UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

APR 16 1991

ROBERT L. HOECKER
Clerk

BRYAN JAMES CAREL,

Petitioner-Appellant,

v.

U.S. PAROLE COMMISSION

Respondent-Appellee.

No. 90-6391
(D.C. No. CIV 90-1524-P)
(W. D. Okla.)

ORDER AND JUDGMENT*

Before MCKAY, SEYMOUR, 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); 10th Cir. R. 34.1.9. Therefore, the case is ordered submitted without oral argument.

We grant the appellant's request to proceed in forma pauperis.

The appellant, Bryan Carel, appeals from the district court's dismissal of his 28 U.S.C. § 2241 habeas petition. He raises one issue on appeal: whether the Parole Commission abused its discretion when it calculated his initial parole eligibility date.

* 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.

The district court held that the Parole Commission had not abused its discretion. We affirm.

FACTS

Carel was convicted and sentenced to two five year prison terms for filing a false income tax return and for making a false statement on a Federal Aviation Form. The district court suspended the second five year term on the condition that he be placed on probation for five years following his release from prison.

Carel's initial pre-hearing parole assessment was prepared on December 26, 1989.[1] Carel's salient factor score was calculated at eight--a relatively high figure reflecting a positive assessment of Carel's rehabilitative potential. However, his "severity of offense" category was rated as a Category Eight on the basis that Carel's two convictions stemmed from his involvement in a number of major drug transactions. Under the Parole Guidelines Table, a "severity of offense category" of eight cross-referenced with a salient factor of eight equates to a parole date of 100+ months. 28 C.F.R. § 2.20(j)(2) (1989).

At his initial parole hearing on January 22, 1990, Carel argued that because he had not been found guilty of any drug offenses, that it was improper to consider his alleged involvement in drug distribution schemes for purposes of calculating his initial parole eligibility. Carel noted that if the eligibility

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[1] Because the two offenses Carel was convicted of occurred before the effective date of the United States Sentencing Guidelines, Carel is eligible for parole. We note that a defendant who is sentenced under the Guidelines is not eligible for parole.

date calculation had not taken into account the alleged drug offenses, his initial parole eligibility date would have been set at 0 to 10 months. The hearing examiners disagreed and held that there was sufficient evidence in the presentence report to support their recommendation that Carel's parole eligibility be based upon his purported drug activities, notwithstanding his protestations of innocence. The examiners did note, however, that the 100+ year figure was somewhat misleading because in any event, Carel would be eligible for parole after forty months--the 2/3 date of completion. Initial Hearing Summary at 1 (Jan. 22, 1990) (located at Respondent's Answer to Habeas Corpus Petition, Exhibit D, No. Civ-90-1524-P (Oct. 11 1990, W.D. Okla.)). Both the Regional Commissioner as well as the Parole Commission National Appeals Board affirmed the examiners' decision.

Carel, having exhausted all available administrative avenues for relief, petitioned for habeas relief with the United States District Court for the Western District of Oklahoma. The district court in a memorandum opinion dismissed his petition. Carel filed a timely appeal to this court. We now turn to the merits of his petition.

DISCUSSION

We begin by noting that our ability to review a Parole Board decision is extremely narrow: "The standard of review . . . is whether the decision is arbitrary and capricious or is an abuse of discretion." Nunez-Guardado v. Hadden, 722 F.2d 618, 620 (10th Cir. 1983) (quotation omitted). Where the prisoner disputes the accuracy of information presented, the Commission is required to resolve the dispute by applying a preponderance of the evidence standard. 28 C.F.R. § 2.19(c)(1989). Our review of whether the Commission reached the correct result is limited to a determination of whether there is "some evidence" to support the Commission's decision. See Maddox v. U.S. Parole Comm'n, 821 F.2d 997 (5th Cir. 1987); Kramer v. Jenkins, 803 F.2d 896, 901 (7th Cir. 1986). Thus, the question we address is whether there is some evidence to support the Commission's decision to rate Carel's offense severity as a Category Eight.

The level eight rating was based upon a finding at all three levels (the examiners, the Regional Commissioner, and the Parole Commission National Appeals Board) that Carel's income tax problems were related to his participation in a number of drug transactions. The Parole Commission noted that Carel had bought and sold a number of planes that were used to transport large quantities of drugs. The Commission focused on a sale of an Aero Commander in early 1986 that was used to transport twenty-two kilograms of cocaine. The Parole Commission found that by selling this aircraft, Carel had knowingly aided and abetted a conspiracy with the intent to distribute in excess of 18.75 kilograms of cocaine. Under 28 C.F.R. § 2.20, a cocaine distribution offense involving a quantity in excess of 18.75 kilograms is assessed at a severity level of eight.

The Parole Commission based its findings upon Carel's presentence report. Although Carel had not been charged with any drug offenses, his presentencing report described in detail his alleged involvement in several narcotics distribution schemes.

Carel did not object to the presentencing report when it was tendered by the prosecution during his sentencing hearing. The report contained the following information: Carel had been involved in illegal drug activities during the years 1978 through 1986. During this time, Carel had both flown aircraft loads of illegal drugs from foreign countries and had purchased several aircraft for use by other drug runners. In both 1984 and 1985, Carel had purchased Piper Apache airplanes to be used to smuggle drugs. Towards the end of 1985, Carel purchased a Cessna 411. He then sold the plane to a drug smuggler for $50,000. All of these sales involved cashiers' checks in amounts of less than $10,000 thereby enabling Carel to avoid filing a currency transaction report. The Cessna 411 was found abandoned and wrecked near Salinas, Mexico. Residue of a marijuana cargo was found in the wreckage. In November of 1985, Carel purchased and then sold an Aero Commander that was later seized on March 20, 1986, in Roswell, New Mexico, carrying a cargo of twenty-two kilograms of cocaine. In early 1986, Carel's own Piper airplane was seized at an airport in Texas. The plane had been used to import five hundred and twenty-three pounds of marijuana. Carel was arrested, pled guilty to possession of marijuana, and was sentenced by state court to a ten year probation term and was fined $25,000.

Although Carel contends that he had no intention of aiding and abetting the purchasers of the Aero Commander airplane to transport their twenty-two kilogram cargo of cocaine, the presentence report certainly contained "some evidence" to the contrary. At a minimum, the fact that Carel had pled guilty to a possession of narcotics charge involving over 500 pounds of marijuana in September of 1986 meets the "some evidence" standard.

The last argument we address is Carel's claim that he was denied the opportunity to present evidence to the Parole Commission and that as a result, his due process right to a meaningful hearing had been denied. This contention is without merit. Carel confuses two concepts: (1) his right to present his side of the case to the Parole Board and (2) the Parole Board's right to consider yet simultaneously reject his proffer. Carel's due process right only embodies the first concept. Upon reviewing the record, we are convinced that Carel was given meaningful opportunity to present his side of the case. Indeed, in its Notice of Action on Appeal, the National Appeals Board Commission stated:

> The Commission has considered your version of the offense. However, the Commission finds more persuasive the information which indicates that you were utilizing your special skills to broker airplanes to a cocaine importation conspiracy with knowledge that those airplanes would be used for activities to further the conspiracy.

Respondent's Answer to Petitioner's Habeas Corpus Petition, Appendix G.[2] The gravamen of Carel's complaint is that the Parole

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[2] Carel introduced an affidavit to the effect that the Parole Commission refused to consider his side of the story at his January 22, 1990 hearing. According to Carel he was told by an examiner:

> Essentially what I hear . . . the contesting of the information, essentially that has to do with the court. I think I indicated that earlier. You know we are bound by that information as being the official version. What I'm saying is that you have to go back to court and [petition] the court about making changes in the presentence report. I know what you're saying, but the

[Footnote continued . . .]

Board refused to believe his side of the story and instead, attributed more weight to the Presentence Report. That simply does not equate with a due process violation. See Robinson v. Hadden, 723 F.2d 59, 62 (1983) ("The Parole Commission shall consider, if available and relevant, presentence investigation reports.").

The district court's decision to deny the appellant's petition for habeas relief is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

[. . . footnote continued]

> point remains that until that's changed by the court, you know, that's still the document of the court. It's what we consider in [the decision]."

Petitioner's Addendum to Memorandum in Support of Petition for Habeas Corpus, No. Civ-904524-P (Oct. 11, 1990, W.D. Okl). Carel claims that by placing so much weight on the presentence report, the Commission had violated his due process rights. Carel argues that he had not contested the presentence report at his sentencing hearing because he only had ten minutes to review the document and because the recommendation contained in the Report was that he be paroled in 0 to 10 months. We do not find this argument persuasive. Carel should have objected at the time of sentencing to those portions of the report that he found to be inaccurate.