

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION
The Honorable Ralph King Anderson, III, Administrative Law Judge
Appellate Case Number 2013-000042

BERNARD BAGLEY, #175851, ... APPELLANT

v.

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

RESPONDENT'S FINAL BRIEF

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court order summarily dismissed Appellant's appeal determined that the Board considered an omitted statutory validated individualized risk assessment pursuant to §24-21-10(f)(1) in making its determination?
2. Whether the notice of rejection for provisional parole stated consideration in conclusion of law, and findings of fact statutory validated individualized risk assessment pursuant to §24-21-5(2), and §24-21-10(f)(1), sufficient to support denial of parole?
3. Whether the Administrative Law Court order summarily dismissed Appellant's appeal determined that the Board considered appropriate factor of unsuitability for provisional parole pursuant to §24-21-645(D), in making its determination?
4. Whether the notice of rejection denying parole conclusion of law and findings of fact violate the doctrine of res judicata bars any reason to deny appellant provisional parole that could have been raised in his former notice of rejection or parole hearing pursuant to §24-21-640, §24-21-645(D) and SCDPPPS Form 1212?
5. Whether the Administrative Law Court order summarily dismissed Appellant's appeal determined that the board considered appropriate factors pursuant to the doctrine of Res Judicata in making its determination pursuant to §24-21-640, §24-21-645(D), and SCDPPPS Form 1212?
6. Whether the Administrative Law Court order summarily dismissed Appellant's appeal determined that the Board considered appropriate factor that create a significant risk of increased punishment upon the Appellant when the Board exercised its life-means -life policy for the remainder of Appellant's natural life under §24-21-645(D), and §16-3-20(A)?
7. Whether the Administrative Law Court order summarily dismissed Appellant's appeal determined that the Board considered appropriate factor of a rational nexus between the substantial evidence and ultimate determination of appellant's current dangerousness and threat to public safety pursuant to §24-21-(10)(f)(1)?
8. Whether the Administrative Law Court order summarily dismissed Appellant's appeal determined that the Board considered appropriate procedures pursuant to Due Process Clause in making its decision pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution, and Article IV, §2[1], of the U.S. Constitution?

STATEMENT OF THE CASE

On August 23, 1990, after getting into an argument with his wife the day before, the Appellant discovered she resigned from her job; withdrew all of the money from their bank account; and, took their daughter to her mother's house in Eastover, South Carolina. The Appellant traveled from Raleigh to Eastover to confront her. Upon arrival, he kicked in the door of his mother-in-law's home, and inquired about a possible affair. During the ensuing argument he shot her twice causing her death.

The Appellant was later indicted by the Richland County Grand Jury for the offense of murder. He appeared before the Honorable Dan Laney to answer to this offense; and upon conviction received a sentence of incarceration for the remainder of his natural life. At the time the Appellant committed this offense, South Carolina law allowed an individual serving a sentence for life the possibility of parole upon the service of twenty (20) years.

The Appellant made his initial appearance before the Parole Board on September 8, 2010. Upon the conclusion of this hearing, the Board denied the Appellant an opportunity to be released on parole. He later appeared before the Board on October 10, 2012. The Appellant's parole was once again denied due to: 1) the nature and seriousness of the current offense; and, 2) the use of a deadly weapon in this or a previous offense. (R.p.7). Upon receiving the order of denial, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleges that the decision of the board was arbitrary and capricious; and, violates the omnibus crime reduction and sentencing reform act of 2010. (R.p.9-p.10). While this case was pending before the ALC, the Appellant filed a motion for discovery, and for additional

documents.

On December 27, 2012, the Honorable Ralph King Anderson, III issued an order dismissing the motion for discovery. He also ruled that the Respondent had shown that all of the procedures were followed prior to the denial of parole, so he dismissed the appeal.

(R.p.1-p.3). The Appellant has now filed a notice of appeal before the South Carolina Court of Appeals. The final brief of the Respondent follows.

ARGUMENTS

1. The Administrative Law Court did not err in determining that the order of denial was proper pursuant to South Carolina law.

The Appellant argues the Board failed to present any evidence that it applied a process revealing a risk assessment of his possible behavior prior to the denial of parole. The South Carolina Code of Laws specifically state:

Establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions.

S.C. Code Ann. §24-21-10(F)(1)(Supp. 2011).

The Respondent argues that the current process does determine the risk of the Appellant to the community. The Board is currently applying a process and criteria established by the South Carolina General Assembly, and found in Department policy. The adoption of this process was listed within the order of denial pursuant to the South Carolina Supreme Court decision of

Cooper v. The South Carolina Department of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008).

In Cooper, the Supreme Court broaden the powers of the ALC, allowing them not only to review the decisions of parole eligibility, but the procedures followed in the denial of parole. In Cooper, the Supreme Court decided that the Department failed to reveal that they considered the mandatory criteria prior to denial. They determined that the findings of fact were included; however, the Parole Board neither, “offered an explanation nor indicated that it has considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form.” Id., at 500. In this case it clearly states within the order of denial, that the mandatory criteria in the statute and Department policy was considered.

The Appellant argues that the Board never considered a risk or needs assessment tool, consistent with evidence based practices. The Respondent will argue, that following the statutory and Department criteria forces the Board to make a determination regarding the actual risk of the Appellant. This determination is consistent with evidence based practices, by making a determination of the Appellant’s possible risk to the community, and his ability to function outside of prison.

The mandatory criteria applied by the Board to each Parole case is found in Section 24-21-640 of the South Carolina Code of Laws, which specifically state:

The board must carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner may be paroled until it appears 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.

S.C. Code Ann. §24-21-640 (Supp. 2010).

The statute also mandates that the Board “establish written, specific criteria for the granting of parole and provisional parole.” S.C. Code Ann. §24-21-640 (Supp. 2010). The fifteen factors the Board considers prior to the granting or denying of parole consist of:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate’s offense, the circumstances surrounding the offense and the inmate’s attitude toward it;
3. The inmate’s prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate’s attitude toward his/her family, the victim, and authority in general;
5. The inmate’s adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate’s employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate’s physical, mental and emotional health;
8. The inmate’s understanding of the cause of his/her criminal conduct;
9. The inmate’s efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate’s overall plan. This includes inmates living arrangements, where he/she will live and who he/she will live with; the character of those with whom

the inmate plans to associate in both his/her working hours and his/her off-work hours;
the inmate's plans for gainful employment;

11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow his/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;
15. Other factors considered relevant in a particular case by the Board.

It is the position of the Respondent, that within these criteria there exist a process validating the risk consistent with evidence based practices; and, that will determine factors that has contributed to the Appellants criminal behavior. South Carolina law defines "criminal risk factors" as:

Characteristics and behaviors that, when addressed or changed, affect a person's risk for committing crimes. The characteristics may include, but not limited to, the following risk and criminogenic need factors; antisocial behavior patterns; criminal personality; antisocial attitudes, values, and beliefs; poor impulse control; criminal thinking; substance abuse; criminal associates; dysfunctional family or marital relationships; or low levels of employment or education.

S.C. Code Ann. §24-21-5(2) (Supp. 2011).

Each of the above listed criminal risk factors are determined by the mandatory criteria found in the aforementioned fifteen factors.

The Appellant is of the opinion that his Parole was denied without the Board considering

evidence-based practices, and factors that contribute to his criminal behavior. The Respondent disagrees, the reasons for denial are clear, and the bases of this denial reveals that all factors of his criminal behavior was considered prior to denial. The denial had to do with the violent nature of the offense of murder; and the use of a deadly weapon in the commission of this offense. The order delivered expressed what was considered, and the reason for denial. This was the determination of the Supreme Court in what should be included in future orders. Cooper, specifically states:

We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form. If the Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.

Id.

A final decision shall include findings of fact and conclusions of law, separately stated. S.C. Code Ann. §1-23-350 (Supp. 2011). It is the opinion of the Respondent that the findings of fact is the event that occurred, and the conclusion of law is the applied criteria. This is why the lower court concluded that the Respondent “explicitly stated that it considered all the factors published on the parole consideration form as well as the factors outlined in Section 24-21-640 of the South Carolina Code of Laws. Therefore the Board’s letter of decision is sufficiently detailed to meet the standard set forth in Cooper.”

The ALC made the proper decision regarding the validity of the decision of the board. The reasons for the denial of parole clearly follows the criteria that must be considered prior to denial. These reasons was made aware to the Appellant as to why parole was denied. The order is

clear, the criteria within the statute and the mandatory policy was considered prior to the denial of parole. According to the Supreme Court, if this is shown no further review by the ALC is necessary. The Parole Board clearly stated in its rejection that it considered the statutory criteria and the criteria set forth in Form 1212 which is sufficient under Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009).

2. Use of identical reasons for multiple denials cannot be considered a violation of res judicata.

The Appellant argues that the use of identical reasons for denial violates the doctrine of res judicata. Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence, that was the subject of a prior action between those parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999); Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Plum Creek, *supra*, *quoting*, Hilton Head Center of South Carolina, Inc. v. Public Service Comm’n of South Carolina, 294 S.C. 9, 362 S.E.2d 176 (1987). To establish res judicata the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; (3) adjudication of the issue in the former suit. Plum Creek, *supra*; Reidman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992); Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986).

In order for it to be res judicata it must be some type of adjudication. A parole or probation hearing cannot be considered an actual adjudication. It is not a criminal trial of those charges, but a more informal proceeding with respect to notice and proof of alleged violations.

State v. Franks, 276 S.C. 636, 281 S.E.2d 227 (1981). The Parole Board is the sole authority to determine parole eligibility, separate and apart from the Court's authority to sentence a defendant. Cooper, at 496. During a denial of parole identical reasons can be use for numerous decisions as long as the reasons would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24-21-640, and its own criteria. Id., at 112 FN.5. If this is the final decision of the Board it must be acknowledged, the sole authority to deny parole remains with the Parole Board.

There exist no specific format that must be used by the Respondent within their orders, but there must exist a detailed conclusions regarding the law and a factual reasoning to their decision. Administrative agency's finding of fact and conclusions of law need not be presented in a particular format, as long as they are supported by the evidence, and whether the law was correctly applied. Cloyd v. Mabry, 295 S.C. 86, 367 S.E.2d 171 (1988). The reasons for the denial of parole is not a legal argument raised as a defense, nor is it a legal argument challenging the denial of parole. Therefore the third criteria found in Plum Creek has not been established, so this denial cannot be considered a violation of res judicata.

3. The denial of parole did not violate the equal protection clause of the United States Constitution.

Though the Appellant concedes there exist no Constitutional or inherent right to be released on parole; he does argue that he is being denied parole as others are being released, for the identical offense. It is his opinion that due to him being a former law enforcement officer, he is being treated differently.

Though not mentioned, the Respondent believes the Appellant argues that he is being

denied equal protection. The United States Constitution states: "no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV §1. The Appellant argues he is being treated differently than other inmates with identical offenses. Each individual that goes before the board are reviewed by the identical criteria; however, the outcome may not be identical due to each case having a different set of facts. Treating inmates differently does not pose a violation of equal protection. The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same. Roller v. Gunn, 107 F.3d 227 (1997). The only measures that should be identical in each case before the board, are the criteria considered, and the ability of the inmate to present evidence in mitigation. Both of which were accomplished during each of the Appellant hearings.

Within his brief the Appellant lists many attributes achieved which was considered by the Parole Board. The ALC nor this Court has the authority to consider anything regarding what was given to the Parole Board prior to their decision. Factors listed in the Appellant's brief regarding mitigating evidence relates to facts not the law, which the Court cannot review. The Court will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the fact could be as related by a witness upon whose testimony the finding was based. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981).

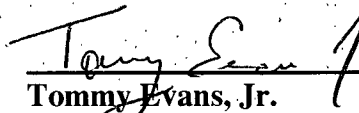
The Appellant accuses the Board of treating him differently as other inmates serving a similar offense; however, he has provided no proof of this occurring. Since the Appellant is the party who raised these allegations, it is upon him to provide proof that the allegations are true. In

administrative proceedings the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof and the burden of proof test rest upon one who files a claim with administrative agency to establish that required conditions of eligibility have been met. Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (2000). The Appellant has only made assumptions regarding what was applied during his parole hearing, he has offered no proof that he was treated any differently than any other inmate in a similar situation. It is clear that after all the criteria was applied it remains the Parole Board who determines if the Appellant should be released on parole. It should also be apparent that this decision was made after the application of the mandatory criteria established in South Carolina law and Department policy. The application of these criteria was properly placed within the order of denial pursuant to Cooper. Therefore, the ALC was proper in dismissing this appeal.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the ALC dismissing this appeal be affirmed.

Respectfully submitted,



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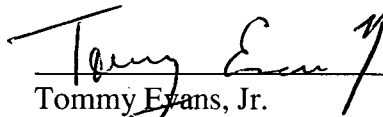
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S.C. DEPARTMENT OF PROBATION, PAROLE,
AND PARDON SERVICES, ... RESPONDENT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and
with the South Carolina Supreme Court's order dated August 13, 2007.



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March 26, 2013

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated March 26, 2013, on Appellant this 26th day of March, 2013, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certify that all parties required by Rule to be served have been served.



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