

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Appellate Case Number 2013-001561

GEORGE ADAMS, 3181283, APPELLANT

v.

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

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

- 1. Did the lower court err in determining that the Respondent was correct in denying the Appellant parole eligibility due to the commission of a subsequent violent offense?**
- 2. Did the Appellant have a preexisting expectation of parole eligibility that was violated in the denial of his parole eligibility?**
- 3. Did the Respondent unlawfully restructure the statute that the Appellant was initially convicted of committing?**

STATEMENT OF THE CASE

On June 17, 1992, in Columbia, South Carolina, the Appellant along with his co-defendants James Brown and Rosena Farmer decided to rob Johnny's grocery, a small grocery store owned by Mildred and Joe Collins. The Appellant and Mr. Brown entered the store and approached the front counter. At the counter stood Mrs. Collins, the Defendant's requested beer and cigarettes, and was informed that those items were not sold in the store. Then Co-defendant Brown pointed a hand gun at Mrs. Collins and demanded money. When this occurred Mr. Collins entered from a back room grabbed Mr. Brown, and a scuffle ensued where Mr. Collins was shot. While Mr. Collins lie on the floor his wallet was stolen by Mr. Brown. Both defendants immediately exited the store, and Mr. Collins later died as a result of his gunshot wound.

The authorities were immediately contacted and later apprehended all three defendants. Upon lawfully being advised of his Miranda rights, the Appellant gave the authorities a full confession. Although the Appellant was not the actual shooter he was charged with the offense of murder, and armed robbery. On June 23, 1994, the Appellant appeared before a jury of his peers and was convicted of both offenses. He was sentenced by the Honorable Henry L. McKellar to a term of imprisonment for the remainder of his natural life for the offense of murder, and twenty-five (25) years for armed robbery.¹

At the time the Appellant committed this offense South Carolina law allowed a person serving a sentence for murder parole eligibility upon the service of twenty (20) years. Prior to the arrival of his parole eligibility date, the Respondent conducted a mandatory investigation to determine if he can actually appear before the Parole Board. During the course of this investigation the Respondent discovered that the Appellant was previously convicted on September 17, 1991,

¹ Co-Defendant James Brown was convicted on March 21, 1994 and received a life sentence.

of the offense of burglary in the first degree. (burglary 1st) The burglary 1st and murder offense are both classified as violent.² Since he was convicted of a prior classified violent offense the Department determined he is not eligible for parole.

On December 21, 2012, the Appellant was informed that due to his prior conviction of a violent offense he is not eligible for parole. The Appellant was also informed the he can appeal the Respondent's decision to the Administrative Law Court. Upon receiving this notice of the denial the Appellant filed a notice of appeal on January 21, 2013. Within this appeal the Appellant alleged that the Respondent violated ex post facto by following the law on the date when he was sentenced and not the date when he committed the offense. The Appellant also alleged that his denial of parole was in violation of due process.

Upon reviewing briefs submitted by each party, the Honorable Ralph K. Anderson, III, Chief Administrative Law Judge issued an order. Within this order Judge Anderson found that the denial of parole eligibility followed the law that existed at the time the Appellant committed the offense; and, since he was never eligible for parole there never exist no denial of due process. Judge Anderson decided to affirm the decision of the Respondent.

Upon receipt of this order the Appellant filed a notice of appeal before this Court. In this appeal the Appellant raises the previous allegations addressed by the ALC. The Respondent will argue that the ALC was correct in affirming the decision to deny parole eligibility. The Respondent's initial brief supporting their arguments follows.

² For purposes of definition under South Carolina law, a violent crime includes the offenses of murder (Section 16-3-10); and, burglary in the first degree (Section 16-11-311). S.C. Code Ann. §16-1-60(Supp. 1986).

ARGUMENTS

- 1. The Appellant was never eligible for parole due to a prior conviction of a crime classified as violent, so the ALC was correct in affirming the decision of the Appellant.**

The Appellant argues that the Respondent was not authorized to review his sentencing date in the determination of his parole ineligibility. This assertion is without merit. The Appellant is not, and has never been eligible for parole. This is due to the terms found in Section 24-21-640 of the South Carolina Code of Laws which state:

The [parole] board must not grant, nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction for violent crimes as defined in Section 16-1-60.

S.C. Code Ann. §24-21-640 (Supp. 2013).

The statute was part of the Omnibus Criminal Justice Improvement Act of 1986. Therefore, in determining whether an offender is a subsequent violent offender, the subsequent crime must have been committed after the effective date of the statute, June 3, 1986. The prior crime can be committed at any time including after the offense date of the subsequent crime because the focus is on the date of the sentencing not the date of the commission of the subsequent crime.

There does exist exceptions, if the subsequent crime was committed between January 1, 1994, and January 12, 1995, the prior crime must have been classified as violent at the time the subsequent crime was committed.³ With the exception of this small window of time, there exist no ex post facto violation where an inmate is treated as a subsequent violent offender based in part on a prior conviction which was not defined as violent on the date the prior crime was committed. Sullivan v. State, 331 S.C. 479, 504 S.E.2d 110 (1998); see also, Philips v. State, 331 S.C. 482,

³ For that brief period the General Assembly change the law to reflect this, that law was change back to its original state the next year.

504 S.E.2d 111 (1998). This Court also decided that a prior violent offense committed in another state does not preclude a prisoner from being eligible for parole. See, State v. Hinton, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2005).

The Appellant is currently serving a sentence for murder which was committed on June 17, 1992. At the time he committed this offense the Appellant had a previous conviction for burglary 1st committed on March 8, 1991. Both convictions occurred in South Carolina and were classified as violent when they were committed, there exist no violation of ex post facto. For a law to present an ex post facto violation it must: **(1) be retrospective and apply to events taking place prior to the enactment;** and (2) work to disadvantage the offender. State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009).

Both offenses occurred in South Carolina and does not fall into the above listed dates to be considered ex post facto. Since they are both classified as violent, pursuant to the language of the statute the Appellant is not eligible for parole. The words of the statute must be given their plain and ordinary meaning without resorting to the subtle or forced construction to limit or expand the statute's operation. Municipal Association of South Carolina v. AT&T Communications of the Southern States, 361 S.C. 576, 606 S.E.2d 468 (2004).

The Appellant also argues that his denial of parole eligibility was in violation of due process. In the United States Supreme Court decision of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Court acknowledged 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. Inmate of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979)⁴ In Greenholtz, the Supreme Court determined that there exist

⁴ 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

no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. Greenholtz, at 2104. The Respondent argues that since the Appellant was never eligible for parole due to his prior convictions, he did not have the right to due process. If the Court feels he had a liberty interest in being allowed to appear before the Board, thereby, due process rights, there exist no denial of due process. The Appellant's denial of parole eligibility was reviewed by an impartial Court, pursuant to Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003). The lower Court properly decided that the denial of parole eligibility was valid pursuant to South Carolina law, and affirmed the decision of the Parole Board.

2. The Appellant should not have a preexisting expectation of parole eligibility.

The Appellant argues that he is being denied parole eligibility that was a part of his sentence. When the Appellant was initially convicted the murder statute stated:

A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years.

S.C. Code Ann. §16-3-20(A)(Supp. 1986)

However, according to South Carolina law a person is not eligible for parole if he is serving a second violent conviction upon the conviction of a subsequent offense classified as violent. The ALC was correct in deciding that these statutes work in harmony. Section 16-3-20 applies to those convicted of murder with no prior violent convictions. If a person convicted of murder has a prior offense that is classified violent pursuant to Section 16-1-60; then, Section 24-21-640 applies, and that person will not be eligible for parole. If the Appellant had no prior conviction of a violent

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 2015.

offense he would be allowed to appear before the Board; however, due to his prior conviction of a classified violent offense, he never was eligible for parole.

The Appellant argues that when he was first incarcerated he was given a projected parole eligibility date, and the parole examiner informed him of a scheduled parole hearing date. These were projected dates, were never confirmed. Nothing is confirmed until the completion of the mandatory pre-parole examination. This investigation must be completed prior to a person appearing before the Parole Board. After reviewing the prior record of the inmate, if there exist a prior conviction of a classified violent offense by law that inmate is not eligible for parole.

The Appellant was not denied any Constitutional rights and the Respondent proved to the ALC that he had a prior conviction of a violent offense. Both convictions were placed in the record on appeal given to the ALC. He made an informed decision that the denial of parole eligibility was pursuant to statute and lawful; therefore, the decision of the ALC should be affirmed.

3. The Respondent did not restructure the sentence of the Appellant.

The Appellant is of the opinion that due to him not being eligible for parole the Department restructured the murder statute. The murder statute existing at the time the Appellant committed the offense allowed parole eligibility upon the service of twenty (20) years. Since the Appellant had a prior crime classified as violent it denied his parole eligibility. This statute existed when he committed this offense; therefore, the Appellant is not eligible for parole.

The Appellant argues that the Respondent failed to follow the sentencing of the Court at the time of his conviction. The sentencing Judge has no authority to determine parole eligibility. That determination is made by the Respondent, abiding with the statute existing at the time the crime was committed. Section 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

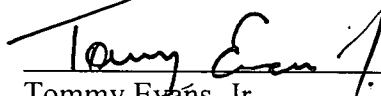
prisoner meets the prerequisites of parole eligibility. State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989). The Board followed the statute in making the determination of the denial of the Appellant's parole. The statute clearly states that if an inmate with a prior conviction of a violent offense, and currently serving a sentence for violent crime, he would not be eligible for parole. This determination cannot be changed by the Courts. The question of parole eligibility is separate and independent from the court's authority to sentence an offender. The final judgment of the court in a criminal case is the sentence. Id., at 623.

Both crimes were committed after the effective date of the statute. Since it was proven that the Appellant committed a burglary 1st and then subsequently committed an offense of murder, both classified as violent, pursuant to statute he is not eligible for parole. It is clear the Respondent followed South Carolina law as it existed at the time the crime was committed. The decision of the ALC affirming the denial of parole was proper and should be affirmed by this honorable Court.

CONCLUSION

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

Respectfully submitted,



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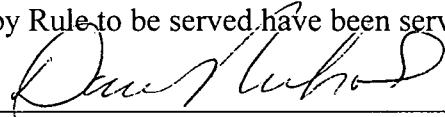
S.C. DEPARTMENT OF PROBATION, PAROLE AND
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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated January 9, 2014, on Appellant this 9th day of January, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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



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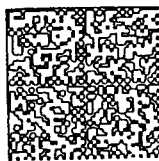
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