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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Docket Number 23-ALJ-15-0010-AP

Appellate Case No.: 2023-001050

CHARLES WILIAMS, #086721,.....APPELLANT

v.

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

BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the ALC erred when it summarily dismissed Appellant's appeal as a "routine denial" of parole?
    a. Appellant's appeal constituted an "as-applied" claim
    b. The ALC had jurisdiction to review Appellant's "as-applied" claim
    c. The ALC's summary dismissal violated a fundamental right

STATEMENT OF THE CASE

On September 26, 1975, Appellant left a night spot with three females ranging in age from 15-17 years old. About a month later, on October 26, 1975, the bodies of all three females were found floating in the Reedy River about fourteen miles outside of Greenville County. The investigation revealed Appellant took all three victims and gave them some pills, which they consumed leading to their death a short time later. Appellant then drove to a wooded area by the Reedy River and rolled each body into the water. Due to the age of the case, information regarding his indictment and conviction are limited. On April 16, 1976, Appellant was sentenced to death by electrocution; however, on April 14, 1977, the South Carolina Supreme Court vacated Appellant's death sentence and remanded his case to the lower court for resentencing. On April 20, 1977, Appellant was sentenced to three life sentences which were set by the court to run consecutive to each other.

Appellant became parole eligible in August 1984. Since that time, Appellant has had twenty-one parole hearings with the most recent review taking place on March 29, 2023. Following Appellant's appearance, the Board rejected his request for parole citing the nature and seriousness of Appellant's offense as the reason for its rejection.

Upon being informed of his denial of parole, Appellant filed a notice of appeal before the Administrative Law Court (ALC) on April 25, 2023. In his appeal, Appellant alleged "(1) abuse of discretion, (2) failure to follow substantive and procedural law, (3) unlawful procedure, (4) violation of due process, (5) deprivation of a state-created liberty interest in parole, and (6) the Board's parole decision is arbitrary and capricious." The Honorable Deborah Brooks Durden of the ALC determined that the court did not have jurisdiction to hear this matter as it was a routine

denial of parole, thus affirming the Board's decision, and the appeal was summarily dismissed May 31, 2023.

Appellant's issues in this appeal could be considered to be contained in his bare-bones appeal, but they are most similar to his appeal in 2021, in which this Court affirmed the denial. Appellant argues the application of Form 1212 or any "factors beyond the scope of the statutory language of S.C. Code Ann. § 55-612" to Appellant's parole hearing violates the ex post facto clause of the U.S. Constitution, the ALC had the authority to hear his challenge because it considered the constitutionality of an "as-applied" situation, and S.C. Code Ann. § 1-23-600(D), upon which the ALC based its dismissal, is unconstitutional as it infringes upon his fundamental right of access to the court. the same issues in this appeal.

Conversely, Respondent argues that the ALC was correct in its determination this was a routine denial of parole and cannot be reviewed. Beyond that and in the alternative, Respondent argues Appellant's brief raises issues that were not argued below and are therefore not preserved, the changes in the criteria are minimal and not penal in nature so there exists no violation of ex post facto, and there was no error in the ALC's summary dismissal. Respondent's brief follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. When reviewing a parole case, the ALC sits in an appellate capacity. *Furtick v. S.C. Dept. of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2004). Under the appellate standard of the Administrative Procedures Act, the ALC's review is limited to the record, absent irregularities in the procedure of the agency. S.C. Code Ann. § 1-23-380(4). Additionally, the court may not substitute its judgment for the

judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5). However, "an administrative law judge shall not hear... an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." S.C. Code Ann. § 1-23-600(D).

In an appeal from an ALC decision, the Administrative Procedures Act provides the standard of review. S.C. Code Ann. §1-23-610(B). This Court may only reverse the decision of the ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

"The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Id.* In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Hill v. S.C. Dep't of Health and Envtl. Control*, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).

ARGUMENTS

1. The ALC properly dismissed the appeal.

Appellant raises several issues on appeal, all aimed at his belief that the ALC should have overturned the Board's decision and granted him parole due to its failure to follow what he believes are the appropriate procedures, including strictly abiding by the Parole Board statute that was in place when he was convicted.

The ALC does not have the ability to hear an appeal of a routine denial of parole. "An administrative law judge shall not hear ... an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services." S.C. Code § 1-23-600(D). Only when the Department determines an inmate is permanently ineligible for parole does the ALC have full jurisdiction to review that decision. *Furtick*, 352 S.C. at 598, 576 S.E.2d at 149. In *Furtick*, the Supreme Court extended *Al-Shabazz*[1] to parole eligibility decisions while emphasizing the difference between a final decision of parole eligibility and the routine granting or denial of parole by the Parole Board of parole-eligible inmates.

"Parole is a privilege, not a right." *Cooper v. S.C. Dep't of Probation, Parole and Pardon Services*, 377 S.C. 489, 496, 661 S.E.2d 106, 110 (citing *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003)). "[N]o 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 § 24-21-640. "Undoubtedly,

[1] *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000).

the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 11.

So constrained, the ALC properly considered the Board's procedures and not its decision-making authority. The Board, being the sole body empowered to grant or deny parole, elected to deny parole to Appellant after carefully considering the required factors. The Board clearly stated that it did so in the letter of rejection to Appellant. The ALC was thus required to dismiss the appeal by the Supreme Court in *Compton v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 385 S.C. 476, 684 S.E.2d 175 (2009). "We emphasized that ... if the Parole Board clearly states in its order denying parole that it considered the factors outlined in section 24–21–640 and the fifteen factors published in Form 1212, and that if the Parole Board complies with this procedure, the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision." *Id.*, 385 S.C. at 479, 684 S.E.2d at 177.

2. Appellant's arguments were not preserved for review at this stage.

Appellant's summary dismissal was based on the filing of his notice of appeal that contained six short words or phrases listing his issues as listed in the Statement of the Case above. Respondent did not file a response before the court issued its order, which contained only language regarding the fact this rejection was a routine denial of parole, as evidenced in the record on appeal. Appellant references the possibility that his original filing was insufficient pursuant to SCALC Rule 59(D), but Respondent is not aware of any deficiency letters or other issues that would affect this case.

Respondent cannot be expected to respond to issues that were not raised to either the Parole Board or the ALC. This is confirmed in *James v. S.C. Dep't of Probation, Parole and Pardon Services*, 377 S.C. 564, 568, 660 S.E.2d 288, 290-91 (2008) (citing *Great Games, Inc. v. South*

Carolina Dep't of Revenue, 339 S.C. 79, 529 S.E.2d 6 (2000)) – general rules of preservation apply and, if an argument is not addressed in the ALC's order, it is not preserved for appellate review. Appellant had the option of filing a Rule 59(e), SCRCP, motion to alter or amend the order, but he did not.[2] As such, this court does not have the ability to consider the arguments raised by Appellant as they were not considered by the lower court.

3. The Board's use of its current parole consideration criteria does not result in an ex post facto violation.

As a threshold matter, Respondent asserts that, because this was a routine denial of parole, the ALC's affirmation of the Parole Board's decision should stand as there is no legal basis to overturn it. The ALC reviewed the procedures, as it is limited to in this capacity, and found them to comply with all relevant law. *See Cooper.*

Regardless, Appellant argues that the use of the parole consideration criteria found in S.C. Code §24-21-640 and the criteria listed in the Board's current Form 1212 constitutes an ex post facto violation. Because he committed his crime in 1975, he argues that the criteria the Board uses should solely be that which was used at the time of his offense.[3]

Respondent submits that the changes to the parole criteria do not retroactively alter the definition of the crime or increase the punishment for a crime. As discussed in *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000), ex post facto violations occur when "the legislative

[2] This is specifically addressed in the 2019 Revised Notes to Rule 29(D), SCALC: "Issues raised in the contested case proceedings but not addressed in the written order are no longer deemed denied, but must be raised by the parties in a motion for reconsideration in order to be preserved for appeal." Though Parole review cases the set of rules for special cases, referral within those rules is clearly made to the availability of a motion pursuant to Rule 59.

[3] Appellant has unsuccessfully submitted this identical argument to this Court and the Honorable Deborah Brooks Durden under Docket No. 19-ALJ-15-0002 (Order filed July 22, 2019). This Court affirmed the decision of the ALC in 2023-UP-107, filed March 15, 2023. He also unsuccessfully argued denial of due process after a routine denial of parole to the Honorable Carolyn C. Mathews and Court of Appeals, ending in Opinion No. 2012-UP-216.

amendment 'produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.*, quoting *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995).

In *Jernigan*, the legislative change at issue was a change from yearly parole hearings to biannual hearings for violent offenders. The Supreme Court determined that the change violated ex post facto because increasing the time between parole hearings "effectively increases the 'quantum of punishment.'" *Jernigan* at 340 S.C. at 265, 531 S.E.2d at 512, quoting *Lynce v. Mathis*, 519 U.S. 433, 444-45 (1997).

At the time Appellant committed the offense, S.C. Code Ann. § 55-612 (Supp. 1962) defined the mandatory criteria the Parole Board was obligated to apply to an inmate seeking parole. Section 55-612 of the South Carolina Code of Laws specifically stated:

> The Probation, Parole and Pardon Board shall carefully consider the record of the prisoner, before during and after imprisonment, and no such prisoner shall be paroled until it 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 interests of society will not be impaired thereby; and that suitable employment has been secured for him.

S.C. Code Ann. § 55-612 (Supp. 1962)

In comparing this to the current statute, which was amended in 1981 and is now § 24-21-640, the only difference is the word "shall" is replaced by the word "may" – "...no prisoner may be paroled...." This change does not affect the Board members nor the criteria used in the determination of parole. This minor difference must be considered procedural, and not a violation of ex post facto. A procedural change is not ex post facto even though it may work to an inmate's disadvantage. *State v. Bryant,* 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009). It certainly does not represent the "significant risk," whether on its face or through implementation, of "a longer period of incarceration than under the earlier rule," as Appellant argues. *Garner v. Jones*, 529 U.S. 244,

251 (2000); *Jernigan*, 340 S.C. at 261, 531 S.E.2d at 509.

Appellant alleges that the consideration of the Department's fifteen criteria found in Form 1212 violates ex post facto, specifically as it includes consideration of the nature and seriousness of the offense.[4] He argues that since these criteria did not exist at the time of his conviction, and that he has not received parole since he started receiving hearings in 1984, then it must be to his detriment. This argument is flawed, as correlation does not necessarily imply causation.

Furthermore, neither the statutory nor Departmental criteria are penal in nature so it does not violate ex post facto. In order for the ex post facto clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature. *State v. Huiett,* 302 S.C. 169, 394 S.E.2d 486 (1990). The Department criteria do not increase punishment; nor does it change the parole board or add to the number of votes necessary to be awarded parole. The use of the current criteria is merely a procedural change; therefore, it does not violate ex post facto.

Lastly, there is no conceivable application of Form 1212 or the current wording of the statute that could increase Appellant's potential time in prison. Appellant looks to *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597 (1995), *Jernigan*, and *Huiett* to support his claims that the "quantum of punishment" may be increased by this language change. All three of the cases consider the possibility of ex post facto violations due to a change in frequency of parole hearings and found that, in most instances, retroactive application would be an ex post facto violation. That fact pattern is clear application of a new rule that could lengthen incarceration. In the case *sub judice*, though, there is no new rule, merely a reframing of the existing standards. Therefore, the decision of the Board and the Administrative Law Court should be upheld.

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[4] The Board must establish written, specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (1990).

CONCLUSION

Appellant appealed a routine denial of parole. As such, the ALC had limited authority to hear the appeal, and only to review whether the Board followed proper procedure. Because the record clearly shows the Board followed the procedure outlined in *Cooper*, the ALC properly dismissed the appeal. Its decision should therefore be upheld.

Respectfully submitted,

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October 24, 2023

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PARDON SERVICES, ...RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* on Appellant this 24th day of October, 2023, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Charles Williams, #86721
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

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

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October 24, 2023

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: Charles Williams v. SCDPPPS
23-001050

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated October 24, 2023, along with proof of service in the above referenced case.

Sincerely,

Jessica E. Kinard
Legal Counsel

JEK:dn

Enclosures

cc: Charles Williams, #086721

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