

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
ADMINISTRATIVE LAW JUDGE
Ralph K. Anderson, III.
Administrative Law Judge
Case NO: 13-ALJ-15-0004-AP

Robert F. Spigner, #065500,
Appellate,

INITIAL BRIEF OF APPELLATE
Appellate Case NO:2013-001380

v.

South Carolina Department of
Pardon; Probation and Parole Services,
Respondents.

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JUL 24 2013

SC Court of Appeals

Dated: July 22, 2013

s/ Robert F. Spigner
Robert F. Spigner

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STATEMENT OF ISSUES ON APPEAL

I. Did the S.C. Parole Board render appellant ineligible for parole when they failed to follow S.C. Statutory requirements as set forth in S.C. Code Ann § 24-21-10 (F)(1) Supp. 2010 as well as S.C. Ominibus Crime Reduction and Sentencing Act of 2010?

II. Did the S.C. Parole Board render appellant ineligible for parole by deciding his case prior to the time he was given his pre-parole interview?, thus denying appellant his just and fair opportunity and right to be heard as set forth in the Parole Boards own established criteria and dictated by S.C. Code Ann § 24-21-640 (2012) ?

III. Did the S.C. Parole Board apply the incorrect and improper criteria (Law and Statutes), in deciding appellants parole?, thereby, rendering appellant ineligible for parole? One of many questions raised herein is; what determinative method, and by what authority did the S.C.D.P.P.S. utilize to change appellants original 1971 Common Law Felony into a 1986 Ominibus Crime Bill violent offense?, and thereby, using that after establishing criteria as to appellants eligiblity?

STATEMENT OF THE CASE

On September 8, 1971., appellant was sentenced to Life Imprisonment for the crime of Common Law Murder, S.C. Code Ann § 16-3-10 (_____).

On July 7, 1981 appellant was paroled.

In September of 2000 appellants parole was revoked for compliance issues of missing report date; changing residence without permission and drug use (misdemeanor). since this sole revocation appellant has unsuccessfully appeared before the Parole Board on six (6) occasions, the last appearance occurring on October 10, 2012. Appellant was also denied reinstatement on parole at that time.

On October 25, 2012, appellant requested a rehearing and was denied on December 13, 2012.

A Timely Notice of Appeal was properly filed with the Administrative Law Court on January 7, 2013.

On May 24, 2013, The Administrative Law Court Judge by Order DENIED appellants appeals.

On June 20, 2013 Notice of Appeal was properly filed with the S.C. Court of Appeals.

This APPEAL follows.

STANDARD OF REVIEW

In an appeal from an ALC decision the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann § 1-23-610 (B)(Supp 2012).

This court will only REVERSE the decision of a 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 under unlawful procedure,
- (D) affected by other error of law;

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

(F) arbitrary, capricious or characterized by an abuse of discretion, or unwarranted exercise of discretion.

id " The court may not substitute it's judgement for the judgement of the [ALC] as to the weight of the evidence on questions of fact ". (alterations added). 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. Department of Health and Environmental Control 389 S.C. 1, 9, 10, 698 S.E. 2d 612 (2010).

ARGUMENTS

I. Did the S.C. Parole Board render appellant ineligible for parole when they failed to follow S.C. Code Ann § 24-21-10 (F)(1), Supp 2010, as well as the S.C. Omnibus Crime Reduction and Sentencing Act of 2010?

The Parole Board did not give appellant COMPAS as is required by S.C. Code Ann § 24-21-10 (F)(1) and the S.C. Omnibus Crime Reduction and Sentencing Act of 2010.

The ALC in his Order dated May 24, 2013 states " that because appellant used the wrong cite when presenting this issue that he abandoned this issue ", See: Order Pg. 4 . Appellant who is pro-se and acts in good faith in all his efforts admits to a scrivener's error in mistaken references to S.C. Code Ann § 1-23-380 however, appellant did not use the language of S.C. Code Ann § 1-23-380 but, did use the proper language and intent of the correct cite S.C. Code Ann § 24-21-10 (F)(1) Supp 2010. In any event take note that the respondent did not argue this point.

The respondent and the court states that appellant's issue(s) should be dismissed because COMPAS is not mandatory. However, in this regard both the court and the respondent cite S.C. Code Ann § 24-21-10(F)(1) Supp 2010 as the correct cite of Statutory Law for this issue. See: ALC Order Pg. 2 , and respondents brief Pg. 7 which states " Department MUST develop a plan that includes the following: 1) establishment of a process for adopting a validated actuarial risk 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.

Both, the court and the respondent ignored the meaning of the words "MUST" used to say that something is required by RULE or LAW!, Merriam Websters English Dictionary Pg. 1069 (2008), and SHALL, a command used in RULE or LAW to say that something is required!, Merriam Websters English Dictionary Pg. 1493 (2008).

Appellant argues that the respondent and subsequently the ALC's interpretation of the word MUST and SHALL used in the statute S.C. Code Ann § 24-21-10 (F)(1) is erroneous and SHOULD

BEREJECTED. See: BARTON v. SOUTH CAROLINA DEPARTMENT OF PARDON: PROBATION AND PAROLE SERVICES S.E. 2d, 2013 WL 3366669 S.C. 2013, respondents MUST give correct interpretation of the statute.

The ALC on Pg. 3 of it's Order states " appellant has cited no legal authority showing the department was required to use COMPAS ". This statement is clearly erroneous! But, perhaps, MOST troubling about the ALC statement is it's LACK OF SUPPORT in the record. Appellant cited S.C. Omnibus Crime Reduction and Sentencing Act of 2010, See: Appellants ORIGINAL Brief pg. 2 while both the ALC and the respondents state that COMPAS is not mandatory, they offer NO authority or proff.

S.C. Code Ann § 24-21-10 (D)(1) Supp 2010, REQUIRES training for the Parole Board Members and it's Agents. Would the State Legislature require the time and money be spent to train staff for something that is not mandatory? If not required as mandatory, then the S.C. State Legislature WOULD NOT have used the word REQUIRED" to call for as obligatory or appropriate demand ". The American Heritage College Dictionary Pg. 1160 (2008). Appellant was never given COMPAS as is manditorily required bt S.C. Code Ann § 24-21-10 (F)(1), this statute went into effect on January 1, 2011. COMPAS is obligatory to be used as a mandated requirement for parole consideration.

This cited statute evidence's the proof that COMPAS WAS and IS mandatory.

S.C. Code Ann § 24-21-10(F)(2) Supp 2010 " Establishment of Procedures for the Department of Pardons; Probation and Parole Services on the use of the Validated Assessment Tool to guide the Department's Parole Board ".

Appellant has a substantial personal right to Statutorily Correct Parole Review. Appellant does have a right to require the Parole Board to adhere to statutory requirements in rendering a decision Supp COOPER. The Cardinal Rule of Statutory Construction is to ascertain and effectuate the intent of this State Legislature. Media General Commc'n Inc. v. S.C. Department of Revenue 388 S.C. 138, 694 S.E. 2d 525 (2010). " Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the Rule of Statutory Interpretation are not needed and the court has NO right to impose another meaning, GAY

v. ARIAIL 381 S.C. 341, 673 S.E. 2d 418 (2009) " If the statute is ambiguous, the court MUST construe the term of statute. TOWN OF Mt. PLEASANT v. ROBERTS 393 S.C. 332, 713 S.E. 2d 278 (2011).

When the Parole Board deviates from, or fails to render it's decision without consideration of the appropriate criteria, it essentially abrogates appellant's right to be parole eligible and thus, infringes on a state created Liberty Interest " COOPER v. S.C.D.P.P.P.S. 377 S.C. 489, 661 S.E. 2d 106 (2008). By their own admission, the S.C.D.P.P.P.S. Parole Board of (they claim COMPAS is not mandatory), did not utilize the correct criteria in making appellant's parole decision. This failure is a crucial and critical element of appellant's appeal.

The S.C. State Supreme Court has determined in HINTON v. S.C.D.P.P.P.S. 357 S.C. 327 _____ S.E. _____, (2004), " We find it unexceptable that the Parole Board should look to the so called facts of the case to make it's determination for the facts are almost always disputed ", Thus, the S.C. State Supreme Court having opined to the negative aspect of using "SO CALLED FACTS "it is antagonistic to fairness that the Parole Board continues to use and subscribe to it's stated reasons/policy.

Appellant now appropriately questions the methods and authorities used by the Parole Board in making it's decision since by their own admission they have not used the mandatory criteria (respondent states that appellant was not given COMPAS, because COMPAS was not mandatory. See: R. Brief Pg. 7). Appellant posits that whatever it is that the Parole Board of, has used outside of the legal and proper standards and requirements of both the S.C. State Legislature and the S.C. State Supreme Court. See: S.C. Code Ann § 24-21-10(F)(1) COMPAS, and HINTON Supra. Appellant cited statute and authority in this brief. This issue SHOULD be heard because the S.C. Parole Boards interpretation effects other similiary situated individuals.

II. Did the S.C.D.P.P.P.S. (parole board of) render appellant ineligible for parole by deciding appellant's case prior to the time appellant was interviewed for pre parole interview, thus, denying appellant his just and fair opportunity and right to be heard as set forth in the Parole Boards established criteria and dictated by S.C. Code Ann § 24-21-640 2012.

The respondent states on Pg. 10 of the R-Breif " the parole boards decision was not made prior to the pre parole investigation." This averment is conrary to the official S.C.D.C. documentation reported by the head classification at the Broad River Correctional Institution. The board and legal counsel does not dispute or explain away the response appellant recieved from the head of classification, **See:** attached- S.C.D.C. Inmate Request To Staff so dated September 9, 2012. Respondent offers no evidence or proof that the appellant was not denied parole on or before June 23, 2012.

" MERE SCRIVENOUS ERROR ", **See:** ALC Order Pg.'s 5-6 . The ALC opines that this was a " MERE SCRIVENOUS ERROR ". The ACL also states " an adequate de novo review renders harmless a procedural DUE PROCESS violation based on the insufficiency of the lower administrative body ".

Appellant posits how is it appropriate or proper for the ALC to provide a defense for the respondent?

The respondent did not provide a core defense or principle rebuttle for themselves. **See:** R-Breif Pg.'s 9-10 . Respondent never said; alleged or offered that it was any kind of an error. When the respondent concedes to the to the facts given in the presentation in the appellants breif, those facts carry the weight of the preponderance of the evidence which fulfills the fundamental element of the law; and, further creates proof in the favor of the appellant.

The ALC is remiss in arguing for the respondent and dismissing this issue, when the respondent failed to address the principle

issue themselves. The respondent made a mere conclusory statement, See: R-Breif Pg. 10, made without offering any cognitive reasoning or citing any authority whatsoever.

Is it appropriate and/or legally permissible to allow the respondent to deliberately ignore a valid critical appeal issue within their formal brief, put forth in response? When the respondent failed to assert affirmatively any objection to this claim by the appellant, the respondent in effect, in law and equity waived the right to further judicial review. See: **U.S. v. SCHRONE** 727 F2d 91 (4th Cir. 1984). The Honorable ALC in it's Order on Pg. 4 citing Rule 208 (B)(1)(D), **SLACR, DIVINE v. ROBBINS** 385 S.C. 23, 683 S.E. 2d 286 (Ct. App. 2009)(noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal)(short conclusory statements made without supporting authority and deemed abandoned on appeal, and therefore not reserved for our review).

Unlike application to the appellant why did not the ALC likewise apply these court rules; authorities and opinions to the respondent? Appellant contends the straight forward answer issues a clarion call that equals and balanced justice is absent.

Abandonment of a claim is not a principle that works only to the detriment of the appellant. It ia a sword that cuts both ways. Justice MUST NOT only be just, justice MUST give the appearance of justice, and avoid even the suggestion of favoritism.

This honorable court will please take note that in all of the appellants breifs, the appellant cites authorities and undertakes to explain the issues.

The honorable ALC found that de novo review was given on October 10, 2012 and thus cured any procedural DUE PROCESS violations. See: Order Pg. 6. The court cites **UNISYS CORPORATION v. S.C. BUDGET and CONTROL BOARD/DIVISION of GENERAL**

SERVICES/INFORMATION MANAGEMENT OFFICE 346 S.C. 158, 551 S.E. 2d 263 (2001), (" an adequate de novo review renders harmless a procedural DUE PROCESS violation based on the insufficiency of the lower administrative body "). There are two (2) points that attest that this authority does not apply here.

First/ the court omitted a very important term when quoting this case law " IMPARTIAL PANEL ", See: 551 S.E. 2d 272 (2001) Key17. It is axiomatic that the same Parole Board members sitting thereafter cannot be " impartial " as is required and presumably will infect the judgement of the remainder of the process, to include, but, not limited to the Parole Boards later meeting.

Second/ the adequate de novo review rendering harmless a procedural DUE PROCESS violation based on insufficiency of the lower administrative body, means that the de novo review is done by a higher body. Such is not the case in the instant process under scrutiny.

It is inappropriate and foreign to justice and fairness in law and equity for the court to attempt to justify the respondents actions, especially in consideration that the respondent failed to raise this issue for proper adjudication. The **U.S. Constitution Amendments V., XIV.,** the DUE PROCESS PROTECTION mandates that the trial and appeals be heard by disinterested and impartial judicial officers. See: **CAPERTON v. V.A.T MASSEY COAL COMPANY INC.** _____ U.S. _____ (2009)(WL1576573); **WARD v. VILLAGE OF MOOREVILLE, OHIO**, 409 U.S. 57, 59-62 (1972), and, **TOMEY v. OHIO** 273 U.S. 510, 532 (1927). This issue SHOULD be remanded for proper consideration.

III. Did the S.C. Parole Board apply the improper and incorrect criteria (**law and statutes**) in deciding appellants parole, thereby, rendering appellant ineligible for parole?

A significant and controlling question raised herein is what determinative method, and by what authority did the S.C. Parole Board of, use to change appellants **original 1971 Common Law Felony** into a **1986 Omnibus Crime Bill Violent Offense**? Thereby,

using this later criteria as to appellants eligibility is a significant and incorrect causal effect in the Parole Boards denial of appellants eligibility for parole!

The respondents in their reply state " the Parole Board used criteria that existed when the appellant committed the offense ". See: Respondents Breif Pg. 10 . " Appellant has provided no support for his assertion that the Parole Board used the 'Violent Offence 'Classification from S.C. Code Ann § 16-1-60 in reaching it's decision as to appellants parole." See: Order Pg. 7 .

The honorable ALC states " he thus argues that the Department violated his DUE PROCESS RIGHT by using the wrong criteria and retroactively applying S.C. Code Ann § 16-1-60 (2012)." See: Order Pg. 6. " Appellant has provided no support to his assertion that the Parole Board used the ' Violent Offence Classification ' from S.C. Code Ann § 16-1-60 in reaching it's decision as to appellants parole." See: Order Pg. 7 .

The appellant now asks that this Appeals Court take judicial notice and correct accordingly. The former Director of the S.C.D.P.P.P.S. has admitted in court proceedings that to use the 16-1-60 classification for prisoners whose offense committed prior to 1986 was in ERROR, (See: attached from SMITH v. S.C.D.P.P.P.S. Case No:08-ALC-15-00042-AP).

The honorable ALC states " however, for the same reason given above, this argument is considered abandoned on appeal, for failure to explain how the authority appellant cites supports his argument." This is an erroneous statement by the ALC. In the appellants original breif Pg's. 6,7,and 8 , appellant explains very clearly this issue. Both the honorable ALC and the respondents are ignoring the core principle in this issue as stated by the appellant. Appellant is a Technical Parole Violator! There is a criteria that applies to technical parole violators that the Parole Board of, is choosing to not use! The Parole Board of, and the honorable ALC offered no challenge to this issue, choosing to ignore the valid issue set forth within

the appellants original and final briefs. The respondents after the wording and context of the meaning of the appellants originally presented issue. The respondent then goes on to use case law and subjects that do not address the issue. Not only is this tactic misleading, this effort is in error. Appellant clearly states that he is a technical parole violator and it is this criteria that is the criteria that should be used. See: Appellants Brief Pg. 6 .

In the South Carolina Sentencing Reform Commission Report to the General Assembly 2010, Pg. 17 (See: copy attached), it states in part " P.P.P. maintains a policy which clearly defines violations in two (2) categories-(1) Compliance, and (2) Community Safty, and a process for violation proceedings ". This is clearly a policy that applies to parole violators. By not using this criteria that was created for parole violators, the parole board of is violating appellants DUE PROCESS RIGHTS and EQUAL PROTECTION of the Law; thus, making the appellant ineligible for parole consideration. " when the parole board deviates from or fails to render it's decision without the consideration of the appropriate criteria, it essentially abrogates appellants right to be parole eligible and thus, infringes on a state created Liberty Interest ". See: COOPER v. S.C.D.P.P.P.S. 377 S.C. 489, 661 S.E. 2d 106 (2008).

The respondents don't even mention this issue of parole violation. Is it not the responsibility and obligation for the respondent to address and affirmatively respond in formal, the issue properly brought before the honorable ALC. However, the respondent is deliberately avoiding the issue. The ALC has chosen to argue for the respondent and dismiss appellant upon the courts own initiative, when the respondents themselves refused to address the principle issue!

Appellant raises a question to this court, Is it appropriate and/or legally permissible, either in law or equity to allow the respondent to deliberately ignore and avoid appellants valid and substantively important issue raised on appeal within the

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espondents formal brief in response?

The distinction between a parole violator and the criteria used for someone who has never been paroled, is at the heart of this particular issue. The respondent has failed to address appellants pleadings and averment, thus, evidencing the respondents default as to this issue, and in effect acquiescence in favor of the appellant.

There is a criteria that exist that is for those who violate parole. This is evidenced by the South Carolina Sentencing Reform Commission Report to the General Assembly 2010, See: Pg. 14 infra. This criteria SHOULD be applied to appellant.

IMPARTIAL

The honorable ALC on Pg. 7 of the courts order states " this argument is considered abandoned on appeal for failure to explain how the authority the appellant cites supports his argument ", citing **RULE 37 (B)(3) S.C.A.L.C.R.**, and **RULE 208 (B)(1)(D) S.C.A.C.R.** This is clearly erroneous! See: Appellants Brief Pg. 6-8 , which explains the cited authority. However, when the respondent avoids the issue and refuses to address the issues, the honorable ALC ignores those same rules it clearly applied! When the respondent effectively conceded to the facts advanced in the presentation and affirmative pleadings in appellants brief, those facts carry the weight of the Proponderance of Evidence, which creates the fundamental element and persuasion of the law in favor of the appellant.

A proper question upon this appeal is; Why has the honorable ALC chosen to overlook, or ignore the profound evidence and arguments put forth and established within this appellants brief? By avoiding the facts; citations and arguments presented by the appellant, clearly confirms that this issue was not fairly or substantively represented by the respondent. With ALL due respect to the honorable ALC, the appellants position that he believes this issue was not decided as impartially as is called for in the **U.S. Constitutional Amendments V., XIV**, the DUE PROCESS PROTECTION

mandates that trial and appeals be heard by disinterested and impartial judicial officers. In RE MURCHISON 349 U.S. 133, 136 (1955); *TOMEY v. OHIO* 273 U.S. 510, 532 (1927). In RE MURCHISON: "not to hold the balance nice, clean and true between the state and the accused denies the latter DUE PROCESS of LAW!" A fair trial in a fair tribunal is a basic requirement of DUE PROCESS and is requiring the absence of actual or implied bias.

INCORRECT CRITERIA

The honorable ALC in his Order Pg. 7 states, " the Parole Board is free to take into consideration as one of the fifteen (15) factors on **FORM 1212** ' the nature and seriousness of the inmates offense' ". This is and has been an incorrect interpretation and finding on two (2) different levels.

First/ in respect of the **Legislative Intent**. " a victim's right under the **Victim's Bill of Rights** terminates when the criminal proceedings and the post conviction, **See: S.C. Constitutional Amendment 1-24** also **EX PNTE LITTLEFIELD 540 S.E. 2d (SC 2000)**, actions against the alleged perpetrator are reduced **S.C. Constitutional Amendment 1-24**. This is in violation and constricts the S.C. General Assembly Rule making authority. Just as the trial court can not use the Victims Bill of Rights to re-open a completed criminal proceeding (**Constitutional Artical 1.24**), The Parole Board can not Over and Over again utilize the above to deny the appellant his DUE PROCESS RIGHTS!

Second/ further, such findings seemingly borders on embracing the Tenants Doctrine of Res Judicata (" the effect of foreclosing re-litigation of matters that have once been litigated and decided."), Just to reference the appellants offense at each parole hearing is a re-litigation of the facts which this court held in **HINTON v. S.C.D.P.P.P.S. Op. No: 3722, filed January 12, 2004** that " we find it unacceptable that the Parole Board should look to the 'so called' facts of the case to make this determination, for the 'facts' are almost always disputed and neither this court, nor the Parole Board has any way of

extricating which particular 'facts' the jury decided were true and which were not!" The Parole Board SHOULD NOT undertake such a determination in what would amount to a defacto second trial and an egregious DUE PROCESS VIOLATION!

Once this appellant was granted parole in 1981, appellant overcame ALL of the reasons that the Parole Board used the (Victims Bill of Rights; Nature and Seriousness of Offense; Violence and weapon). To utilize those same reasons again and againis Double Jeppardy! This does violate Res Judication. This does violate the S.C. Supreme Mandate of Law as fully and clearly set forth in the **HINTON (2004)** case cited infra, which remains the law in South Carolina.

The Parole Boards failure to use statutorily required criteria for parole violators affects whether similarly situated individuals. This issue SHOUL BE REMANDED back to the board because this interpretation is wrong! See: Barton and Sentencing Report Pg. 2 and **HINTON**.

This appeal should be heard because the S.C. Parole Boards interpretation of the statutes and law is erroneous and this interpretation effects many others similarly situated individuals. The S.C. Sentencing Reform Commission Report to the General Assembly dated February 1, 2010 states, " In FY 2009, the S.C. Department of Probation, Pardon and Parole Services (PPP) revoked 3,205 offenders to prison, accounting for 24 percent (%) of all prison admissions, 66 percent (%) of whom, or more then 2,100 offenders, were sent back to prison for NON-criminal (Technical) violations, such as a failure to show up at the probation office; alcohol or drug usage ". See: Pg. 2 of the report.

CONCLUSION

This appeal SHOULD BE REMANDED for a decision consistent with the criteria; statutes and the Law.

The State of South Carolina
IN THE COURT OF APPEALS

ROBERT F. SPIGNER, 065500
Appellant

Certificate of
Service

v

South Carolina Dept. of Pardon
Probation and Parole Services
Respondent

Appellate Case
NO: 2013-001380

ROBERT F. SPIGNER, declares under the penalty of perjury that he did mail a copy of his Initial Brief to the parties listed below by placing them in the U.S. Mail clearly addressed.

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