

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JUL 17 1990

ROBERT L. HOECKER
Clerk

EDWARD MICHAEL McCONNELL,)
)
Petitioner-Appellant,)
)
v.)
)
T. C. MARTIN, Warden, and)
the UNITED STATES PAROLE)
COMMISSION,)
)
Respondents-Appellees.)

No. 89-6013
(U.S.D.C. No. CIV-88-1209-W)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before BRORBY, SETH and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Petitioner McConnell appeals from the district court's denial of his petition for habeas corpus, filed pursuant to 28 U.S.C. § 2241. McConnell has sought a 10-month reduction in the

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

aggregate sentence he is currently serving for additional time he previously served in prison on a parole violator term; the additional time served was due to an untimely discovered error in the calculation of his salient factor score under the Federal Sentencing Guidelines. McConnell makes several claims of error in the proceedings before the United States Parole Commission (Commission), the Regional Commissioner, the National Commissioners, and the National Appeals Board (Board). For the reasons that follow, we affirm the judgment rendered in the proceedings below.

In 1974, while on parole from a prior conviction for bank robbery, McConnell violated parole by committing the following offenses: conspiracy to distribute heroin; conspiracy to commit bank robbery; in 1975, McConnell unlawfully possessed a firearm, and committed the offense of escape--guilty pleas were entered on these offenses. In 1981, McConnell was paroled from the aggregated sentence of 17 years. In 1985, McConnell once again violated parole by being convicted on guilty pleas for possession by a felon of a firearm (UZI semi-automatic rifle) and ammunition, possession of cocaine, and possession of marijuana. By Notice of Action dated May 22, 1986, on a combined initial/dispositional parole revocation hearing, the Commission assigned a presumptive parole date of October 9, 1987. McConnell did not appeal that decision.

On June 25, 1986, the Institution Discipline Committee (IDC) found McConnell guilty of prison misconduct; he was involved in a

conspiracy to introduce narcotics of unknown weight and purity into the prison, and had made multiple bribes to a staff correctional officer to assist in the scheme. The record indicates that an investigation revealed other inmates also were participating in the distribution of the drugs over a period of time in 1985 and 1986, and that a female visitor of McConnell's was supplying the drugs to the correctional officer. Payments were made to a place outside the institution. On July 10, 1986, the IDC found McConnell guilty of a second disciplinary infraction--the unauthorized use of narcotics, based upon laboratory tests of a urine specimen which tested positive for cocaine metabolite and THC (marijuana). In light of this new adverse information, the Commission ordered reopening of McConnell's case and ordered that his presumptive parole date be retarded; there is no dispute that a rescission hearing was scheduled for the next appropriate docket.

In September 1987 McConnell received a rescission hearing, and by Notice of Action dated October 26, 1987, the National Commissioners ordered rescission of the presumptive parole date of October 9, 1987, and continued petitioner to a presumptive parole date of February 1, 1994. This decision required McConnell to serve an additional 76 months. McConnell appealed the decision to the Board, and it affirmed. However, it modified some of the reasons in light of its finding that McConnell's salient factor score for the parole violation addressed in the May 22, 1986 Notice of Action was in error and that a lower guideline range was

applicable. However, the Board noted that immediate release was not warranted because of his commission of serious rescission behavior, i.e., new criminal conduct extending into the community (bribery of correctional officer/introduction of narcotics into prison), and the use of narcotics in prison. The Board also affirmed the decision to go above the rescission behavior guidelines, agreeing with the National Commissioners that McConnell was a poorer risk than indicated by his salient factor score, a score based on two prior parole violations and the fact that he committed serious crimes in the community, some of which were within 10 months following his first parole in 1974.

McConnell then sought habeas corpus relief in the federal district court from the penalty imposed for the substantive offenses, his parole violations, the prison misconduct, and from the Board's refusal to "correct" the error in his initial salient factor score by giving him a 10-month reduction in the aggregate sentence imposed. The district court denied McConnell's petition, and this appeal followed.

This court reviews the denial of a petition for writ of habeas corpus de novo. See Monk v. Zelez, 901 F.2d 885, 888 (10th Cir.). However, the decisions of the Parole Commission are reviewed only to determine whether there is a rational basis in the record for the Commission's conclusions embodied in the statement of reasons. See Misasi v. United States Parole Comm'n, 835 F.2d 754 (10th Cir.).

McConnell asserts that the district court erred in upholding the Commission's refusal to rectify an excessive initial assessment by crediting his current sentence with a 10-month reduction for time previously served as a result of error in the initial determination of his salient factor score. He submits that this is repeated punishment for the same conduct and, therefore, violative of due process. The district court concluded that the Commission did not abuse its discretion in refusing to grant McConnell credit for the additional 10 months previously served; the error was not discovered until after the otherwise applicable guideline range and original presumptive parole date had passed, and McConnell had committed serious rescission behavior, some extending into the community.

We find no basis for relief in McConnell's assertion that the failure to discover the error in a timely fashion was the failure of the Commission, nor have we been cited to any authority which would require reversal on that basis. To the contrary, the Second Circuit held in *Bryant v. Warden, Metropolitan Correctional Center*, 776 F.2d 394 (2d Cir.), cert. denied, 475 U.S. 1023, that a prisoner who, due to error by the Parole Commission, served almost 10 months additional time on a parole violator term was not entitled to "bank" the extra months and then draw on the "banked" time to offset punishment imposed for subsequent parole violations and future crimes.

To require credit be given for additional time previously served due to error would encourage violations of prison rules

without fear of incurring additional time in confinement. See Bryant, 776 F.2d at 397. In Bowen v. Murphy, 693 F.2d 104, 105 (10th Cir.), we held that a prisoner is not entitled to credit on sentence being served for time served on sentences imposed previously on convictions ultimately vacated. We noted that this request for credit on a future unrelated sentence for a crime not yet perpetrated at the time of the previous void sentence would result in allowing convicted individuals to establish a line of credit for future crimes, giving them a sense of immunity and an incentive to engage in criminal conduct. See also Johnson v. Riveland, 855 F.2d 1477 (10th Cir.). We believe this rationale is equally applicable to the case at bar.

McConnell also asserts that "banking" time is not possible under the circumstances of this case. We have examined his "time" argument (or sequence of events) and his point that there was no release from confinement and find them without merit. Bryant, 776 F.2d 394; Bowen, 693 F.2d 104.

The time McConnell is currently serving was the result of the prison misconduct found by the IDC. The fact that the allegations of misconduct were not the subject of complaint or conviction is not a basis for relief because 28 C.F.R. § 2.34(c) provides that the Commission may rely upon IDC findings regarding prison misconduct as conclusive evidence of guilt. See also Arias v. United States Parole Comm'n, 648 F.2d 196 (3d Cir.) (Commission may consider information other than that underlying conviction).

Thus, McConnell's current incarceration is based on a separate and independent cause of confinement notwithstanding that there was no release in the interim, and no formal conviction on the misconduct found by the IDC. Banking time is not an inapplicable concept in this case, and McConnell's assertion that reliance on Bowen and Bryant is misplaced is without merit.

And, despite McConnell's contrary assertion, *McClanahan v. Mulcrome*, 636 F.2d 1190 (10th Cir.), does not hold that disciplinary infractions are not "new information" for purposes of reopening a case by the Commission to reconsider a presumptive parole date. In fact, in that case we affirmed the Commission's view that a case may be reopened on the basis of "new information" upon the discovery by the Commission of an error in the initial determination of the severity rating for the offense.

McConnell also contends that the Commission erred in determining the penalty for the Bribery/Introduction of Narcotics misconduct. He argues that the guidelines at 28 C.F.R. § 2.36(a)(2)(ii), "New Criminal Behavior in a Prison Facility," should have been used rather than § 2.36(a)(3), "New Criminal Behavior in the Community." McConnell's argument is based in large part on the examples for use listed in § 2.36(a)(3); however, McConnell has improperly viewed the examples as limitations on the use of that provision. Indeed, as McConnell notes in his brief, the impact of the prison misconduct on the community must be considered. We disagree with McConnell's view that his misconduct had no impact on the community, and no victim

outside the prison. In fact, his bribery of a correctional officer in order to introduce narcotics into the prison for distribution helped foster and perpetuate the illegal drug market in the community, and by its nature necessarily required illegal drug transactions to occur in the community. Surely there can be no doubt that bribing an officer to bring drugs into the prison from outside, together with the payment of monies to an address outside the prison, is conduct which goes beyond the prison boundaries. We find no abuse of discretion in the Commission's use of § 2.36(a)(3) to determine the penalty for the misconduct.

There was no due process violation in the imposition of a penalty for prison misconduct in the absence of complaint or indictment, trial, and sentencing. Although a prisoner has the right to an opportunity to respond to the charges against him, this does not equate with the right to a trial. McConnell's argument not only overlooks the fact that an inmate does not enjoy the full panoply of rights available to those who have not yet been adjudicated guilty of criminal behavior, but also ignores the provisions of 28 C.F.R. § 2.34(c) as noted above. McConnell received copies of the IDC findings and the misconduct report prior to the rescission hearing. Thus, he was apprised of the allegations and had an opportunity to respond.

McConnell also claims that the district court erred in affirming the Commission's decision to impose a period of incarceration above the guideline range for the prison misconduct. He submits that the circumstances given as "good cause" for the

decision above the guidelines were first announced at the Regional Commissioner's review of the rescission hearing, and were not mentioned in the September 1987 rescission hearing. McConnell thus asserts that he was denied the opportunity to challenge the grounds given to justify the sanction imposed. McConnell also submits that the Commission improperly considered information that had been presented previously and was not then considered sufficient to warrant a penalty above the guidelines.

McConnell refers to *Nunez-Guardado v. Hadden*, 722 F.2d 618 (10th Cir.), for a statement of what will satisfy the "good cause" requirement for parole decisions above the guidelines. The record in this case supports the determination to impose a sentence above the guideline range. We have described above the drug distribution plan in the prison and the bribes. These facts demonstrate a substantial degree of planning in the continuing criminal enterprise operated by McConnell, sufficient to come within the language of the legislative history considered in Hadden. Moreover, the district court correctly noted that the salient factor score does not take into account multiple parole violations, which are present in this case, even though it does consider whether the current offense behavior was a violation to parole.

McConnell argues that the Commission previously did not consider the 1974 offenses as warranting a sentence above the guidelines, and therefore they cannot be used to justify the upward departure following the prison misconduct determinations.

The Commission has broad power to consider matters other than the conviction when making its parole decisions. Arias, 648 F.2d 196. The Commission has discretion to set a presumptive parole date "above the appropriate guideline, and it does not lose this authority simply because it previously chose not to exceed higher guidelines that had been incorrectly applied to the prisoner." Patterson v. Gunnell, 753 F.2d 253, 255 (2d Cir.) (citations omitted).

In light of McConnell's multiple parole violations, his consistent involvement with firearms and narcotics, and his demonstrated willingness to engage in criminal conduct whether on parole or in the prison, we cannot say the decision to impose a penalty above the guideline was unwarranted, or otherwise an abuse of discretion. McConnell's heavy reliance on Schiselman v. United States Parole Comm'n, 858 F.2d 1232 (7th Cir.), is misplaced.

Also on the issue of an above-the-guidelines parole decision, we find no error in the consideration of the type of firearm in deciding to go above the guidelines, rather than the mere fact of possession of a firearm. Because McConnell's possession of a firearm was considered at the initial parole determination, McConnell was sufficiently apprised of the information which would be presented for review on appeal from the Commission's decision. In imposing a penalty above the guidelines, the National Commissioners did not err in considering the type of weapon involved as a related but distinct consideration from the mere

fact of possession of a firearm. In addition, the reasons for the decision were specified and McConnell had the opportunity to appeal; thus, he was not denied due process.

McConnell acknowledges that four or more prior convictions warrant a "0" rating, and he had four prior convictions preceding the current offense. Thus, we find no merit to the argument advanced by McConnell which would warrant reversal of the result reached below.

McConnell's final claim of error involves the penalty assessed for his unauthorized use of narcotics after his urine specimen tested positive for cocaine metabolite and THC. McConnell's claim that the infraction occurred and he was found guilty of it by the IDC at a time when the penalty was 0-4 months is undisputed. However, no penalty was imposed for the infraction until 14 months after the IDC had determined McConnell's guilt, during which time the penalty for the infraction had been increased to a range of 0-8 months. McConnell was ultimately given the eight-month maximum for this institutional rule infraction.

We recognize that § 2.34(a) states there should be a prompt report of prison misconduct to the Regional Commissioner for prisoners who have a set presumptive parole date. We also note that the district court found the "notification to the Regional Commissioner was markedly less than prompt." Nevertheless, we believe the district court correctly determined this was not a sufficient basis for granting habeas corpus relief.

The district court's memorandum opinion points out there is no dispute that the rescission hearing was scheduled for the next appropriate docket following the order to reopen McConnell's case, and that McConnell had notice and the opportunity to be heard, at which he denied all allegations underlying the misconduct reports. We agree with the district court's assessment that the notification of misconduct was "less than prompt," but the court correctly noted that the guidelines are not law for purposes of the prohibition against ex post facto application of the higher range which came into effect after McConnell was found guilty of misconduct but before he was sanctioned therefor. See Resnick v. United States Parole Comm'n, 835 F.2d 1297 (10th Cir.).

As a final matter, there is a pending motion by McConnell to supplement the record on appeal to add the affidavit of James Beck in support of his claim that the rescission penalty for the prison misconduct should have been determined pursuant to § 2.36(a)(2)(ii), rather than § 2.36(a)(3). However, we determined above that there was no error in the use of § 2.36(a)(3), and thus deny McConnell's motion to supplement the record.

The judgment rendered in the proceedings below is AFFIRMED in its entirety.

Entered for the Court

Oliver Seth
Circuit Judge