

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION
The Honorable John D. McLeod, Administrative Law Judge
Case Number 12-ALJ-15-0002-AP

Curtis Richardson, #269166, APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES, RESPONDENT

RESPONDENT'S INITIAL BRIEF

Matthew C. Buchanan
General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250**

ATTORNEY FOR THE RESPONDENT

RECEIVED
MAY 07 2013
SC Court of Appeals

TABLE OF CONTENTS

Table of authorities ii

Statement of issue on appeal iii

Statement of the case 1

Arguments

1. The Appellant’s parole hearing did not violate the ex post facto clause. 2

2. The Appellant has not exhausted his administrative remedies. 5

Conclusion 11

TABLE OF AUTHORITIES

CASES

State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002).....2

Steele v. Benjamin, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004).....3

Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000).....3

STATUTES

S.C. Code Ann. §44-53-370(b)(2) (Supp. 2010).....2

CONSTITUTION

U.S. Const. Art. I, §10.....2

S.C. Const. Art. I, §4.....2

STATEMENT OF ISSUES ON APPEAL

1. **WAS THERE AN EX POST FACTO VIOLATION BY THE DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES?**
2. **DID THE ADMINISTRATIVE LAW COURT ERR BY DISMISSING THE APPEAL FOR NOT EXHAUSTING ALL ADMINISTRATIVE REMEDIES?**

STATEMENT OF THE CASE

On January 23, 2010, the Appellant did possess with intent to distribute 4.5 grams of marijuana. He was arrested by an officer with the South Carolina Highway Patrol.

On September 16, 2011, the Appellant pled guilty to Possession with Intent to Distribute Marijuana before the Honorable Benjamin Culbertson and received five years incarceration.

On February 27, 2013, the Appellant made his initial appearance before the Parole Board. Upon the conclusion of this hearing, the Board decided to deny the Appellant an opportunity to be released on parole due to: 1) the nature and seriousness of the current offense; 4) prior criminal record indicates poor community adjustment; and 5) failure to successfully complete a community supervision program. On January 23, 2013, before the parole hearing was even held, the Appellant decided to file a notice of appeal before the Administrative Law Court (ALC). On January 31, 2013, Ralph King Anderson, III, Chief Administrative Law Court Judge released an order dismissing the Appellant's appeal with prejudice.

Within his notice of appeal the Appellant alleges that the Department of Probation, Parole and Pardon Services (the Department) violated the Ex Post Facto Clause when it held his parole hearing in February, and that since he was denied parole at that hearing that now his administrative remedies have been exhausted. In response, the Respondent argues that there is no Ex Post Facto Clause violation by the Department. Furthermore, even though his parole hearing has been heard subsequent to this Appeal, Appellant has not exhausted his administrative remedies in this case because he has not appealed the parole board's actual decision to deny him parole. The initial brief of the Respondent presenting its position follows.

ARGUMENTS

1. THE DEPARTMENT DID NOT VIOLATE THE EX POST FACTO CLAUSE.

The Ex Post Facto Clauses of the United States Constitution and the State of South Carolina Constitutions only apply to the retroactive application of laws passed subsequent to the commission of an offense. U.S. Const. art. I, § 10; S.C. Const. art. I, § 4.

In the Appellant's case, the offense was committed on January 23, 2010. While the Crime Reduction and Sentencing Reform Act of 2010 did pass later that year, which amended numerous drug offense penalties and collateral consequences, the Act did not change for the worse the parole eligibility for the Appellant's offense. S.C. Code Ann. 44-53-370(b)(2).

Appellant's brief alleges that the Respondents changed his classification to violent and not parole eligible. That classification comes from the South Carolina Department of Corrections, not the Department of Probation, Parole and Pardon Services. When the error was found, it was corrected and Appellant received his parole hearing in February.

Lastly, the Appellant's assertion that the ex post facto clauses were violated falls short of meeting the definition of ex post facto, because the Appellant is not claiming that he was adversely affected by a change in the law, but in an erroneous classification by the Department of Corrections. State v. Wall's, 348 S.C. 26, 558 S.E.2d 524 (2002), sets forth the two conditions for a law to be considered ex post facto:

For a law to fall within *ex post facto* prohibitions, two critical elements must be present. First, the law must be retroactive so as to apply to events occurring before its enactment. Second, the law must disadvantage the offender affected by it.

Id. at 30, 525.

Before applying the critical elements, the courts must have a law in question. Therefore,

Appellant's argument that the Department violated the Ex Post Facto clauses of the State and Federal constitutions fails.

2. THE APPELLANT HAD NOT EXHAUSTED ALL ADMINISTRATIVE REMEDIES, AND THE COURT OF APPEALS IS NOT THE PROPER VENUE.

The ALC Order dismissing the Appellant's claim occurred before the Appellant appeared before the Parole Board. Citing Ward v. State, 343 S.C. 14, 538 S.E.2d 245 (2000), the ALC was required to dismiss the appeal because he had not exhausted his administrative remedies.

The parole hearing was heard February 27, 2013, after which the Parole Board denied the Appellant's request for parole. The Board cited the Appellant's criminal history, failure to complete other terms of community supervision, and the nature of the offense as its grounds to deny parole. The Appellant has not appealed this decision to the proper court, which would be the ALC.

While the Department does not dispute the Appellant's right to judicial review of its decision to deny Appellant parole, the Appellant must first submit the decision to the ALC. Steele v. Benjamin, 362 S.C. 66, 606 S.E.2d 499 (Ct. App. 2004). Indeed, this Court cannot review a decision that has not been rendered.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the Appellant's appeal be Dismissed.

Respectfully submitted,

Matthew C. Buchanan
General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9012

BY: 

Matthew C. Buchanan
General Counsel

Attorney for the Respondent

Columbia, South Carolina
May 6, 2013