THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Carolyn C. Matthews, Administrative Law Judge

Case No. 2013-000526

Ronald Tate, #114188, ... Appellant,

v.

S.C. Department of Probation,
Parole and Pardon Services, ... Respondent.

BRIEF OF APPELLANT

Ronald Tate, #114188
Appellant

Perry Correctional
Institution Q-2 B-220
430 Oaklawn Road
Pelzer, S.C. 29669
(No Phone)

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STATEMENT OF ISSUES ON APPEAL

Whether the Parole Board committed Ex Post Facto and Due Process violation when applying current parole standards rather than the standard in effect at the time of Appellant's offense?

Whether Appellant is being treated as a violent offender by the Parole Board?

Whether Respondent allows Appellant to appear before the Parole Board on an annual basis pursuant to South Carolina Law in effect at time of his offense?

Additionally appellant was denied sufficient discovery to make a complete showing that retroactive application created a significant risk of increased punishment.

STATEMENT OF THE CASE

This case is brought before the South Carolina Court of Appeals pursuant to the appeal of Ronald Tate (Appellant), an inmate incarcerated in the South Carolina Department of Corrections. On February 9, 2011, the South Carolina Department of Probation, Parole and Pardon Services notified Appellant that the Board had rejected him for parole. Appellant filed a notice of appeal on February 28, 2011 with the Administrative Law Court (ALC) challenging the Board's denial of parole and the parole laws and procedures related to his parole eligibility. On February 12, 2013, Appellant received an Order from Carolyn C. Matthews, Administrative Law Judge affirming the decision of the Parole Board. Appellant filed his notice of appeal on March 11, 2013 with the Court of Appeals and received confirmation of same on March 18, 2013.

ARGUMENT

APPELLANT CONTENDS THAT THE PAROLE BOARD COMMITTED EX POST FACTO AND DUE PROCESS VIOLATIONS WHEN IT APPLIED THE CURRENT PAROLE STANDARD RATHER THAN THE STANDARD IN EFFECT AT THE TIME OF APPELLANT'S OFFENSE.

Appellant is being deprived of liberty interest in parole of criteria of section 24-21-640 (§55-612, 1962 Code), as amended by addition by Act 100 of 1981, and criteria promulgated by Parole Board in 1982, in violation of his guaranteed rights to property and liberty interest and due process of law in of the Fourteenth Amendment, and in violation of Article 1, § 10 of the United States Constitution. Appellant submitted to the ALC the following relevant parole standard in effect at the time of his offense:

The South Carolina Parole and Community Corrections Boards is mandated under Code of Laws of South Carolina 1976 Section 24-21-640 to consider circumstances warranting parole:

The Board shall carefully consider the record of the prisoner, before and after imprisonment, and no such prisoner shall be paroled until it shall appear to the satisfaction of the Board, that the prisoner has shown a disposition to reform, that in the future, he will probably obey the law and lead a correct life, that by his conduct he has merited

a lessening of the rigors of his imprisonment, that the interest of society will not be impaired thereby and that suitable employment has been secured for him.
The Board shall establish specific criteria for the granting of parole and provisional parole. Such criteria shall reflect all the aspects of this section. The criteria shall be made available to all prisoners at the time of their incarceration and the general public. Section 24-21-640 of Act 100 of 1981 (SCDC 19-109, Jan. 1982).

In contrast, the relevant parole standard in effect at the time of Appellant's initial hearing of April 1, 1998 and all subsequent hearings applied by the Parole Board changed shall to must and may. See Section 24-21-640 (1986); Act 462, § 30; 1990 Act 510, § 1. and PE Form 6 July (1991), removing all language that Board was mandated to consider circumstances warranting parole.

The Administrative Law Judge compared the section that was in effect at the time of appellant's incarceration to the current version and stated that it differs only by the word "shall" being replaced by the word "may." And further stated that the current statute is EXACTLY like the past statute. This was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

In Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), the Court concluded that the mandatory language and the structure of the Nebraska statute at issue in Greenholtz created an "expectancy of release," which is a liberty interest entitled to such protection. Idid. When scrutinized under the Greenholtz standard, the South Carolina statute at issue clearly creates a liberty interest in parole release that is protected by the Due Process Clause of the Fourteenth Amendment. The Court found significant its mandatory language-the use of the word "shall"-and the presumption created-that parole release will be granted when the designatedfindings are made. Greenholtz, 442 U.S.

A duly promulgated regulation has the force and effect of statutory law and becomes an integral part of the enabling statute. Pritchett v. Lanier, 766 F. Supp. 442, 447 (D. SC 1991); Tant v. Dan River Inc., 289 S.C. 325, 345 S.E.2d 495, 496 (1986).

Therefore the criteria promulgated by parole board in 1982 that existed until July 1991 has the effect of law, and must be considered in conjunction with Section 24-21-640. In promulgating criteria, rules and policies, the Board must do so lawfully. Any prisoner whose crimes occurred from June 1981 - June 1986 clearly has a protected liberty interest in parole, for if they met criteria of 24-21-640 (55-612, 1962 Code), as amended by addition by Act 100 of 1981 and criteria promulgated by parole board in 1982.

Respondents current parole criteria is of a discretionary power and limits the statutory mandates of the law at time of appellant's offense. The Board deliberates upon a reasonable probability that an inmate will not again violate the law. The decision is discretionary. The Court in Garner recognized the caution that cloaks any review of a parole boards exercise of discretion, it clarified that the mere fact that a board's decision is discretionary "does not displace the protections of the Ex Post Facto Clause," because there is always the danger that legislatures might disfavor certain persons after the fact even in the parole context." 529 U.S. 253-54 120 S.Ct. 1362.

The Third Circuit Court of Appeals applied the Garner standard, and after reviewing evidence of how the Pennsylvania Parole Board implemented a rule change found an ex post facto violation. See Mickens-Thomas v. Vaughn ("Michens-Thomas 1"), 321 F.3d 374 (3d Cir. 2003). In that case, the state legislature added language to the parole statute that public safety must be considered "foremost". Id., at 377. The statute in effect at the time of plaintiffs conviction required a balancing test based on several factors. In deciding the import of the modification, the appellate court considered "other events coincident with" the revision, including an operations manual, a Parole Board-authored statement on policy, board statements before and after the change, and statistical data comparing release rates before and after the change. The court held that making "concern for public safety" the overriding consideration for parole violated the Ex Post Facto Clause. In effect, the parole board had defaulted its duty to cocnsider "all factors counseling in favor of release." 321 F.3d at 387.

A cursory review of the statistics aided the appellate court in reaching its finding that the plaintiff, whose life sentence had been commuted by the governor, showed a significant risk of increased punishment. In 266 instances of commuted life sentences, the plaintiff was the only one so situated who was not paroled on the first or second attempt. The court concluded that the board "mistakenly construed [the statutory change] to signify a substantive change in its parole function. Id., at 391.

Appellant contends that the cumulative changes in the parole laws and policies, when considered in total, since his conviction, have significantly disadvantaged him as conceded by Carolyn C. Matthews (ALC) on page 2 of her Order, and violate the Ex Post Facto Clause of South Carolina and U.S. Const. see U.S. Const. Art. 1, § 10, cl. 1, and due Process Clause of South Carolina and U.S. Const. amend. XIV, § 1. (Compl. ¶¶ 114-17).

The ALJ's reliance on the omnibus crime act was misplaced, where the statue's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning. South Carolina Department of Transportation v. First Carolina Corporation of South Carolina, 369 S.C. 150, 631 S.E.2d 533 (2006).

RESPONDENT DOES NOT ALLOW APPELLANT ANNUAL PAROLE ELIGIBILITY REVIEW PURSUANT TO SOUTH CAROLINA LAW.

Appellant was denied parole eligibility on November 17, 2009 and under South Carolina Law was rescheduled to be heard on November 17, 2010, one year after rejection. The mandated November 17, 2010 annual parole eligibility hearing pursuant to S.C. Law was revoked, inordinately delayed and scheduled for January 5, 2011, than postponed and rescheduled for February 9, 2011, whereby appellant was denied parole.

Respondent has not followed the law as it applies to appellant receiving an annual parole eligible review every 12 months as mandated by law. Appellant was denied parole pursuant to § 16-1-60 and/or § 16-1-70 which states, "after rejections for parole the procedure of scheduling of rehearing with applicable legal exceptions may allow for a one year hearing; or will be reheard for parole one year following the date of parole rejection. This procedure is flawed and applied unlawfully to appellant as evident by the incongruity in his parole hearings as follows:
April 1, 1998; May 24, 2000; May 22, 2001; July 17, 2002; July 16, 2003; July 18, 2004; July 13, 2005; July 26, 2006; August 29, 2007; October 8, 2008; November 17, 2009, and February 9, 2011.

Respondent's claim that they review appellant annually is not true as evident above. After appellant's initial hearing on April 1, 1998, his next hearing was "biannually", May 24, 2000; theafter appellant had five consecutive annual hearings from May 22, 2001 - July 26, 2006, as seen above. The math is simple, if respondent had followed the law, appellant would have had his fourteenth parole hearing by April 1, 2011. At the filing of this appeal, appellant had only been heard by the parole board 12 times. Appellant was denied a parole eligible hearing in 1999 and 2010.

Respondent continues to deny appellant an annual hearing by altering the frequency of appellant's eligibility causing him to be denied two lawful annual hearings. Respondent asserted that they have followed the law, but refuses to answer why they denied appellant a parole hearing in 1998 and 2010? And the ALJ has concurred and affirmed this unlawful procedure.

ADDITIONALLY, Appellant has not been permitted sufficient discovery to make a complete showing [that retroactive application created a significant risk of increased punishment]. Appellant filed his Motion of Discovery on March 17, 2011, to access data pertaining to the effect of the retroactive application of the parole laws on his own prison term. Respondent will not comply with appellant's request absent direction from the Court. Also, appellant's Motion for Discovery was denied by the Court.

Supreme Court noted that the Court's of Appeals are entitled to cure insufficient records by ordering discovery, Garner, 529 U.S. at 257, 120 S.Ct. 1362. ("Appellant claims he has not been permitted sufficient discovery to make this showing [that retroactive application created a significant risk of increased punishment]. The matter of adequate discovery is one for the Court's of Appeals....").

CONCLUSION

For the foregoing reasonable application of law provided by appellant, concludes that retroactive application of the parole laws and the application of defined violent crimes since his offense and conviction, as well as the cumulative parole law changes, undoubtedly violated his Ex post facto rights and/or deprived appellant of his guaranteed rights to property and liberty interest and due process of law in of the Fourteenth Amendment.

Respondent be mandated to follow the mandatory criteria promulgated by the parole board in 1982, and apply the full benefits of section 24-21-640 of Act 100 of 1981 enacted by legislative language that the appellant has a clear claim of entitlement to.

Ronald Tate

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CERTIFICATE OF SERVICE

I, Ronald Tate, certify that I have served the Brief of Appellant and Designation of Matter to be included in the Record on Appeal on Carolyn C. Matthews, Administrative Law Court, by depositing a copy of it in the U.S. Mail, postage prepaid, on June ___, 2013 addressed to her at Administrative Law Judge Division, 1205 Pendleton St., Suite 224, Columbia, S.C. 29201.

I further certify that I have served a copy of same to Tommy Evans, Jr., Legal Counsel for the South Carolina Department of Probation, Parole and Pardon Services at 2221 Devine St., Suite 600, P.O. Box 50666, Columbia, S.C. 29250.

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P.C.I. MAILROOM

Ronald Tate

Ronald Tate, #114188
Appellant

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(No Phone)

This 4, day of June 2013,

at Pelzer, South Carolina.