

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Appellate Case Number 2013-002712

THOMAS THOMPSON, #80681, APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES. RESPONDENT

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

1. **Has the denial of parole followed the mandates proscribed by the South Carolina Supreme Court in the Cooper decision?**
2. **Does the Court has the ability to reverse a decision of the Parole Board based totally on fact?**
3. **Did the Board violate the Appellant Constitutional rights in the denial of parole?**

STATEMENT OF THE CASE

On October 4, 1975, the Appellant along with his co-defendants Walter Gordon and Ben Holmes called a taxi with the intent to rob the driver. The taxi arrived with the driver Mr. George Upchurch and a passenger Mr. James Donald Hodge. During this robbery the Appellant shot Mr. Upchurch in the back of the head immediately causing his death. He also shot Mr. Hodge in the temple, however, he survived but lost an eye. Both victims were found later and authorities notified. Upon the completion of the investigation it was discovered that the Appellant and co-defendants possibly committed this crime. They were found arrested and charged with the offense of murder.

On December 11, 1975, the Appellant appeared before the Honorable Robert Hayes for the offense of murder. Upon completion of this appearance the Court sentenced the Appellant to a term of incarceration for the remainder of his natural life.¹ At the time the Appellant committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of ten years. On February 5, 1986, the Appellant made his initial appearance before the Parole Board. Upon conclusion of this hearing the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial hearing, the Appellant has appeared before the Board an additional fifteen times each resulting in a denial of parole. His last appearance occurred on October 2, 2013, parole was denied due to: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense. Upon being notified of his denial of parole the Appellant filed a notice of appeal before the Administrative Law Court. (ALC)

¹ Walter Gordon and Benjamin Holmes were both convicted of accessory before the fact of murder, and both received life sentences.

On November 26, 2013, the Honorable Deborah Brooks Durden, Administrative Law Judge issued an order of dismissal. Upon being informed of the ALC's dismissal, the Appellant filed a notice of appeal before this Honorable Court. Within this appeal the Appellant alleges that the Board erred by denying his parole in violation of South Carolina law. He also alleges that parole was denied in violation of equal justice, and should be considered cruel and unusual punishment.

The Respondent argues that the decision of the Parole Board conformed with the decision of the South Carolina Supreme Court in Cooper. The Respondent will also argue that the denial of parole never violated any of the Appellant's Constitutional rights; nor can the Court reverse a decision based on questions of fact. The brief of the Respondent supporting their argument follows.

ARGUMENTS

- 1. The Respondent followed the mandates proscribed by the South Carolina Supreme Court in Cooper; therefore, the decision of the ALC was correct.**

The Appellant argues that the Board failed to apply the criteria established by the General Assembly found in the South Carolina Code of Laws, which specifically state:

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 his 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. 2013).

It is the position of the Respondent that each of the mandatory criteria was applied to the Appellant's case, so the ALC made the correct decision in dismissing this appeal.

The ALC recognized that the Respondent properly notified the Appellant of his denial of parole. The Board followed the standards provided by the South Carolina Supreme Court in the case of Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008). In Cooper, the Supreme Court decided that a finding of fact was included; however, the Court determined that the Parole Board neither, “offered an explanation nor indicated that it considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form.” Id., at 500. The Supreme Court decided 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. In Cooper, the Supreme Court established what future Parole Board orders should consist of, 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.

A final decision or order adverse to a party in a contested case shall be in writing and include a findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350 (Supp. 2013). In the case at bar, the order of denial did conform with the Cooper decision, and South Carolina law. The findings of fact were the reasons provided as to why parole was denied; and, the conclusion 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. The reasons given for denial were reasonable and followed the mandatory criteria. Since the Board is the sole authority to deny parole, which is not appealable; the ALC made the

correct decision. 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 399 (1991).

The ALC determined that the notice of rejection stated it considered the fifteen factors and §24-21-640, so it is a routine denial of parole. The ALC has no authority to review this denial, and made the proper decision dismissing this appeal. This decision should not be subject to reversal. The Appellant never raises any violation of procedure prior to the decision, he just voiced mitigating circumstances that goes beyond the jurisdiction of the Courts.

In Cooper, the court determined that the order denying parole was unlawful due to it not presenting any conclusions of law. It was the opinion of the Supreme Court that in order for the Board to prove that proper procedures were followed it must not only state a findings of fact but the statute and policy considered in reaching this conclusion. The order delivered to the Appellant is clear, the criteria within the statute and the mandatory policy were 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 notice of rejection that it considered the statutory criteria and the 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).

It is clear by the order that the criteria was followed prior to the decision of the Parole Board. Since the ALC made this finding, there exist no error in law; the decision of the ALC should be upheld.

2. The court does not have the ability to reverse a decision of the Parole Board based upon a question of fact.

The Appellant asserts that the Board failed to consider the facts of his case which allows an reversal of this decision. Within his brief the Appellant list many mitigating circumstances that he

wishes this Court to consider. The Respondent argues that the ALC was correct in not using these factual decisions by the Board to make her determination. This is due to the fact the Court does not have the authority to reverse a decision of the Board based upon a question of fact.

Though the Board did consider the age of the Appellant at the time he committed the offense; and his classes and treatment during his incarceration, other events overrode these mitigating factors. The Board had to take into consideration that the Appellant shot two individuals causing the death of one, and the loss of an eye of another. They also had to consider the vehement opposition to parole raised by the victims family, Cherokee County Sheriff, and the Seventh Circuit Solicitor.²

The Board is entrusted with a very serious responsibility. They must determine if each inmate before them will not be a danger if released from incarceration. One way to make this determination is to consider the offense he was convicted of committing. If after considering the information presented, and the Board continues to believe that there exist a risk of further crimes, it is their duty to deny parole. The Appellant request the ALC to reverse due to the facts presented to the Parole Board. These are determinations made by the Board that cannot be reversed by the Courts. The Court will not overturn a finding of fact. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). The Court have no ability to reverse a decision of the Board, only to remand due to a failure to follow proper procedure. 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 Department of Probation, Parole, and Pardon Services. S.C. Code Ann. §1-23-600(D)(Supp. 2013). So the decision of the ALC was correct, there exist no error in law.

² The surviving victim James Donald Hodge died in 2002, however, his wife continues to raise her objections to the Appellant being released on parole.

3. The Board did not violate the Appellant's Constitutional rights in the denial of parole.

The Appellant alleges that the denial of his parole should be considered cruel and unusual in violation of the eighth amendment of the United States Constitution. The Appellant makes this argument due to the fact he was sixteen when he committed the crime, and has been incarcerated since his arrest in 1975. Though the Appellant has spent a long time incarcerated, due to the crime committed this cannot be considered cruel and unusual. The Appellant committed the offense of murder so it is possible that he will spend the remainder of his life incarcerated.

Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Const. Amend. VIII. The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime. State v. Kiser, 288 S.C. 441, 343 S.E.2d 292 (1986). The three factors in assessing proportionality are: 1) the gravity of the offense compared to the harshness of the penalty; 2) sentences imposed on other criminals in the same jurisdiction; and, 3) sentences for the same crime in other jurisdictions. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001), *quoting*, Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983). In applying these factors, the penalty placed on the Appellant cannot be considered cruel and unusual.

Regardless of age, the Appellant was convicted of shooting two innocent individuals, one in the back of the head taking his life, the other in the temple causing a removal of an eye. A life sentence cannot be considered to harsh a penalty, considering the gravity of the offense committed by the Appellant. At the time the Appellant committed this offense the only sentence you can get for murder in South Carolina is life. In all states the offense of murder carries a possibility of receiving a life sentence, this is due to the fact a person should be given a life sentence when

committing the ultimate crime of taking another person's life. Since this case does not violate any of the factors to determine an existence of a cruel and usual punishment, this sentence cannot be considered a violation of the eighth amendment.

The Appellant at this time is serving a life sentence for an offense he committed at age sixteen. In State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002) the South Carolina Supreme Court decided that, "Lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment." Id., at 205.

The Appellant also argues that a majority of inmates sentenced to life with a ten year parole eligibility have been granted parole. He argues that the average time served on a murder conviction is fifteen years; however, he has been incarcerated for twenty-eight years. The Appellant has offered no proof to the veracity of this statement. The Respondent guesses that he is attempting to create an equal protection argument, however, this does not raise to the level of being denied his right to equal protection.

The Appellant has not presented any proof that the Board used a different criteria other what is mandatory pursuant to South Carolina law. It is the burden of the Appellant to prove that he was not treated equally as other inmates in a similar situation. An Appellant for relief, or a privilege has the burden of proof and the burden of proof test upon on who files a 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). To establish an equal protection violation; a party must show that similarly situated persons received disparate treatment. TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (S.C. App. 1998). The Appellant never provided any evidence revealing his case

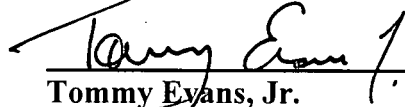
was considered differently as any other inmate appearing before the Board in a similar situation.

Since no evidence of unfairness was shown there exist no denial of equal protection.

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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March 21, 2014

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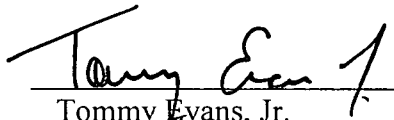
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DESIGNATION OF MATTER

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



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Assistant General Counsel

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SOUTH CAROLINA DEPARTMENT
OF PROBATION, PAROLE,
AND 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 and Designation of Matter* dated March 21, 2014, on Appellant this 24th day of March, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Thomas Thompson, #80681
Kershaw Correctional Institution
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I further certify that all parties required by Rule to be served have been served.


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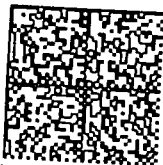
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