

State of South Carolina
In the Court of Appeals

Appeal from the Administrative Law Court
Docket No. 12-ALS-15-0026
Hon. Shirley C. Robinson, Admin. Law Judge

Stewart Buchanan, #069848, Appellant,

v.

SC Department of Probation,
Parole and Pardon Services, Respondent.

Appellant's Combined Motions

(1) To Transfer Case; and,

(2) To Argue Against Precedent

Rules 204 and 217, SCACR

Now comes Appellant Stewart Buchanan who moves this Court to request the Supreme Court to certify this case for review by that Court so Appellant may argue against precedent regarding issues of significant public interest and legal principles of major importance.

In support of his motions, Appellant would respectfully show:

I. Background

A. The Facts:

"The Parole Board determined this offense of murder was so egregious even if this is the only offense on his record it will still deny him parole consideration." (Brief of Respondent (AIC), pg. 8, lns. 34, attached.)

Respondent's explanation clearly evinces that the Board did not, and will not, consider the factors outlined in section 24-21-640 and the factors published in its parole form.

Appellant challenges the method and procedure employed by the Board in reaching the decision to deny parole which has rendered him parole ineligible.

B. The Law:

In Furhick v. DPPS, 352 S.C. 594, 576 S.E.2d 146 (2003), cert. den., 592 U.S. 932, 123 S.Ct. 2584, 156 L.Ed.2d 612 (2003), the Court announced the standard of review in cases challenging the method and procedure employed by the Board in reaching its decision: "... a parole-eligible inmate does not have the same right of review after a decision denying parole; ...".

In Cooper v. DPPS, 377 S.C. 489, 661 S.E.2d 106 (2008), the Court modified the standard of review to allow the ALC no more than to review the agency decision to inquire whether it clearly states the Board 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. Under that scenario, the ALC can summarily dismiss the inmate's appeal."

In Barton v. DPPS, -- S.E.2d --, 2013 WL 3366669, July 03, 2013 the Court again modified the standard of review in cases challenging the method and procedure employed by the Parole Board in reaching its decision to deny parole by applying the APA's standard found in section 1-23-380. However, the Court failed to instruct the ALC to apply the broader, more inclusive APA standard of review to parole cases rather than the severely limited Furtick/Cooper standard. Under existing law, the ALC may not apply the APA standard of review to parole cases; but, the APA standard of review applies to appeals from the ALC in parole cases.

C. The Case:

On July 12, 2013, nine (9) days after the Barton decision, the ALC applied the Furtick/Cooper standard of review to Appellant's challenge to the method and procedure employed by the Parole Board in reaching its decision which rendered him parole ineligible. Like Barton, the Parole Board clearly stated that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form. Like Barton, the Parole Board issued (1) Nature and Seriousness of Offense, (2) Use of a Deadly Weapon in this Offense, and (3) Indication of Violence in this Offense, as the reasons for denying parole.

Had the Barton Court applied the Furtick/Cooper standard of review, inquiry would have stopped at the statement of reasons and the Court would have affirmed the decision.

Had the ALC applied the Barton/APA standard of review to Appellant's case, the ALC may have very likely reversed or modified the Parole Board's decision. At very least, Appellant would have received the procedural due process from the ALC to which he is entitled.

II. Questions Presented

I. Whether the Furick standard of review imposed upon the ALC in cases challenging the Parole Board's decision to deny parole deprived Appellant his statutorily-created right to review, granted him by section 1-23-380(A)(6)(a-f), and announced by the Supreme Court in Barton, thereby denying him procedural due process of law in violation of the 14th Amendment to the United States Constitution?

II. Whether the Cooper standard of review imposed by the ALC in cases challenging the Parole Board's decision to deny parole deprived Appellant his statutorily-created right to review, granted him by section 1-23-380(A)(6)(a-f), and announced by the Supreme Court in Barton, thereby denying him procedural due process of law in violation of the 14th Amendment to the United States Constitution?

III. Whether the ALC's failure to apply the APA standard of review toward his challenge to the method and procedure employed by the Parole Board in reaching its decision to deny parole deprived Appellant of procedural due process of law in violation of the 14th Amendment to the United States Constitution?

IV. Whether the Department's explanation that, "[t]he Parole Board determined this offense of murder was so egregious even if this is the only offense on his record it will still deny him parole consideration", clearly evinces that the Board did not consider the factors outlined in section 24-21-640 and the fifteen factors published in its parole form and that Appellant has been rendered parole ineligible?

V. Whether the Parole Board's use of boiler plate, pro forma language to comply with the Cooper procedure constitutes a "routine denial of parole" when the Board's explanation clearly evinces they did not consider the factors outlined in section 24-21-640 and the fifteen factors published in its parole form and Appellant has been rendered parole ineligible?

VI. Whether the Parole Board's stated reasons for denying parole of (1) Nature and Seriousness of Offense, (2) Use of a Deadly Weapon in this Offense, and (3) Indication of Violence in this Offense are sufficient to deny parole when the Board's explanation clearly evinces these reasons only conceal their rendering Appellant as parole ineligible?

VII. Whether the Barton decision modified the Furtick standard of review inasmuch as the APA, section 1-23-380(A)(6)(a-f), standard of review, as applied in Barton, grants parole-eligible inmates the right of review after a decision denying parole?

VIII. Whether the Barton decision modified the Cooper standard of review inasmuch as the APA, section 1-23-380(A)(6)(a-f), standard of review, as applied in Barton, grants parole-eligible inmates the right to review of challenges to Parole Board decisions which do not render the inmate parole ineligible?

IX. Whether the ALC erred by affirming the Department's decision to deny parole pursuant to Furtick and Cooper nine (9) days after the Barton decision when applying the APA's, section 1-23-380(A)(6)(a-f), standard pursuant to Barton would have produced a different result in Appellant's favor?

X. Whether equitable and constitutional principles demand that this Court reverse the ALC's order affirming the Parole Board's decision to deny Appellant parole and remand the case to the ALC for further proceedings consistent with this Court's opinion in light of Barton?

III. Conclusion

The Board explained that it "will still" deny Appellant parole consideration: they will not consider the statutory criteria of section 24-21-640 or the criteria on the parole form. This Court cannot force Respondents to give such consideration -- only to act as though they have. That is all the Cooper decision has done.

The ALC's affirmation of the Department's decision should be reversed.

Respectfully submitted:

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Dated: August 6, 2013

STATE OF SOUTH CAROLINA
In the Administrative Law Court
Docket Number 12-ALJ-15-0026

APPEAL OF FINAL DECISION
Department of Probation, Parole and Pardon Services

STEWART BUCHANAN, #69848, APPELLANT

v.

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

BRIEF OF RESPONDENT

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Parole and Pardon Services
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ATTORNEY FOR THE RESPONDENTS

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STATEMENTS OF ISSUE ON APPEAL

1. Whether the due process clause of the fourteenth amendment applies to conduct of proceedings by the South Carolina Department of Probation, Parole and Pardon Services Parole Board which undertakes to grant paroles to certain prisoners convicted in 1973 before service of their entire sentences?
2. Whether the due process clause requires a balance between what may be conflicting interests in order to arrive at what is substantially fair?
3. Whether the primary function of a statement of reasons is to facilitate judicial review?
4. Whether the Due Process Clause enables a reviewing body to determine whether parole has been denied for an impermissible reason?
5. Whether the statement of reasons permits the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational, and consistent, and also protects the inmate against arbitrary and capricious decisions based upon impermissible consideration?
6. Whether Appellant who has suffered a grievous loss by being denied parole for thirty (30) years by reasons of completely ex parte proceedings, is entitled to full review of his case pursuant to the rules for contested cases?

STATEMENT OF THE CASE

On May 18, 1973, the Appellant unlawfully entered the home of neighbor Aileen Boone in Fort Mill, South Carolina. After walking thru the bed room to other parts of the house, he returned to the bedroom, the victim awoke noticed him and called his name. The Appellant approached, she immediately fled to the living room and climbed out of a window onto the front porch. The Appellant chased her to the front yard, with a pocket knife he stabbed her several times. She managed to struggle away, only to be caught, and stabbed several more times. The Appellant left her body to die in her front yard as he fled to his home next door. The victim died as a result of these stab wounds. The victims body was later found by a paper carrier who immediately called the police. It was later discovered that the Appellant committed this crime, he was arrested and charged with the offense of murder. Upon conclusion of the trial, a jury of his peers found the Appellant guilty but recommended mercy. The Appellant appeared before the Honorable Frank Epps who sentenced the Appellant to period of incarceration for the remainder of his natural life. Pursuant to South Carolina law existing at of the offense the Appellant became eligible for parole upon the service of ten (10) years.

On January 12, 1983, the Appellant made his initial appearance before the Parole Board. Upon conclusion of this hearing the Board decided to deny parole. The Appellant has since appeared before the Board an additional thirteen (13) times each resulting in a denial of parole. His most recent appearance occurred on June 13, 2012, the Parole Board decided to deny parole due to: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) a use of a deadly weapon in this or a previous offense; 4) a prior criminal record indicates poor community adjustment. R. p. 3. Upon receiving the order of denial the

Appellant issued a request for reconsideration. R. pp. 4-6. The Board immediately decided to reexamined the Appellant's file. On August 10, 2012, the Board issued a response to this request: they decided that the reasons of this request would not affect their decision, so the request for reconsideration was denied. R. p. 7.

Upon receiving the denial of reconsideration, the Appellant filed a notice of appeal in the Administrative Law Court (ALC). R. p. 1. Within this appeal the Appellant alleges that he was denied due process and a liberty interest in being denied parole. The respondent will argue that the denial of parole did conform with the Cooper decision, nor did it not violate due process. The decision of the Parole Board must be affirmed. The brief of the Respondent follows.

ARGUMENTS

1. The denial of parole conformed with the Cooper opinion and did not deny the Appellant due process rights.

The ALC's jurisdiction to hear final decisions of the Department is derived from the decisions of the South Carolina Supreme Court in Al-Shabbaz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), and Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2002). In Al-Shabbaz, the Supreme Court created a new avenue by which inmates could seek review of some final decisions of a state agency in "non-collateral" matters related to a conviction or sentence, i.e. matters in which an inmate does not challenge the validity of a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC and ultimately the Court of Appeals pursuant to the Administrative Procedures Act. Al-Shabbaz, at 376.

In Al-Shabbaz, the Court recognized that "these administrative matters typically arise in

two ways: (1) when an inmate is disciplined and punishment is imposed; and, (2) when an inmate believes prison officials have erroneously calculated his sentence, sentence-related credits or custody status.” Id., at 369. The Court noted that the appealable final decision in Furtick arises in the latter manner where the inmate alleges the Department erroneously determined that he was not eligible for parole. The Court held that, in order to determine whether an inmate’s claim against the Department is entitled to review by the ALC under the procedures set forth in Al-Shabbaz, it is first necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. Furtick, at 598. The Court determined that the permanent denial of parole eligibility, implicates a liberty interest sufficient to require at least minimal due process. Id.

In the South Carolina Supreme Court decision of Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008), the Respondent was seeking a reversal of a lower court decision that the ALC has jurisdiction in reviewing the procedure of the Parole Board. The Supreme Court decided that, “if a Parole Board fails to consider and apply the statutory-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under Furtick warrants review by the ALC.” Id., at 502.

Under Cooper, the Supreme Court decided that the findings of fact were included; however, the Parole Board neither, “offered an explanation nor indicated that it had considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form.” Id., at 500. Within the Cooper opinion the Supreme Court established what future Parole Board orders should entail. It specifically states in Cooper.

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.

Within his brief the Appellant relies on the Fourth Circuit United States Court of Appeals decision of Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1975), *dismissed by*, 423 U.S. 147, 96 S.Ct. 347 (1975). In Bradford, the court mentions the United States Supreme Court case of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972) in which the Court acknowledge that a person facing a revocation of parole has minimal due process rights. A distinction between a person currently on parole and a person seeking parole was made in the case of Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979)¹ In Greenholtz the Supreme Court determined that there exist no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.

Greenholtz, at 2104.

In Bradford, the Court of Appeals determined that due process must be allowed in parole cases, however, the Court determined that the prisoner should know why he was denied parole, and what changes in attitudes, habits, and what will be required if he is ever be successful in obtaining parole. Bradford, at 732. The court gave no determination of how much rights a person

¹There is a crucial distinction between being denied a conditional liberty one has, as in parole, and being denied a conditional liberty that one desires. The parolees in Morrissey (and probationers in Gagnon) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments of normal life." 408 U.S. at 482, 92 S.Ct. at 2600. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison. Greenholtz, at 2105.

seeking parole is afforded. The criteria is made available upon entering the Department of Corrections. This criteria is also given to each inmate prior to their hearing including the Appellant, as evidenced by the signed form 1212 included in the record. R. p. 8. The Appellant was given a right to a hearing in which he was allowed to present evidence in mitigation, and make a presentation to the Board as to why he should be granted parole. Therefore, all criteria established in Bradford was followed, the Appellant claims have no merit. Within his brief the Appellant argued that he was not allowed to face his accusers in violation of his constitutional rights. This right is not given to any inmate seeking parole, no inmate has a right of confrontation at the hearing. S.C. Code Ann. §24-21-50 (Supp. 2011).

The Appellant also argues that the reasons for denial was insufficient to enable a reviewing body to determine if parole was denied for an impermissible reason. There exist no guidelines that determine how much detail a reason for denial must be. A final decision in a contested case shall be in writing or stated in the record and shall include a findings of fact and conclusions of law, separately stated. S.C. Code Ann. §1-23-350 (Supp. 2011). The order of denial conformed to the Cooper decision and South Carolina law. It provided a conclusion of law which was the statute and policy that was followed in making the determination; and, a findings of fact which was the reasons for the denial of parole.

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 after denial 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 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. The decision of denial was not arbitrary and capricious but abided to the mandatory criteria found in South Carolina law.

Within his brief the Appellant accused the Respondent of using reasons that did not allow the court to make a determination of whether or not the proper procedures were followed. The Appellant argues that the decision of denial was arbitrary and capricious. The South Carolina Code of Laws provides that the ALC may reverse or modify the decision of an agency, or remand the case for further proceedings, if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are arbitrary and capricious, characterized by abuse or discretion, or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(A)(6)(f)(Supp. 2011).

The legislature has placed the sole responsibility in the awarding or denial of parole with the Parole Board. South Carolina law provides the criteria that must be followed before making this determination. South Carolina law specifically states:

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 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. 2011).

The criteria located within South Carolina Code of Laws and the fifteen criteria established through Department policy clearly reveals that the criteria that must be satisfied to the board's discretion before an inmate is awarded parole. It is clear by the language of the statute that the legislatures intended the Parole Board to be the sole decision makers in determining whether or not an inmate should be released on parole. So the Board is the sole decision makers and this decision cannot be reviewed by the Courts. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 553 S.E.2d 578 (2000). Where the statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning. South Carolina Department of Transportation v. First Carolina Corporation of South Carolina, 369 S.C. 150, 631 S.E.2d 533 (2006). All rules of statutory construction are subservient to the maximum that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 567 S.E.2d 240 (2002). The Appellant argues that the reason given for the denial should be determine arbitrary and capricious since it did not go into further detail. No law exist that reveals the reason for denial must go into any particular detail or should be case specific. All it must show that all mandatory criteria was considered prior to denial.

The Appellant was denied parole due to four reasons: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a prior offense; 3) a use of a deadly weapon in this or a prior offense; 4) prior criminal record indicates poor community adjustment. The Appellant committed the offense of murder in which he stabbed a women numerous times

outside her own home. This event was serious, violent, and there was the use of a deadly weapon. As to the criminal history, the Board must consider the record of the inmate before, during, and after the crime was committed. The Parole Board determined this offense of murder was so egregious even if this is the only offense on his record it will still deny him parole consideration.

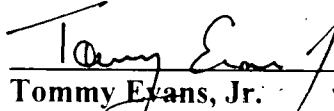
The Appellant also argues that the reasons given for denial should be determined arbitrary and capricious. He seeks a decision by the ALC on a factual determination made by the Parole Board, the ALC does not have that jurisdiction. An administrative law judge shall not hear an appeal involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600(D)(Supp. 2011). The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(5)(Supp. 2011). The Appellant has provided no proof that the decision to deny parole was done arbitrarily or capriciously. The proof lies with the Appellant to reveal that the denial of parole was done unlawfully. In administrative proceedings the general rule is that the applicant for relief, benefits, or a privilege has the burden of proof as the burden of proof test rest upon the one who filed the claim with an 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 denial of parole was reasonable and followed the criteria provided from the statute and Department policy. The Respondent has provided sufficient substantial evidence proving that the denial of parole was lawful. A reasonable person would reach the identical conclusion as the board; therefore, this decision should be affirmed. Substantial evidence is evidence that in viewing the record as a whole would allow reasonable minds to reach the same conclusion that

the commission reached. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the South Carolina Department of Probation, Parole and Pardon Services be affirmed.

Respectfully submitted,



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December 11, 2012

The State of South Carolina
In the Court of Appeals

Appeal From The Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Case No. 12-ALJ-15-0026-AP

SCDPPPS, Respondent.

v.

Stewart Buchanan, #069848, Appellant.

Proof of Service

I certify that I have served the "Notice of Appeal" (with Order), my "Motion for Leave to Proceed Without Payment of Fees", my "Combined Motions (1) To Transfer Case; and (2) To Argue Against Precedent, Rules 204 and 211, SCACR", my "Proof of Service" (to Respondent), my "Proof of Service" (to Clerk, Administrative Law Court), and my "Proof of service" (to Clerk, Court of Appeals) (with true and correct copies of the first page of the "Notice of Appeal", the "Motion for Leave to Proceed Without Payment of Fees", my "Combined Motions...", and the "Proof of Service" (to Clerk, Court of Appeals) for file-stamping and return in the provide SASE), by depositing same in the McCormick CI mailroom addressed to Hon. Tanya Gee, Clerk, S.C. Court of Appeals, P.O. Box 11629, Columbia, SC 29211, on this 7th day of August, 2013.

S/ Stewart Buchanan
Affiant

Sworn to and subscribed before me
this 07 day of Aug, 2013.

JC Franklin
Notary Public
my commission expires: 12-16-2014

RECEIVED

AUG 12 2013

SC Court of Appeals