STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable S.Phillip Lenski, Administrative Law Judge
Docket Number 23-ALJ-15-0022-AP

Appellate Case No.: 2024-000093

ROBERT SPIGNER, #65500, ...APPELLANT

v.

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

INITIAL 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 December 23, 1970, the Richland County Sheriff's Department received a call that a checker cab was found parked half-way between Sunglow and Conders Road in Columbia, South Carolina. After the authorities responded they found Victim slumped over the steering wheel, shot in the right temple and her throat cut. Deputies contacted the Checker Cab dispatcher, learning that Victim's last pickup were two males from the airport wishing to be taken to Farrow Road. Deputies then spoke to the individuals at the airport, but the interviews brought no leads so the case grew cold.

On February 17, 1971, investigators caught a break when a witness came forward who said that on the incident date, he gave Appellant and his co-defendant a ride to the airport. He was told to pick them up later on Catalina Court. When he returned, both defendants ran to his vehicle, and the noticed Appellant was in possession of a reddish purse. They informed the witness they had just robbed and shot a cab driver. After this new information Appellant was brought in for questioning. After being advised of his rights, he informed the authorities that he in fact did committed the robbery; however, he said the co-defendant actually shot Victim.

On September 8, 1971, Appellant appeared before the Honorable Wade Weatherford for the charge of murder. Upon completion of this appearance Judge Weatherford sentenced the Appellant to a term of incarceration for the remainder of his natural life.

At the time of the offense South Carolina law allowed for parole eligibility upon the service of ten years. Appellant was granted parole upon his initial appearance in 1981. Appellant's parole was later revoked in September of 2000 due to his admitting the use of cocaine, absconding supervision, failure to maintain employment, and testing positive for marijuana.

Since his revocation, Appellant has appeared before the Board ten times, each resulting in the denial of parole. At his most recent hearing on June 21, 2023, the Board rejected him for the nature and seriousness of the offense, use of a deadly weapon, and failure to successfully complete a community supervision program. Appellant appealed to the Administrative Law Court (ALC), arguing that the Board has rendered him ineligible for parole by using the incorrect criteria in deciding whether to grant him parole. The ALC dismissed his appeal, determining his denial of parole to be a routine denial of parole and therefore limiting the court's authority to review any further. R.*

Appellant now brings this appeal, arguing that the ALC judge erred when he failed to consider additional information that had been submitted into the record.

In response, Respondent will argue that the ALC was correct in its determination this was a routine denial of parole and cannot be reviewed beyond determining that the Board considered the requisite factors of parole consideration. 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 cites to a pair of cases to support his argument that the ALC may modify or reverse findings based on the evidence in the record. However, as a creation of statute the ALC only has the authority given to it by the General Assembly.

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, 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. R.* 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

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

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 status as an inmate who once received parole which was then revoked does not change the Board's criteria for parole consideration at subsequent parole hearings.

Appellant argues that the Board did not use "criteria for parole violators" when it denied him parole. He uses old policies from the time of his conviction to argue that the Board failed to use "enforcement phase" criteria.

Respondent submits that Appellant is incorrect in his characterization of himself as being a parole violator. Instead, he should be viewed as a routine parole applicant, with no special status because his parole had previously been revoked.

This is supported in S.C. Code §24-21-680, which states that upon a revocation, "such prisoner must be eligible to parole thereafter when and if the board thinks such parole would be proper." Historically, the Board has allowed inmates whose parole is revoked to appear before it after one year, or after two years for inmates who have had their parole revoked more than once.

Parolees whose parole is revoked become inmates again. "[A] final determination must be made by the board as to whether the prisoner's parole should be revoked and whether he should be required to serve any part of the remaining unserved sentence." *Id.* While certainly the Board can consider the inmate's prior unsuccessful term of parole when it reviews the "record of the prisoner before, during, and after imprisonment,"[2] the Board does not repeatedly "revoke" the

[2] Section 24-21-640.

inmate each time it denies parole at subsequent hearings. Thus, the Board properly utilized the criteria for parole consideration as required by §24-21-640.

In the event that this Court construes his argument as raising an ex post facto issue because the criteria for parole consideration at the time of his conviction may be different from the statutory factors the Board must currently utilize, 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 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).

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." *Garner v. Jones*, 529 U.S. 244, 251 (2000); *Jernigan*, 340 S.C. at 261, 531 S.E.2d at 509.

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.

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. Furthermore, the Board's use of its current criteria for consideration of parole is appropriate. The ALC's decision should therefore be upheld.

Respectfully submitted,

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February 28, 2024

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S.C. DEPARTMENT OF PROBATION, PAROLE AND
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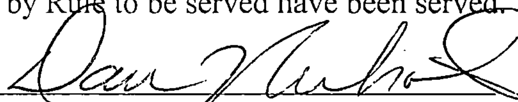
CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated February 28, 2024, on Appellant the 28th day of February, 2024, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert Spigner, #65500
Allendale Correctional Institution
PO Box 1151, Hwy 47
Fairfax, SC 29827

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



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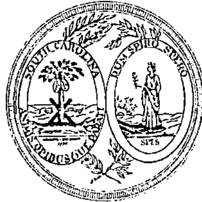

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The Honorable Jenny Kitchings
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P. O. Box 11629
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Re: SCDPPPS v. Robert Spigner
24-000093

Dear Ms. Kitchings:

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

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Robert Spigner, #65500

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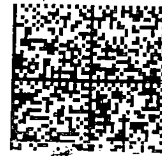

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