

State of South Carolina
In the Court of Appeals

Appeal from the Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Docket No.: 13-ALJ-15-0025-AP
Appellate Case No.: 2014-001097

Jeremiah DiCapua, #105096, Appellant,

v.

South Carolina Department of
Probation, Parole and Pardon Services, Respondent.

Initial Brief of Appellant

Jeremiah DiCapua, #105096
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Appearing Pro Se

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I. Statement of the Case

A. Introduction

Appellant Jeremiah DiCapua, #105096, hereby appeals the final decision of the South Carolina Administrative Law Court ("ALC") dated April 16, 2014. (See, Order, Record on Appeal, pg. —.)

That on April 13, 2013, Appellant appeared before the South Carolina Parole Board for consideration for parole.

That by letter dated April 3, 2013, he was advised that he had been rejected for parole for two reasons. (See, Notice of Rejection, Record on Appeal, pg. —.)

That a timely request for reconsideration was filed on April 29, 2013. (See, Record on Appeal, pg. —.)

That Appellant was notified by letter dated June 7, 2013 that his request for rehearing had been denied. (See, letter, Record on Appeal, pg. —.)

That Appellant respectfully appeals the ALC's final decision on the following basis:

(a) That the Appellant was originally paroled on August 9, 2000;

- (b) He was revoked on July 27, 2007;
- (c) His revocation was based on a conviction for additional charges;
- (d) This conviction has now been overturned and there is no longer a basis for his original revocation. (See, Order Granting Post-Conviction Relief, Record on Appeal, pg. —.)
- (e) The letter of rejection indicates that the reasons for rejection are:
- i. Nature and seriousness of current offense; and,
 - ii. Prior criminal record indicates poor community adjustment.
- (f.) The Appellant would contend that the current offense has been set aside by the Court and thus he has no "current" offense; and that the poor community adjustment, i.e., parole revocation, is no longer a viable reason for denial.

For the above-stated reasons, Appellant seeks review of the final decision from the ALC, which deprives him of a liberty interest based on the above. (See, Notice of Appeal, Record on Appeal, pg. —.)

B. History of Proceedings

A. In August of 2000, Appellant was paroled from the South Carolina Department of Corrections. -2-

B. On October 16, 2003, Appellant was arrested in Horry County, S.C., for Distribution and Possession with intent to Distribute Cocaine. (Record on Appeal, pg. —.)

C. On October 23, 2003, Warrant 26-03-515 was issued by Horry County Probation, Parole and Pardon Services for the arrest of Appellant for violation of parole (re: the above arrest (in B, above)). (Record on Appeal, pg. —.)

D. On October 13, 2004, a Parole Revocation Hearing against Appellant (re: the above arrest (in C)) was held before the South Carolina State Parole Board. The final ruling of the Board forgave and dismissed the warrant against Appellant; and further, allowed Appellant to continue on parole. (Record on Appeal, pg. —.)

E. On January 11, 2005, Appellant was found guilty of the above-mentioned charges that the South Carolina State Probation and Parole Board previously allowed Appellant to continue on parole for (re: paragraph D, above). (Record on Appeal, pg. —.)

F. On January 13, 2005, Appellant was sentenced to 30 months on each conviction, to run concurrent. (Record on Appeal, pg. —.)

G. On January 14, 2005, the trial court sua sponte vacated Appellant's convictions and sentences concerning these charges, and the South Carolina Department of Probation, Parole and Pardon Services again allowed Appellant to continue on parole. (Record on Appeal, pg. —.)

H. On April 23, 2007, the South Carolina Court of Appeals reversed the sua sponte trial order and reinstated Appellant's convictions and sentences. (Record on Appeal, pg. —.)

I. On July 25, 2007, the South Carolina Department of Probation, Parole and Pardon Services revoked Appellant's parole because of the reinstatement of the convictions and sentences by the South Carolina Court of Appeals. (Record on Appeal, pg. —.)

J. On February 23, 2011, Appellant's convictions and sentences were again overturned on a grant of Post-Conviction Relief, again deeming Appellant legally innocent of the charges which caused Appellant's parole revocation. (Record on Appeal, pg. —.)

K. On April 3, 2013, Appellant appeared before the South Carolina State Probation and Parole Board, requesting reinstatement of parole;

and thereafter, by letter dated April 3, 2013, Appellant was notified that his request for reinstatement was denied. (Record on Appeal, pg. —)

L. On April 29, 2013 and May 3, 2013, separate timely "Petitions for Rehearing" were filed by Appellant's parole attorney, Tommy A. Thomas, Esq., and by Appellant, pro se. Thereafter, by letters dated June 5th and 7th, 2013, Appellant was notified that his "Petition for Rehearing" was denied.

M. On July 1, 2013, Appellant, pro se, forwarded to the ALC timely "Notice of Appeal" from the final decision of the South Carolina Department of Probation, Parole and Pardon Services, case # 13P0025.

C. Argument

Appellant respectfully contends that Respondent's actions to not reinstate Appellant's parole after Appellant's convictions and sentences have again been vacated constitutes a breach of an implied agreement between the parties, resulting in the loss of Appellant's state-created liberty and property interest in rights, privileges and immunities

granted Appellant by South Carolina State law:

1. In support thereof, Appellant would respectfully show this Court:

(a) That Appellant was originally paroled on August 9, 2000.

(b) That his parole was revoked on July 25, 2007.

(c) That the revocation was based on a conviction irrelevant to Appellant's original grant of parole in 2000.

(d) That this conviction has now been overturned/vacated again and there is no longer a basis for Appellant's revocation. (Record on Appeal, pg. —.)

2. In further support thereof, Appellant would respectfully show the Court that the agency's findings of fact (re: "Notice of Rejection") to not reinstate Appellant's parole are no longer valid! (Record on Appeal, pg. —.)

(a) That the "Nature and seriousness of current offense" NO LONGER EXISTS; whereas, the convictions and sentences that caused Appellant's revocation in 2007 have again been vacated as they were in 2005 when the agency

again allowed Appellant to continue on parole. (Record on Appeal, pg. —.)

(b) That the "Prior criminal record indicates poor community adjustment" NO LONGER EXISTS; whereas, the current offense has again been set aside by the court; and thus, Appellant has NO current offense and that the "poor community adjustment", i.e. parole revocation, is NO LONGER a viable reason for denying reinstatement of Appellant's parole -- whereas the arrest for these vacated charges and ANY charges considered a parole violation were FORGIVEN back in 2004 when Appellant was allowed to continue on parole. (Record on Appeal, pg. —.)

(c) Therefore, Appellant has NOT violated the conditions of his parole ... Appellant is legally innocent again and there is NO cause for the agency to deny reinstatement of Appellant's parole.

D. Standard of Review

"The standard of review is the Administrative Procedures Act",
Barton v. South Carolina Department of Probation, Parole and Pardon Services,
404 S.C. 395, 745 S.E.2d 110 (SC 2013).

According to the APA, Section 1-23-380(A)(6), this Court can reverse, or modify, the agency decision if:

(a) Respondent's decision is in violation of constitutional or statutory provisions. SC Code §1-23-380(A)(6)(a).

(b) Respondent's decision is in excess of the statutory authority of the agency. S.C. Code §1-23-380(A)(6)(b).

(c) Respondent's decision is made upon unlawful procedure. SC Code §1-23-380(A)(6)(c).

(d) Respondent's decision is affected by other error of law. SC Code §1-23-380(A)(6)(d).

(e) Respondent's decision is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. SC Code §1-23-380(A)(6)(e).

(f) Respondent's decisions are clearly an unwarranted exercise of discretion. SC Code §1-23-380(A)(6)(f).

E. The Law

The Parole Board's "findings of fact" denying to reinstate Appellant's parole for: (A) Nature and seriousness of offense (when there NO LONGER is an offense), and (B) Prior criminal record indicates poor community adjustment (when Appellant is again legally innocent and has not violated any laws of the land since being allowed to continue on parole, as back in 2004 and again in 2005) is unlawful. That Appellant was already granted parole in 2000, and the revocation is now baseless, "affects an inmate's substantial personal right to statutorily correct parole review". Cooper v. South Carolina Department of Probation, Parole and Pardon Services, 377 S.C. 489, 499, 661 S.E.2d 106, 111-112 (2008).

"Undoubtedly, the Parole Board is the sole authority with decisions regarding the grant or denial of parole. However, the Legislature created this Board to operate within certain parameters. We do not believe the legislature established the Board and intended it to render decisions without any means of accountability." Cooper, supra, at 499.

As early as the 1986-87 term of SC Attorney General's Opinions, it is commonly understood that when Appellant is found legally innocent

by a court of the reasons for his parole revocation, his parole should be reinstated:

"If after warrant for violation by probationer of conditions of probation has been issued, and probation has been revoked by court, there is a determination by the court that there has been no violation by the probationer of any condition of the probation, there is a serious question as to the validity of the revocation of probation." 1956-57 SC App. Gen. Op. 219.

Certainly, the Parole Board has denied or narrowly restricted Appellant's right to be heard on review of his prior revocation now that the circumstances have changed.

"States may not deny or narrowly restrict right to be heard on revocation of parole." Bearden v. State of SC, 443 F.2d 1090 (4th Cir. (SC) 1971).

Appellant does not argue whether the parole he was granted in 2000 was a "right" or "privilege"; however, he does argue that, when he is legally innocent of the reasons for revocation, he has suffered a "grievous loss".

"Whether any procedural protections are due depends not on whether governmental benefit is characterized as a 'right' or 'privilege' but whether individual will be condemned to suffer grievous loss." Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972).

Many courts have found parole, once granted, to be a constitutionally protected right:

"A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right. See Meachum v. Fano, 427 U.S. 215, 226, 96 S.Ct. 2532, 2539; Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974). Plainly, however, the underlying right must have come into existence before it can trigger due process protection. See e.g., Lewis v. Flint, 439 U.S. 438, 442-443, 99 S.Ct. 698, 701-702." Connecticut Board of Pardons v. Dumschat, 101 S.Ct. 2460 (1981).

Appellant argues that Respondent has violated his constitutionally protected right to substantive due process as well. Appellant has a property or liberty interest in the parole which had been granted him in 2000. Respondent has deprived him of this property or liberty interest. Respondent will not re-evaluate their decision to not reinstate Appellant's parole even when provided with evidence proving the reasons for the prior revocation are now invalid.

"To make out a claim that [] action violated substantive due process, Appellant must, in circumstances of this case, demonstrate (1) that they had a property interest, (2) that the state deprived them of the property or liberty interest, and, (3) that the state's actions fall so far beyond the outer limits of legitimate governmental action that

"no process could cure the deficiency." Sylvania Dev. Corp. v. Calvert County, Md., 48 F.3d 810, (emphasis original), cited in, Plyler v. Moore, 100 F.3d 365 (4th Cir. SC 1996),

The only proper criteria for the Parole Board to consider in this case is whether Appellant did, in fact, violate the conditions of his parole by being guilty of indictments with which he had been charged.

"If the Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility, and thus infringes on a state-created liberty interest." Cooper, supra., at 488-489.

II. Questions Presented

A. Whether Respondent deprives Appellant of a state-created liberty interest in the very same parole which the Parole Board granted Appellant in 2000?

B. Whether Respondent has deprived Appellant of state-created procedural and substantive due process of law?

III. Argument

A. Respondent deprives Appellant of a state-created liberty interest in the very same parole which the Parole Board granted Appellant in 2000.

Appellant reiterates the contents of the foregoing pages 1-11, sections I(A)(B)(C)(D)(E), as completely as if stated again in their entirety herein.

It is undisputed that, once a prisoner is released on parole, a parolee has a vested liberty interest in parole. Bearden v. State of SC, 443 F.2d 1090 (4th Cir. SC 1971).

Appellant was released on parole in 2000. Subsequent facts prove Appellant has not violated the conditions of his parole. The revocation of Appellant's parole is unlawful. Respondents refuse to correct their error.

B. Respondent has deprived Appellant of state-created procedural and substantive due process of law.

Appellant reiterates the contents of the foregoing pages 1-11, sections I(A)(B)(C)(D)(E), as completely as if stated again in their entirety herein.

S.C. Code Ann. §§1-23-380(A)(6)(a-f) was created for Appellant's benefit and imposes upon Respondent a duty to provide Appellant with both procedural and substantive due process of law. Barton v. South Carolina Department of Probation, Parole and Pardon Services, supra.

Respondent's actions violate the 14th Amendment, U.S. Const., due to his liberty being deprived in violation of constitutional or statutory provisions. S.C. Code §1-23-380(A)(6)(a); because his parole was deprived for acts he did not commit, and Respondent will not reinstate his parole after being given proof his convictions and sentences have been vacated.

Respondent's decision is in excess of the statutory authority of the agency when Respondent is not authorized by law to violate Appellant's parole without cause. S.C. Code §1-23-380(A)(6)(b).

Respondent's decision is made upon unlawful procedure when they give no consideration to Appellant's previously granted parole rights. S.C. Code Ann. §1-23-380(A)(6)(c).

Respondent's decision is affected by other error of law. S.C. Code §1-23-380(A)(6)(d).

Respondent's decision is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. S.C. Code Ann. §1-23-380(A)(6)(e).

Respondent's decision to not review the parole revocation, its reasons, the cause for revocation being eliminated, and to reinstate parole is clearly an unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(A)(6)(f).

IV. Conclusion

Appellant respectfully requests this Court to reverse or modify Respondent's decision and thereby issue an Order for reinstatement of Appellant's parole whereas his procedural and substantive rights have been prejudiced and deprived him due to the administrative procedures, findings, inferences and conclusions violate S.C. Code Ann. §1-23-380(A)(6)(a-f). Appellant requests any such and further relief as may be deemed appropriate, just and in accordance with law.

Respectfully submitted:

Jeremiah DiCapua
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Dated: June 20, 2014

State of South Carolina
In the Court of Appeals

Appeal from the Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

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Docket No.: 13-ALS-15-0025-AP
Appellate Case No.: 2014-001097

SC Court of Appeals

Jeremiah DiCapua, #105096, Appellant,

v.

South Carolina Department of
Probation, Parole and Pardon Services, Respondent.

Proof of Service

I certify I have served the "Initial Brief of Appellant" and "Designation of Matter to be Included In Record on Appeal" on the Department of Probation, Parole and Pardon Services by depositing a copy of it in the United States Mail, postage prepaid, on June 20, 2014, addressed to their attorney of record, Tommy Evans, Jr., Esq., S.C. Dept. Prob., Par. & Pdn. Svc., P.O. Box 50666, Columbia, SC 29250.

Jeremiah A. Capua
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Dated: June 20, 2014

Jeremiah DiCapua, #105096
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The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Jeremiah DiCapua v. SCOPPS
Appellate Case No. 2014-001097

Dear Ms. Kitchings!

Enclosed you will find originals of my "Initial Brief of Appellant" and my "Designation of Matter to be Included In Record on Appeal" for filing in your office.

Proof of service upon Respondent is included.

With kind regards,

Respectfully,

Jeremiah DiCapua
June 20, 2014

Enclosures

cc: Tommy Evans, Jr., Esq.
File

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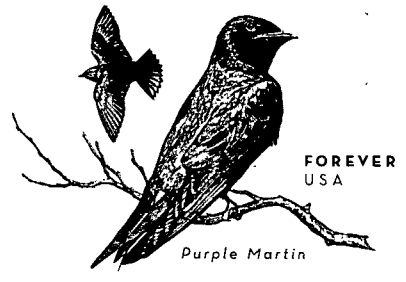
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