 13, Subchapter A, ¶¶ 5-6, these factors are merely illustrative of those that the Commission may, in its broad discretion, consider; indeed, the Commission may consider any aggravating or mitigating factors that are not arbitrary or irrational. *Id.*; 28 C.F.R. § 2.19(c). Gilbert's argument in this respect is therefore unavailing.

More particularly, Gilbert asserts that the statements in the PSR concerning his leadership role are too conclusory to support the departure and that the amount of the precursor chemicals recovered cannot be considered as an aggravating factor.⁵ However, as the former argument was not at all raised below and the latter

⁴In the PSR, Gilbert admitted that the drug manufacturing conspiracy continued at least from 1978 to 1986 and involved at least five people, that the conspirators had manufactured more than 200,000 doses of methamphetamine during the duration of the conspiracy, and that he had made a substantial amount of money as a result of the conspiracy.

⁵Gilbert also argues that his role as an organizer/recruiter for the conspiracy was already taken into account in determining his offense severity category and that the ten to fifteen "cooks" cited by the panel refer to the amount of drugs involved in the offense, which had also already been considered. As Gilbert has failed to raise these issues before the district court, we will not consider them here. See also *infra* note 7.

was merely mentioned but not briefed or discussed, we will not consider these contentions.⁶

Lastly, Gilbert contends that the Commission has violated its own regulations so frequently that it has effectively abrogated them. Whatever the merits of this argument as a matter of theory, Gilbert's own undocumented statistics show that the Commission has departed from its guidelines in only 12.7% of its cases nationwide. Even if this figure were significant, Gilbert provides no evidence to show that these departures were not based on good cause or were otherwise beyond the Commission's legitimate statutory authority. Moreover, as noted above, the Commission had good cause in this case to depart from the parole guidelines. This argument therefore fails on all fronts.

II. Double Counting Claims

Gilbert claims that, in setting his parole, the Commission impermissibly "double counted" by considering information both to set his initial parole guideline range and then again in deciding

⁶We find these allegations to be meritless in any event. The Commission may consider the PSR in making its determination. 18 U.S.C. § 4207(3); *United States v. Manotas-Mejia*, 824 F.2d 360, 368 n.6 (5th Cir.), *cert. denied*, 108 S.Ct. 354 (1987). Although information in the PSR cannot be based on unsworn statements by the *prosecution*, see *United States v. Elwood*, 999 F.2d 814, 817 (5th Cir. 1993), the PSR relied on Gilbert's own statements in determining that he was an organizer/recruiter in the conspiracy. Further, although the amount of precursor chemicals may not be considered in determining a prisoner's initial offense severity rating, they may be considered as an aggravating factor warranting a departure. The record clearly shows that the Commission did not rely on the amount of the precursor chemicals, but only on the actual amount of methamphetamine produced, in setting Gilbert's offense severity category.

to depart from that range. It is true that the Commission "cannot use aggravating factors to continue a prisoner beyond the guidelines when such factors were used initially to place the prisoner in a particular severity category." *Maddox*, 821 F.2d at 1001 (footnote and internal quotation marks omitted). In this case, the Commission determined Gilbert's offense severity category by reference to the more than 200,000 doses of methamphetamine produced by the conspiracy. Its decision to depart from the guidelines, however, was based on the extended duration of the conspiracy and Gilbert's long-term involvement in it, Gilbert's central role in the conspiracy, the large amount of precursor chemicals found, and the ten to fifteen "cooks" to which Gilbert admitted in the PSR.⁷ No double counting occurred here.

III. Summary Judgment Claim

Finally, Gilbert claims that the district court erred in granting summary judgment for the Commission because genuine issues of material fact remain. Three of the five "fact" issues that Gilbert claims remain in dispute are actually legal determinations that would not preclude the granting of summary judgment.⁸ The

⁷Although Gilbert argues on appeal that the "cooks" refer to the actual amount of methamphetamine produced by the conspiracy and therefore were double counted, he failed to raise this issue in the district court. As noted above, *see supra* note 5, we will not consider issues that are not first presented to the district court for determination. In any event, the other articulated aggravating factors are more than sufficient to support the Commission's decision here, and no prejudice to Gilbert is apparent.

⁸These are Gilbert's arguments that the Board implicitly rejected the aggravating factors relied on by the panel, that the amount of precursor chemicals were not reasonably foreseeable to

other two issues--the quantity of drugs involved in the offense and the duration of the conspiracy--were facts to which Gilbert admitted when he pleaded guilty.⁹ This argument also fails.

Conclusion

The judgment of the district court is AFFIRMED.

Gilbert, and that there was insufficient evidence to support the departure.

⁹Of course, Gilbert only pleaded guilty to a conspiracy lasting eight years--from 1978 to 1986. The Commission's determination that the conspiracy lasted ten years, however, is amply supported by substantial information. Moreover, even if the conspiracy did in fact last only eight years, that period is more than sufficient to support the Commission's determination to depart.