THE SOUTH CAROLINA COURT OF APPEALS

Bernard Bagley, Appellant,

v.

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

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SC Court of Appeals

Appellate Case Number: 2013-000042

APPELLANT'S MEMORANDUM

1. WHETHER AT THE TIME OF THE APPELLANT'S HEARING DID SECTION 24-21-10(f)(1) REQUIRE THE PAROLE BOARD TO EVALUATE AN INMATE USING THE DEPARTMENT'S ADOPTED RISK ASSESSMENT TOOL AND CONSIDER THE RESULTS OF SUCH AN EVALUATION IN REACHING A PAROLE DECISION?

2. IF SO, WAS THE STATUTE COMPLIED WITH IN THE PAROLE PROCEEDING?

ANSWERS

1. YES, AT THE TIME OF THE APPELLANT'S HEARING, SECTION 24-21-10(f)(1) REQUIRE THE PAROLE BOARD TO EVALUATE AN INMATE USING THE DEPARTMENT'S ADOPTED COMPAS NORTHPOINTE INSTITUTE FOR PUBLIC MANAGEMENT RISK ASSESSMENT TOOL WHICH THE PAROLE BOARD "SHALL USE" IN MAKING A PAROLE DECISION.

2. NO, THE STATUTE SECTION 24-21-10(f)(1) WAS NOT COMPLIED WITH IN THE OCTOBER 12, 2012 PAROLE PROCEEDING BECAUSE THE HEARING WAS MADE UPON AN UNLAWFUL PROCEDURE ARBITRARY OR CAPRICIOUS MANNER.

INTRODUCTION

Bernard Bagley, #175851, (Bagley) submits this Memorandum challenging a decision by the Administrative Law Court (ALC) order under review by this Court's request upon filed ORDER dated 6/13/14. For purposes of this Memorandum, Appellant incorporates into the record and repeat as if repeated verbatim herein, his filed briefs, and now file this, his Memorandum, and would respectfully aver to this Court the following: Jurisdiction is invoked in the instant case because Bagley do in fact, have a protected liberty interest in the adopted COMPAS risk assessment evaluation which the Parole Board shall use in making a parole deci-

sion as to determine whether the parole agents can properly supervise him upon release on parole.

DISCUSSION

In an appeal from the ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. §1-23-610(B)(Supp. 20-12). This Court will only reverse the decision of an ALC if that decision is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or charcterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. "The Court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact." Id. (alterations added). In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. [Citation omitted].

1. Section 24-21-10(f)(1):

Indeed, §24-21-10(f)(1) require the Parole Board to evaluate an inmate using the department's adopted COMPAS risk assessment tool to make specific findings and determination under Rule 52, South Carolina Rules of Civil Procedures, (SCRCP), as a conclusion of law. The language in §24-21-10(f)(1) on its face makes the procedure applicable at all parole cases. The revealing mandatory guidelines as follows: The South Carolina Code of Laws specifically state:

> 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 purpose of the foregoing statement explains that the procedure is to

assess the risk and crimnogenic need factors for substantial compliance, but more importantly, the parole board "shall use" in making parole decisions. In interpreting statutes, the Court look to the plain meaning of the statute and the intent of the Legislature. Hinton v. S.C. Dept. of Prob., Parole, & Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct.App.2004). Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the State. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991), construing in favor of the defendant the different time frames for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary.

If a Parole Board deviates from or renders its decision without consideration of the appropriate evaluation of an inmate using the department's adopted COMPAS risk assessment, Bagley avers and believe it essentially abrogates his right to his October 12, 2012 parole eligibility and, thus, infringes on a state-created liberty interest under the Fourteenth Amendment of the U.S. Constitution Procedural Due Process Clause. Section 24-21-10(f)(1) was created by the Legislature for the Board to render decisions by means of accountability, and to operate within a certain parameters. The Appellant believe that he does have a right to require the Board to adhere to statutory requirements to evaluate him and to consider the results of such evaluation in rendering a decision.

The Parole Board apparently only considered a different set of facts when reachit decision, in which Bagley argues the October 12, 2012 parole hearing was carried out under unlawful procedures since the adopted COMPAS risk assessment tool consistent with evidence-based practices and factors that contribute to criminal behavior was not produced by the Parole Board as required by department's and State statute §24-21-10(f)(1). The record shows that the parole examiner interviewed the Appellant on 6/21/12, but did not administer the adopted COMPAS risk assessment evaluation. Further, no evidence establishes that the Parole Board at the time of the Appellant's hearing applied §24-21-10(f)(1) as required to evaluate him using the department's adopted COMPAS risk assessment tool to consider the results of such an evaluation in reaching their parole decision. Bagley specifically argues that §24-21-10(f)(1) applies. Bagley further contends that the department's failure to follow the requirements of §24-21-10(f)(1) requires reversal and remanded to the parole board for a new hearing within thirty

30 days.

2. Due Process/Administrative Law:

The Appellant avers, since the method of evaluation and the parole decision has been challenged and since the parole board did not follow established procedure outlined in §24-21-10(f)(1), Bagley has shown that the failure to follow the procedure in dispute is irrational and capricious. The department has no basis to show how the failure to apply §24-21-10(f)(1) is rationally grounded. Thus, the wrong procedure was applied in reaching a parole decision, and there is no rational basis the department as to why §24-21-10(f)(1) was not applied. Appellant asserts, the department's or parole board's actions in not applying §24-21-10(f)(1) are arbitrary and capricious. Moreover, it has the effect of rendering Bagley parole ineligible on October 12, 2012, which under Furtick v. S.C. Dept. of Prob, Parole & Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003), (ALSO SEE: Furtick 649 S.E.2d 35, 38 (2007), it does not mean that there must be a permanent denial of parole eligibility before a sufficient liberty interest is involved. Again, Bagley is challenging through his appeal the Parole Board's failure to utilize the procedure promulgated by the Legislature in §24-21-10(f)(1) of the S.C. Code, substantial compliance that the parole officials can properly supervise him upon the adopted COMPAS risk assessment tool evaluation that will show to the board's satisfaction that he can be a productive resident outside of prison without being a threat or danger to anyone in the community as required under §24-21-640.

In addition, Appellant asserts that the rejection letter the Parole Board issued to him makes no mention of the procedure outlined or substantial compliance of §24-21-10(f)(1). Also, the department's failure to utilize the procedure in accordance to the statute regulations certainly produces a sufficient risk of increasing the measure of punishment attached to his violent crime regardless that he is serving a life sentence. The Court ruled in Cooper v. S.C. Dept. of Prob., Parole, and Pardon Servs., 377 S.C. 489, 499, 661 S.E.2d 106, 111-12 (2008), Parole is a privilege and Cooper has no right to be paroled; however, Cooper does have a right to require the Parole Board to adhere to statutory requirements in rendering a decision. (alteration added). Wherefore, the extent of his pun-

ishment is that he would spend the rest of his life in prison is without merit. At the time of Appellant's sentencing a person imprisoned for life would become eligible for parole after serving 20 years of his sentence. Moreover, the nature of parole is early release from imprisonment. SEE: §24-21-700.

Bagley avers that the interpretation of §24-21-10(f)(1) resolves this case before the Court, because the parole board "shall use" in making parole decisions in §24-21-10(f)(1), means "shall use" in making parole decisions. The statute was not complied with in the parole proceeding, and as a result, it diminished Bagley's ability to achieve parole on October 12, 2012, and affected the quantum of punishment by newly criminalized his acts, enhanced his punishment, and certainly, altered the legal rules of evidence in §24-21-640, and §24-21-10(f)(1).

Bagley further contends that the department's failure to follow the requirements of §24-21-10(f)(1) requires reversal and remand to the parole board for a new hearing withing thirty (30) days.

CONCLUSION

The Appellant states that he believes rehabilitation signifies remorseful, humility, redemption, and humbleness for him, and for the foregoing reasons established in his brief and all documents on file with this Court, he pray that the Court grant the relief genuinely requested by Appellant, mercy and grace and any such other relief this Court deems fair and just.

Respectfully submitted,

s/ Bernard Bagley, #175851
HD133/KER.CI
4848 Goldmine Hwy.
Kershaw, SC 29067
pro se

June 20. 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Court
Appellate Case No.: 2013-000042

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v.

S.C. Department of Probation, Parole
and Pardon Services, Respondent.

CERTIFICATE OF COUNSEL
[Pro se]

The undersigned certifies that the Appellant's Memorandum contains all material proposed to be included by the parties.

s/ Bernard Bagley
#175851/HD133/KER.CI
4848 Goldmine Hwy.
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S.C. Department of Probation, Parole,
and Pardon Services, Respondent.

PROOF OF SERVICE

I, Bernard Bagley, the Appellant certify that I have served the Appellant's Memorandum, and Certificate of counsel dated June 20, 2014, on the Respondent this 20th day of June 2014, by depositing a copy of the same in the U.S. Mail, postage prepaid, addressed to: Tommy Evans, Jr.
SCDPPPS General Counsel
P.O. Box 50666
Columbia, SC 29250

s/ Bernard Bagley
#175851/HD133/KER.CI
4848 Goldmine Hwy.
Kershaw, SC 29067

June 20. 2014

Benjamin Bagley
#175851-HD133-Kerc.I.
4848 Goldmine Hwy.
Kershaw, S.C. 29067

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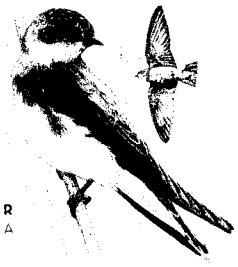

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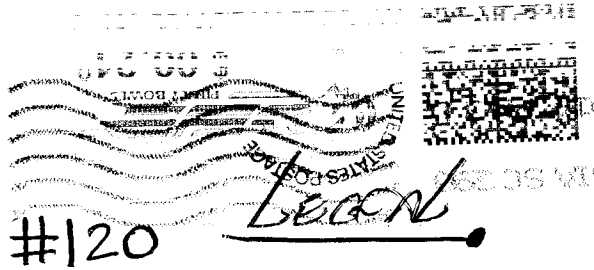
P.O. Box 11629
Columbia, S.C. 29211-1629



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