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SC Court of Appeals

The STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge
Appellate Case No. 2023-001050

Charles Williams, #086721, ... Appellant,

v.

South Carolina Department of Probation, Parole, and Pardon Services, ... Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of a June 26, 2023 order of the Administrative Law Court ("ALC") affirming the final agency decision of the South Carolina Department of Probation, Parole, and Pardon Services ("Respondent") denying parole to Charles Williams ("Appellant"). This decision was preceded by Appellant's hearing before the Board on March 29, 2023.

FACTS

Appellant was convicted on April 16, 1976 for the murders of Rhonda Adams, Cynthia Jones, and Kathy Smith, and was sentenced by the Honorable Judge Frank Epps to death by electrocution. This sentence was later reversed due to the South Carolina Supreme Court decision of *State v. Rumsey*, 267 S.C. 236, 226 S.E.2d 894 (1976) (the statute imposing a mandatory death sentence upon a finding of murder is unconstitutional). Appellant reappeared before Judge Epps and was resentenced to a term of life with the possibility of parole for each offense of murder. At the time Appellant committed these offenses on September 26, 1975, South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon service of ten years.

Appellant was 26 years old when he began serving his life sentence; he is now 73. Appellant made his initial appearance before the Parole Board on December 19, 1984. Appellant appeared at his most recent parole hearing on March 29, 2023. In response to Appellant's parole request, Appellant received a notice of rejection letter from Valerie Suber, Associate Deputy Director for Paroles, Pardons and Release Services, on April 6, 2023, informing Appellant that Respondent had denied his parole request for the privilege of being released on parole. Moreover, Suber's March 29, 2023, *Notice of Rejection* included the following conclusion of law and findings of fact:

The Board hereby makes the following CONCLUSION OF LAW:

After careful consideration of: (1) the characteristics of your current offense(s), prior offense(s), prior supervision history, prison disciplinary record, and/or prior criminal record, as described in the findings of fact below; (2) ***the factors published in Department Form 1212 (Criteria for Parole Consideration)***; (3) ***the factors outlined in Section 24-21-640 of the South Carolina Code of Laws***, and (4) ***actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws.*** The Parole Board had determined that your parole must be denied.

You will be notified 30 days prior to your next scheduled parole consideration date.

FINDINGS OF FACT:

01 Nature And Seriousness Of Current Offense

(R. p. 1, lines 2-15)

STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act ("the Act") provides the appropriate standard of review. *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct.App. 2008). The Act provides the applicable standard:

> (B) The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or 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;
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2022).

ARGUMENTS

I. WHETHER THE ALC ERRED WHEN IT SUMMARILY DISMISSED APPELLANT'S APPEAL AS A "ROUTINE DENIAL" OF PAROLE?

The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. *McEntire Produce, Inc. v. South Carolina Department of Revenue*, 439 S.C. 238, 247, 295, 886 S.E.2d 697, 702 (Ct.App. 2023). The S.C. Supreme Court emphasized that parole review hearings by the Respondent constitute a "routine denial" of parole "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." *Cooper v. South Carolina Dep't of Probation, Parole and Pardon Services*, 377 S.C. 489, 499, 661 S.E.2d 106, 111 (2008). Under that scenario, the ALC would have limited authority to review the decision to determine whether the Respondent followed proper procedure, and the ALC could summarily dismiss the inmate's appeal.

a. Appellant's Appeal Constituted An "As-Applied" Claim

The S.C. Supreme Court established that if the Respondent deviates from or renders its decision without consideration of the *appropriate criteria*, then "it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111. At the time of Appellant's offenses on September 26, 1975, the Respondent's parole considerations were governed and limited by five statutory factors under S.C. Code Ann. § 55-612 (Cum.Supp. 1973), not S.C. Code Ann. § 24-21-640. The 1975 statute, in its entirety, reads as follows:

> **§ 55-612. Circumstances warranting parole; reports of parolees.**
>
> The Probation, Parole and Pardon 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 confinement, that the interests of society will not be impaired thereby and that suitable employment has been secured for him. The paroled prisoner shall, as often as may be required, render a written report to the Board giving such information as may be required by the Board

which shall be confirmed by the person in whose employment the prisoner may be at the time.

South Carolina Code of Laws § 24-21-640 was first created and added to the 1976 Code of Laws by the enactment of 1981 Act No. 100, § 12, eff. June 15, 1981. In its entirety, it reads as follows:

> **SECTION 12.** Article 7 of Chapter 21 of Title 24 of the 1976 Code is amended by ***adding***:
>
> Section 24-21-640. The Board shall carefully consider the record of the prisoner before, during, 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 interests of society will not be impaired thereby; and that suitable employment has been secured for him. ***The Board shall establish written, specific criteria for the granting of parole and provisional parole. Such criteria shall reflect all of the aspects of this section. The criteria shall be made available to all prisoners at the time of their incarceration and the general public.*** The paroled prisoner shall, as often as may be required, render a written report to the Board giving such information as may be required by the Board which shall be confirmed by the person in whose employment the prisoner may be at the time.

The 1981 version of S.C. Code Ann. § 24-21-640 was amended three more times by 1986 Act No. 462, § 30, 1990 Act No. 510, § 1, and 2010 Act No. 151, § 12. Since Appellant began appearing before the Respondent to request the privilege of parole on December 19, 1984, the Respondent has applied ***all four versions*** of S.C. Code Ann. § 24-21-640 while considering whether to grant or deny parole—with each subsequent version adding new factors, and making it increasingly more difficult for Appellant to earn the privilege of parole. The most recent version of S.C. Code Ann. § 24-21-640, effective April 28, 2010, was the version considered by the Respondent on March 29, 2023.

Appellant contends that, while Respondent's Department Form 1212 acknowledges "the [Respondent] exercises its absolute discretion to the limits allowed by state and federal law," the Respondent has repeatedly exceeded its legal authority by considering Appellant's request for parole based on amended statutory laws, and its own agency policy criterion, that were ***not*** in effect at the time of Appellant's offenses on September 26, 1975. At that time in South Carolina, the legislature

had ***not*** granted general rule-making authority to the Respondent to "establish written, specific criteria for the granting of parole and provisional parole." *See* S.C. Code Ann. § 24-21-640 (Supp.2022). Specifically, the Respondent was ***not*** authorized to consider "the factors published in Department Form 1212 (Criteria for Parole Consideration); ... the factors outlined in Section 24-21-640 of the South Carolina Code of Laws, and ... [the] actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws" (R. p. 1, lines 5-8). The South Carolina legislature did ***not*** authorize the Respondent to consider factors beyond the scope of the statutory language of S.C. Code Ann. § 55-612, until ***after*** the enactment of 1981 Act No. 100, §§ 4 and 12, on June 15, 1981. And, most importantly, the legislature did ***not*** authorize the Respondent to retroactively apply the statutes enacted in 1981 Act No. 100, §§ 4 and 12, to Appellant's sentence.

Therefore, Appellant argues the Respondent's application of these post-1981 statutes and "Department Form 1212" to his sentence "effectively changed the standards for granting parole"[1] in violation of the United States and South Carolina Constitution's prohibition against the passage of *Ex Post Facto* laws. *See* U.S. Const. art. 1, §§ 9, 10; S.C. Const. art. 1, § 4; also *Cooper*, 377 S.C. at 501, 661 S.E.2d at 112. The Respondent's application of this *new criteria* were not merely procedural,[2] but

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[1] The appellant in *Cooper* made this precise argument to the S.C. Supreme Court. However, the Court determined that Cooper's argument was disingenuous because (1) his crimes occurred ***after*** the enactment of 1981 Act No. 100, §§ 4 and 12, on June 15, 1981, and, most notably, (2) the statutory language of S.C. Code Ann. § 24-21-640 had ***not*** been substantively changed. In the instant case, S.C. Code Ann. §§ 24-21-10(F)(1) and 24-21-640 ***did not exist***, and the Respondent ***did not*** have legal authorization from the legislature to "establish written, specific criteria for the granting of parole and provisional parole," at the time of Appellant's offenses on September 26, 1975.

[2] The Respondent's argued in *Steele v. Benjamin*, 362 S.C. 66, 69, 606 S.E.2d 499, 501 (Ct.App. 2004), that "because no law existed at the time of Steele's conviction [in 1967] regarding the timing of parole review after a denial of parole, the [Respondent's] internal policy of review every two years controlled." Interestingly, Appellant's offenses occurred on September 26, 1975, and the Respondent has relied on this same internal policy to schedule his parole hearings every two years—like Steele. In effect, the court ruled in *Steele* that "in allowing Steele parole review every two years instead of every year, the Department was applying the 'law/rule/regulation in effect at the time Mr. Steele was sentenced." In view of the court's ruling in *Steele*, the Respondent did not have legislative authority to create or enforce internal policies for the granting of parole and provisional parole. cf. *James v. South Carolina Dept. of Probation, Parole and Pardon Services*, 376 S.C. 392, 398, 656 S.E.2d 402-403 (Ct.App. 2008) (the frequency of parole hearings was a matter determined by the Department's own policy).

instead effectively abrogated Appellant's right to a fair and correct parole review and, thus, "infringe[d] on a state-created liberty interest." *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111 (2008) (emphasis added). If the proceedings are flawed even unintentionally and in good faith, through reliance on inappropriate criteria, it has a decisive effect on Appellant's parole hearings and adds years to his confinement. The Respondent's application of S.C. Code Ann. §§ 24-21-10(F)(1) and 24-21-640, along with its own "factors published in Department Form 1212," rather than the five statutory factors enumerated in S.C. Code Ann. § 55-612, constituted an unlawful procedure and was in excess of the statutory authority granted to the Respondent on September 26, 1975. *See* S.C. Code Ann. § 1-23-610(B)(b) and (c).

A measure is an *ex post facto* law when it retroactively alters the definition of a crime or increases the punishment for a crime. *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). The relevant inquiry regarding an increase in punishment is whether a legislative amendment "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* (quoting *Cal. Dept. of Corr. v. Morales*, 514 U.S. 499, 509, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)). If the amendment produces only a "speculative and attenuated possibility" of increasing an inmate's punishment, then there is no *ex post facto* violation. *Id.* Furthermore, a change in law that merely affects a mode of procedure, but does not alter substantial personal rights is not *ex post facto*. *State v. Huiett*, 302 S.C. 169, 172, 394 S.E.2d 486, 487 (1990) (citing *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)). A court should look to the effect of the statute on the "quantum of punishment" to determine whether an amendment offends the ex post facto prohibition. *Id.*

The 1981 version of S.C. Code Ann. § 24-21-640, in addition to the three subsequent amendments of 1986 Act No. 462, § 30, 1990 Act No. 510, § 1, and 2010 Act No. 151, § 12, were not merely procedural, but cumulatively pose a sufficient risk of increasing the measure of punishment attached to Appellant's sentence by imposing new statutory and agency policy criteria that Appellant

must now satisfy in order to earn the privilege of parole; these same requirements ***did not exist*** on September 26, 1975. Additionally, this risk is further compounded by the Respondent's use of "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." See S.C. Code Ann. 24-21-10(F)(1) (Supp. 2012). Moreover, this additional change further affects Appellant's substantial personal right to a statutorily correct parole review consistent with the parole statutes in effect on September 26, 1975. *Cooper*, 377 S.C. at 499, 661 S.E.2d at 111-12 ("Parole is a privilege and [Appellant] has no right to be paroled; however, [Appellant] does have a right to require the [Respondent] to adhere to statutory requirements in rendering a decision.").

b. The ALC Had Jurisdiction To Review Appellant's "As-Applied" Claim

Ordinarily, the ALC has no authority to hear appeals of parole eligible inmates who have been denied parole by the Respondent. *See* S.C. Code Ann. § 1-23-600(D). Moreover, when an inmate challenges the constitutionality of a statute, regulation, or agency policy, the ALC generally is without authority to pass on the constitutionality of statutes. *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) (When an inmate challenges the constitutionality of a statute, the Department of Corrections and the Administrative Law Court must follow the statute and leave the question of whether it is constitutional to the courts.). However, the S.C. Supreme Court has declared that the ALC has the authority to review "as-applied" constitutional challenges to statutes. *Travelscape, LLC v. S.C. Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28, 38-39 (2011).

In an "as-applied" challenge, the party challenging the constitutionality of the statute claims that the "application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Doe v. State*, 421 S.C. 490, 503, 808 S.E.2d 807, 813 (2017). However, "finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 39. Instead,

'[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1101, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992).

Appellant argues the ALC is "empowered to hear as applied challenges to statutes and regulations ..., and [for] finding a statute or regulation unconstitutional as applied to a specific party..." *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 39; also *Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct.App.2002); *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000).

c. The ALC's Summary Dismissal Violated A Fundamental Right

Despite the S.C. Supreme Court's April 5, 2023, ruling in *Allen v. South Carolina Department of Corrections*, 439 S.C. 164, 886 S.E.2d 671 (2023) that, "A claim that implicates a state-created liberty or property interest is not required for the ALC to have subject matter jurisdiction over [an] inmate grievance appeal that has been properly filed," S.C. Code Ann. § 1-23-600(D) (Supp.2018) does not afford Appellant equal access to the courts to seek remedies for unconstitutional applications of state law by Respondent. The statute related to hearings and proceedings before the ALC was amended by 2012 South Carolina Laws Act 212, § 1, on June 7, 2012. South Carolina Code Ann. § 1-23-600(D), as previously amended by Act 334 of 2008, was further amended to read, in relevant part, as follows:

> An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of the opportunity to earn sentence-related credits pursuant to Section 24-13-210(A) or Section 24-13-230(A) ***or an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services.***

Appellant's appeal of the Respondent's decision involves a "fundamental right," so access to the courts is constitutionally required in this case. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780,

28 LEd.2d 113 (1971); *Sullivan v. S. C. Dept. of Corrections*, 355 S.C. 437, 446, 586 S.E.2d 124, 128 (2003). The Constitution guarantees that prisoners, like all citizens, have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 606 (1996). The grounds for Appellant's appeal in the ALC, filed April 25, 2023, 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 (R. p. 2, lines 19-26). Appellant would point out the grounds for appeal are "the reason or point that something (as a legal claim or argument) relies on for validity," *Black's Law Dictionary* (8th Ed.2004) at 723, and simply refer to "the discrete reason or reasons that caused the party to appeal." cf. *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 906 N.E2d 1125 (2009). Appellant was not required to fully express his claims of the Respondent's violations of our federal and state constitutions in the notice of appeal.

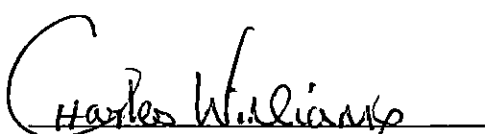
Appellant contends SCALC Rule 59(D) specifically states, "Any notice of appeal which is incomplete or not in compliance with this rule or Rule 71 will not be assigned to an administrative law judge until all required information is received and any applicable filing fee is processed." In addition, SCALC Rule 60(A) specifically states, "Unless otherwise ordered or stayed by the operation of Rule 59, the party first noticing the appeal shall file an original brief within ninety (90) days after the date of assignment." Appellant filed the *Notice of Appeal* on April 25, 2023, and, the Honorable Deborah Brooks Durden was assigned to hear Appellant's appeal of the Respondent's final decision denying parole on May 11, 2023. Therefore, Appellant's original brief was not due for proper filing until July 24, 2023. Although the ALC made no attempt to notify Appellant that the *Notice of Appeal* failed to comply with the requirements of SCALC Rule 59(D), Judge Durden issued an order summarily dismissing the appeal on May 31, 2023—just twenty (20) days later (R. p. 4, line 6). Under this

scenario, Appellant was never afforded a fair opportunity to avail himself under the procedures articulated in the Administrative Procedures Act by formally expressing his "as-applied" constitutional claim through the filing of a brief as mandated by SCALC Rule 60. Appellant received a copy of the order on June 5, 2023.

CONCLUSION

Appellant prays this Court declares that the Respondent's decision constituted an unlawful procedure and was in excess of the statutory authority granted to the Respondent on September 26, 1975, pursuant to S.C. Code Ann. § 1-23-610(B)(b) and (c), or, in the alternative, remand this appeal to the ALC for further proceedings in order to make a factual determination of Appellant's claims of federal and state constitutional violations of Respondent.

Respectfully submitted,



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