

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph K. Anderson, III
Docket Number 13-ALJ-15-0004
Case No.: 2013-001380

ROBERT SPIGNER, #65500,

RECEIVED
APPELLANT
AUG 20 2013

SC Court of Appeals

v.

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

INITIAL BRIEF OF THE RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- 1. 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. Omnibus Crime Reduction and Sentencing Act of 2010?**

- 2. 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 (Supp. 2012)?**

- 3. 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 SCDPPS utilize to change appellants original 1971 Common Law Felony into a 1986 Omnibus Crime Bill Violent offense, and thereby, using that after establishing criteria as to appellants eligibility?**

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. At the scene the authorities found slumped over the steering wheel Ms. Joy Ophelia Gann. She was shot in the right temple and her throat cut. During their investigation deputies contacted the Checker Cab dispatcher. They were informed that the victim's last pickup were two males from the airport wishing to be taken to Farrow Rd. With this information the authorities went to the airport to interview employees regarding Ms. Gann's murder. These interviews brought no leads, so the case ultimately grown cold.

On February 17, 1971, investigator James Scott received a phone call from a Federick Lee Simmons. Mr. Simmons informed investigator Scott that on the incident date, he gave the Appellant and 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, the Appellant in possession of a reddish purse. They informed Mr. Simmons they had just committed a robbery, and shot a cab driver. As a result of this interview the Appellant was brought in for questioning. He waived his rights and informed the authorities that he did in fact commit the robbery; however, the co-defendant was the individual who actually shot Ms. Gann. He was arrested and charged with the offense of murder. On September 8, 1971, the Appellant appeared before the Honorable Wade Weatherford to answer to this offense. 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 he committed this offense, South Carolina law allowed a person parole eligibility for the offense of murder upon the service of ten (10) years. The Appellant initially appeared before the Board on July 7, 1981. Upon the conclusion of this appearance the Appellant

was granted parole. While on parole he committed the offense of robbery in New York and received a sentence of ten to twenty years. He was also convicted in South Carolina for the offenses of fraudulent check, receiving stolen goods, open container and driving under suspension. The Appellant's parole was finally revoked on September 27, 2000, due to his admitting to the use of cocaine, absconding supervision, failure to maintain employment, and testing positive for marijuana.

Since this revocation the Appellant has appeared before the Board an additional six (6) times, each resulting in a denial of parole. The Appellant's last appearance occurred on October 10, 2012, parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) the use of a deadly weapon in this or a previous offense; 4) a prior criminal record indicates poor community adjustment; and, 5) a failure to successfully complete a community supervision program. On October 25, 2012, the Appellant requested a rehearing, this request was denied on December 13, 2012.

The Appellant later filed a notice of appeal before the Administrative Law Court (ALC). He alleged that he was unlawfully denied parole due to the Board failing to follow the statutory requirements; that the use of the offense as a reason for denial permanently denies him parole; that the decision was made prior to his hearing violating due process; and, improper criteria was used in the final decision. The Respondent argued that all of the proper criteria were used in the consideration of parole, and no right of the Appellant was ever violated. On May 24, 2013, the Honorable Ralph K. Anderson, III, Chief Administrative Law Judge, affirmed the decision of the Department.

Upon being notified of the decision of the ALC the Appellant filed this notice of appeal. Within this appeal the Appellant argued that ALC erred in determining that his denial of parole

was lawful. The Respondent will argue that the ALC was proper in denying the Appellant's original appeal, and affirming the decision of the Parole Board. The Respondent's initial brief detailing their arguments follows.

ARGUMENTS

1. The Respondent followed all mandatory statutory criteria prior to the denial of parole.

The Appellant argues that the Respondent failed to follow the South Carolina Omnibus Crime Reduction act of 2010. His allegations stem from the Board not using the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) program prior to the case going before the Parole Board. South Carolina law specifically states:

The department must develop a plan that must include the establishment of a process for adopting a validated actuarial risk and 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, including additional objective criteria that may be used in parole decisions.

S.C. Code Ann. §24-21-10(F)(1) (Supp. 2011).

The statute also mandates the Board establish written, specific criteria for the granting of parole and provisional parole. S.C. Code Ann. §24-21-640 (Supp. 2011). This criteria can be found on form 1212 which was given to the Appellant during his pre-parole investigation. These are the only mandatory criteria that must be considered by the Board. This statute allows a risk assessment tool to be assess by the Board, that tool does not have to be COMPAS. A risk assessment tool was completed for the Appellant as all inmates prior to a parole hearing, it was just not COMPAS. There is nothing in the statue that state the risk assessment must be COMPAS. The Parole Board has been doing risk assessments long before the creation of COMPAS; therefore, the decision of the ALC should be affirmed.

It was revealed in the order of the denial that the mandatory criteria were considered which is necessary according to Cooper. In Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008) the Supreme Court decided that the findings of fact were included; however, the Court determined 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. The Supreme Court ruled in Cooper that if the Parole Board fails to consider, and apply the statutory-related parole criteria, it has the effect of rendering an inmate parole ineligible which warrants review by the ALC. Id., at 502. The Supreme Court did establish what future Parole Board orders should include, in Cooper it specifically states:

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.

In the case at bar, the order of denial did conform with the Cooper decision. It included a findings of fact and conclusion of law separately stated. The findings of facts were the reasons provided by the Board as to why parole was denied; and, the conclusions of law are the statutes and factors used to determine the denial of parole. The order is clear, the criteria within the statute and the mandatory policy were considered prior to the denial of parole.

In this case the Appellant argues that the denial of parole without a determination of his future risk behavior through COMPAS makes the decision unlawful. The ALC determined they

are not allowed under law to make a ruling regarding the use of COMPAS. This is due to the fact Cooper allowed ALC involvement only if it is found that the mandatory criteria was not followed. The COMPAS program does not equate to the mandatory criteria that must be considered prior to denial. There exist no legal authority that states the COMPAS program must be used; therefore, the ALC was correct in affirming the decision of the Respondent. The Appellant relies on section 21-24-10(F)(1) which only states the Board shall develop a plan that considers future criminal behavior. The pre-parole investigation has always assess the possible future criminal behavior which results in a recommendation that the Board may consider.

The COMPASS program is not a mandatory measure that must be considered prior to each parole case, it is just an additional measure made to assist the Parole Board in making a determination. The final decision remains with the Parole Board, which the Court has no ability to reverse. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a potentially eligible inmate by the South Carolina Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600 (Supp. 2011).

The Appellant has failed to reveal any prejudice because COMPAS was not used in his parole consideration. There was no evidence presented to the ALC that reveals the Appellant would have benefited if COMPAS was used. There has also been no evidence revealing that there existed an error of law committed by the ALC. Since there exist no error in law, or prejudice applied to the Appellant; the denial of parole should be affirmed. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice. Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

2. The Board used the correct criteria prior to the denial of parole.

The Appellant alleges that the Board followed criteria of a person requesting parole and not a person who has technically violated parole. He argues this type of hearing is a violation of due process. In the United States Supreme Court case of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972) the Court did acknowledge minimal due process rights for a person facing a revocation of parole. In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, a distinction was made between a person currently on parole and a person requesting parole.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.

The Appellant claims that the Board should have used the criteria of a person who has had a technical violation. The Appellant's parole was revoked in 2000. He is now an inmate in the South Carolina Department of Corrections, subject to the identical criteria as all other inmates appearing before the Board. There exist no violation of Due Process, the Appellant was allowed to appear before the Board to address accusations, and present any mitigating evidence. The Board considered all of the mandatory criteria evidenced by the order of denial; therefore, this denial of parole was lawful.

The Appellant also alleges that he was denied parole prior to his pre-parole investigation. This assessment stems from a response to a request from a staff member at the Department of Corrections. According to this staff member he was denied parole on June 23, 2012. The ALC

¹ There 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.

was correct in determining this as a scrivener's error. The Department of Corrections has absolutely no control of the decision of parole. No prisoner can be paroled until it appears to the **satisfaction of the board**, that he satisfied all criteria justifying a release on parole. S.C. Ann. §24-21-640 (Supp 2011). The Appellant's parole is not denied until determined by the Parole Board. The pre-parole investigation did not begin until July 11, 2012, and he did not appear before the board until October 11, 2012. If a decision was rendered in June there would be no need for an investigation or a hearing. The message the Appellant received via the Department of Corrections was obviously incorrect, the ALC was correct in determining this as an obvious error.

3. The Parole Board used criteria that existed when the Appellant committed the offense.

The Appellant argues that the criteria considered by the Board was not identical to the criteria existing when he committed the crime. He argues the use of current criteria is a violation of ex post facto. The law existing at the time of the offense and not at the time of sentencing determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. Elmore v. State, 305 S.C. 456, 409 S.E.2d 397 (1991). The law regarding the mandatory criteria is identical to what existed at the time the crime was committed. The ALC determined that the use of the present criteria is not a violation of ex post facto. That decision was correct, and should be affirmed by this court.

At the time the Appellant committed this crime, section 55-612 revealed 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 state:

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 previously mentioned section 24-21-640, the only difference is the word “shall” replaced by the word “may.” This change does not effect the Board members or the criteria used in the determination of parole. This minor difference must be considered procedural; therefore, not a violation of ex post facto. Even though a procedural change may have a detrimental impact on a defendant, a mere procedural change which does not affect substantial rights is not ex post facto. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990). The use of the current criteria to deny the Appellant parole was not in violation of any laws, the ALC was correct to affirm the decision of the Parole Board.

4. The use of the crime committed as a reason for a denial of parole followed procedures.

The Appellant argues that the Parole Board using his prior offense for denial, goes against the doctrine of Res Judicata. Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999); Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Hilton Head Center of South Carolina , Inc. v. Public Service Comm’n of South Carolina, 294

S.C. 9, 362 S.E.2d 176 (1987). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures Inc., 308 S.C. 467, 419 S.E.2d 217 (1992); Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986).

Under the doctrine of collateral estoppel, once a judgment on the merits have been reached in a prior claim, the re-litigation of those issues actually and necessarily litigated and determined in the first suit is precluded as to the parties and their privies in a subsequent action upon a different claim. Richburg v. Baughman, 290 S.C. 431, 351 S.E.2d 164 (1986); Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). Collateral estoppel bars re-litigation of the same facts or issues necessarily determined in a former proceeding. Garrett v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987). When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim. Id.

The main subject to all of these cases reveal that Res Judicata relates to litigation. A parole hearing cannot be determined to be any type of litigation, but identical to a probation revocation, which the Court has determine not to be a criminal trial but a more informal proceeding with respect to notice and proof of alleged violations. State v. Franks, 276 S.C. 636, 281 S.E.2d 227 (1981).

The Appellant also attempts to relate this case to the South Carolina Court of Appeals case of Hinton v. S.C. Dept. of Probation, Parole and Pardon Services, 357 S.C. 327, 592 S.E.2d 335 (2004). In Hinton the Court of Appeals ruled that an inmate cannot be barred from parole

consideration under the subsequent violent offender law if the subsequent offense is an out of state conviction. In Hinton the court did state:

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 de facto second trial and an egregious due process violation.

Hinton, at 343.

The Court was referring to the Department use of any facts in an out of state conviction and comparing it to South Carolina law to deny parole pursuant to the subsequent violent offender law. It is obvious that the current criteria allows the use of a prior offense to determine if a person should be released on parole. The South Carolina Code of Laws specifically state: "The board must carefully consider the record of the prisoner **before**, during and after imprisonment." S.C. Code Ann. §24-21-640 (Supp. 2011).

The Appellant also argues that the use of a prior offense for denial of parole permanently denies him an opportunity to be released on parole. His justification is that since the facts will never change, he will never be granted parole. Since he was released on parole in 1981, he should be aware this argument is false. There are numerous individuals who have committed similar offenses currently on parole.

The offense the inmate has committed must be considered, it reveals the character of a person, and a possible threat to the community. The first and foremost factor considered is whether an inmate will continue to be a threat if released. The board must be absolutely convinced that the release of an inmate prior to the completion of his sentence will not be a determinant to society. Until the Board can be completely satisfied that his release will not cause

any harm to the community he will not be granted parole. Once this satisfaction is made the Appellant will be granted parole; regardless of the offense committed.

The Appellant originally requested the ALJ to determine the Board erred in the denial of his parole and reverse the decision of the Board. The Respondent argues that the ALJ was correct in affirming the decision of the Parole Board. The denial of parole was proper and within the province of the Parole Board. In the South Carolina Supreme Court decision of State v. McKay, the Supreme Court specifically ruled:

We conclude that §24-21-640 specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility. Further this Court finds that the question of parole eligibility is separate and independent from the court's authority to sentence an offender.

State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989).

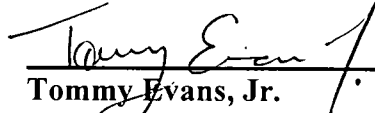
The responsibility of parole eligibility lies with the Parole Board. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole and Pardon. Brown v. State, 306 S.C. 381, 412 S.E.2d 299 (1991).

The only way the ALC would have possibly remanded the decision of the Parole Board is to make a determination that the Board made a decision in error. The Appellant Court sits to review errors in law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). The ALC has determined no error was committed by the Respondent in the denial of parole; therefore, the decision of the ALC should be affirmed.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the ALC be affirmed.

Respectfully submitted,



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August 16, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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The Honorable Ralph K. Anderson, III
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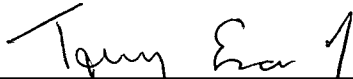
ROBERT SPIGNER, #65500, APPELLANT

v.

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

DESIGNATION OF MATTER

Respondent proposes no additional information to be included in the Record on Appeal.



Tommy Evans, Jr.
Assistant General Counsel

August 16, 2013

STATE OF SOUTH CAROLINA
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PARDON SERVICES, RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* dated August 16, 2013, on Appellant this 19th day of August, 2013, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert Spigner, #65500
Broad River Correctional Institution
4460 Broad River Road
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I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
Executive Administrative Assistant

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