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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Judge

Appellate Case Number 2013-000042

Bernard Bagley, #175851, Appellant,

v.

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

APPELLANT'S FINAL SUPPLEMENTAL MEMORANDA

The Appellant, Bernard Bagley, #175851, (Bagley) submits this Final Supplemental Memoranda challenging the Respondent's Supplemental Memoranda dated June 30, 2014, and 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 Final Supplemental Memoranda, Appellant incorporates into the record and repeat as if repeated verbatim herein, his filed Appellant's Memorandum Addendum, Appellant's Memorandum, filed briefs, and all documents on file with this Court.

Appellant received Respondent's Supplemental Memoranda dated June 30, 2014, on July 3, 2014, and come now to object to Respondent's answer in its argument on page 1, "The Respondent argues that this tool does not determine parole, it's just another matter the board can consider." Appellant avers that the interpretation of §24-21-10(F)(1) resolves this case because the parole board "shall use" in making parole decisions. In §24-21-10(F)(1), means "shall use" in making parole decisions, and not doing so the board diminished Bagley's ability to achieve parole on October 10, 2012, thus, abrogated his rights to his October 10, 2012 parole eligibility. The Appellant request that the Court release him on conditional probation.

Appellant object to Respondent's answer in its argument on page 2, "The Respondent also argues that, this case should be considered moot, due to the fact the Appellant is scheduled for a hearing in October of this year." Bagley avers that the Board October 10, 2012 parole hearing was carried out under unlawful procedures, and requires reversal and remand to the parole board for a new hearing within thirty (30) days, or the alternative, the Court immediately release Appellant on Conditional Probation.

The Appellant object to Respondent's answer in its argument on page 2, "The Appellant was on probation for the offense of murder." Bagley asserts that he has not nor has never been on any probation for the offense of murder. This was the different set of facts the parole board apparently only considered when reaching its

decision in the October 10, 2012 parole hearing. In this case of fraud in fact or in law, false representation of a matter of fact, or misleading allegations, the Appellant pray for immediate release from custody to conditional probation by this Court. The COMPAS risk assessment evaluation would have revealed in Bagley's October 10, 2012 parole hearing that he never was nor never has been on probation for murder. The board affected the quantum of punishment by newly criminalized Bagley's offense according to him on the basis that they the Respondent's states that "The Appellant was on probation for the offense of murder." Additionally, Appellant contends that the Respondent enhanced his punishment by believing he "was on probation for the offense of murder."

Considering the facts of the underlying case that the Appellant was on probation for the offense of murder is a false allegation that seriously prejudiced Bagley by (1) not using the COMPAS assessment; (2) other similar inmates were selected for the COMPAS assessment and were clearly less qualified than Bagley was granted parole, and it's his belief that a strong case can be made that prejudice is a factor, i.e. discrimination; and (3) Bagley's Father passed away based on the stress and hardship from both parties. The Appellant ask that the Court release him on conditional probation.

The Appellant objects to Respondent's arguments on pages 3 and 4. The substantial controversy is that Bagley just learned today by the Respondent that he was on probation for the offense of murder, and could not be granted parole because of the probation violation or revocation, and because of the two (2) immutable factors stated in the Respondent's Memoranda. In addition, Bagley discovered on July 2, 2014 the real reason Parole Examiner Sandra Ryan administered him a COMPAS risk assessment eight (8) months after the October 10, 2012 parole hearing on June 5, 2013, and told him that he would receive a parole hearing afterwards in 2013; however, on November 6, 2013, without Bagley's knowledge the Board determined to rescind the November 6, 2013 hearing and rescheduled on or about October 10, 2014, because Appellant did not withdraw this present appellate case 2013-000042 from the Court. In which Bagley come now to infer that Parole Examiner Sandra Ryan administered him the COMPAS assessment on 6/5/13, eight months after the October 10, 2012 parole hearing. The Respondent scheduled a parole hearing on 11/6/13 in an effort that Bagley would withdraw this appellate case from this Court, but when Bagley did not withdraw his case the parole board rescinded the hearing on 11/6/13, and rescheduled it in October 2014. Bagley asserts that the parole board should have rescinded, continued, postponed, or deferred his October 10, 2012 parole hearing because he was not administered the COMPAS assessment on 6/21/12 specifically when the interest of fairness and justice seem to require it. The Appellant pray that this Court will release him on conditional probation to finish out his sentence. (Attached and incorporated herein is Administrative Law Judge Carolyn C. Matthews order docket number 14-ALJ-15-0010-AP). NOTE: filed June 16, 2014.

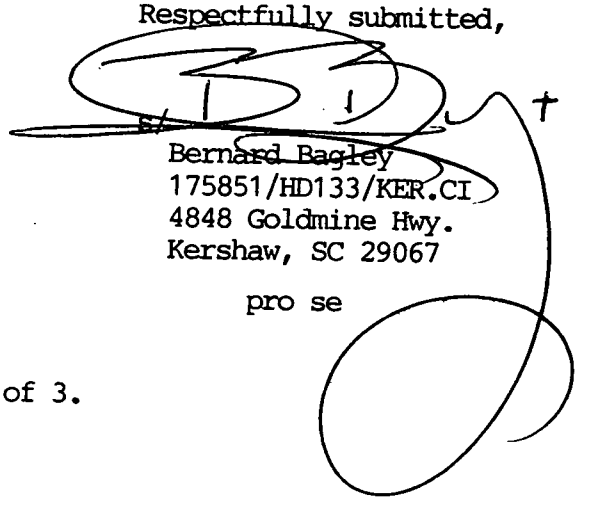
CONCLUSION

The Parole Board clearly should have rescinded, continued, postponed, or deferred Appellant's October 10, 2012 parole hearing when the interests of fairness and justice seem to require it as related to the integrity of the parole proceeding. The COMPAS risk assessment was not used in the board's decision making process when the language in §24-21-10(F)(1) means the board "shall use." It's Bagley's belief that the COMPAS assessment evaluation would have presented the two factors that co-exist in State v. Belcher, 685 S.E.2d 802 (2009), as a different set of facts in mitigation that do relate to law in accordance to Rule 60(b), of South Carolina Rules of Civil Procedures. However, the board was given prior to their decision that the Appellant was on probation for the offense of murder is under fraudulent intentions. In addition, Parole Examiner Sandra Ryan's improprities on 6/5/13 through 11/6/13 were under fraudulent intentions.

WHEREFORE, based on the foregoing reasons, and all documents on file with this Court, Appellant pray that the Court grant the relief genuinely request for immediate release on conditional probation to complete his sentence.

I declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge and belief.

Respectfully submitted,



Bernard Bagley
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pro se

July 3. 2014
Kershaw, SC

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW COURT
Ralph king Anderson, III, Administrative Law Judge
Appellate Case No. 2013-000042

Bernard Bagley, #175851, Appellant,

v.

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

CERTIFICATE OF COUNSEL (PRO SE)

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

s/ Bernard Bagley
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July 3. 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal for the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge
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Bernard Bagley, #175851,

Appellant,

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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 Final Supplemental Memoranda, and Certificate of Counsel Pro se, dated July 3, 2014, on the Respondent this 3rd day of July, 2014, by depositing a copy of the same in the U.S. Mail, postage prepaid, addressed to:

Tommy Evans, Jr.
SCDPPPS Assistant General Counsel
P.O. Box 50666
Columbia, SC 29250

July 3. 2014

s/ Bernard Bagley
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4848 Goldmine Hwy.
Kershaw, SC 29067

Attached: ALC Order dated 6/16/14.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bernard Bagley, #175851, Appellant, vs. South Carolina Department of Probation, Parole and Pardon Services, Respondent.	Docket No. 14-ALJ-15-0010-AP **ORDER**

STATEMENT OF THE CASE

This case is before the South Carolina Administrative Law Court ("ALC") pursuant to the appeal of Bernard Bagley ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. Initially, Appellant was scheduled for a parole hearing on November 6, 2013, however the South Carolina Department of Probation, Parole and Pardon Services ("Department") notified Appellant that pursuant to South Carolina law, Appellant can only appear before the South Carolina Parole Board ("Board") every two years. The Department informed Appellant on January 23, 2014 that his next parole hearing was scheduled on or around October 10, 2014. On February 11, 2014, Appellant filed a Notice of Appeal with the ALC. The Appellant alleges that he should be allowed yearly parole hearings pursuant S.C. Code Ann. § 16-25-90 (Supp. 2013). Further, Appellant argues that the rescheduling of his parole hearing unlawfully enhanced his punishment.

STATEMENT OF FACTS

On August 23, 1990, Appellant discovered that his wife resigned from her job, withdrew all the money from their bank account, and took their daughter to her mother's house in Eastover, South Carolina.[1] Appellant travelled to Eastover to confront his wife. Upon arrival, Appellant kicked in the door of the house, and argued with his wife about her having a possible affair. During the argument, Appellant shot his wife twice causing her death.

Appellant was indicted and tried for Murder in the Richland County Court of General Sessions. The jury found Appellant guilty, and he was sentenced to a term of incarceration for the remainder of his natural life. At the time Appellant committed his offense, South Carolina

[1] Appellant lived in Durham, North Carolina.

law allowed an individual serving a life sentence for Murder the possibility of parole upon the service of twenty (20) years.

Appellant made his initial appearance before the Board on September 8, 2010, where the Board denied parole. Appellant also appeared before the Board on October 10, 2012, where the Board denied parole due to the nature and seriousness of the current offense and the use of a deadly weapon in this or a previous offense. Appellant was scheduled to appear the Board on November 6, 2013, however, it was determined that pursuant to South Carolina law the Appellant can only appear the Board every two years. Appellant was informed that his next parole hearing is scheduled on or about October 10, 2014. This appeal before the ALC followed.

DISCUSSION

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. See Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs., 352 S.C. 594, 576 S.E.2d 146, 149-50 (2003); see also Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In Furtick, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. § 24-21-620, the statute does not create a liberty interest in the granting of parole itself. Furtick, 352 S.C. at 598, 576 S.E.2d at 149 n. 4. Therefore, claims arising from the Board's decision denying parole are not appealable to the ALC, only claims that the Board failed to consider the appropriate criteria so as to be tantamount to an abrogation of parole eligibility. Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs., 377 S.C. 489, 661 S.E.2d 106 (2008).

Appellant is currently serving a sentence for Murder, which pursuant to S.C. Code Ann. § 16-1-60 (Supp. 2013) is a violent offense. S.C. Code Ann. § 24-21-645(D) (Supp. 2013) states:

> Upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole, except that prisoners who are eligible for parole pursuant to Section 16-25-90, and who are subsequently denied parole must have their cases reviewed every twelve months for the purpose of a determination of parole. This subsection applies retroactively to a prisoner who has had a parole hearing pursuant to Section 16-25-90 prior to the effective date of this act.

Appellant argues that he should be considered for parole yearly under S.C. Code Ann. § 16-25-90 (Supp. 2013). However, Appellant has failed to establish this fact during his initial appearance before the Circuit Court during sentencing or the Board.

In order to receive yearly parole hearings, Appellant must be determined to be a victim of spousal abuse by presenting credible evidence to the sentencing court or the Board. South Carolina law states:

> Notwithstanding any provision of Chapters 13 and 21 of Title 24, and notwithstanding any other provision of law, an inmate who was convicted of, or pled guilty or nolo contendere to, an offense against a household member is eligible for parole after serving one-fourth of his prison term when the inmate at the time he pled guilty to, nolo contendere to, or was convicted of an offense against the household member, or in post-conviction proceedings pertaining to the plea or conviction, presented credible evidence of a history of criminal domestic violence, as provided in Section 16-25-20, suffered at the hands of the household member. This section shall not affect the provisions of Section 17-27-45

S.C. Code Ann. § 16-25-90.

S.C. Code Ann. § 24-21-645(D) allows individuals who are eligible for parole under S.C. Code Ann. § 16-25-90 and subsequently denied parole, to have their cases reviewed every twelve months for the determination of parole.

S.C. Code Ann. § 16-25-90 only applies to individuals who have been determined by the sentencing court or in a post-conviction proceeding that there exists credible evidence proving the individual was a victim of a history of criminal domestic violence. Sufficient credible evidence was not provided to the sentencing court or the Board to make this determination. In order to receive the benefit of Section 16-25-90, the history of criminal domestic violence must be proven by a preponderance of the evidence. State v. Blackwell-Selim, 392 S.C. 1, 3-4, 707 S.E.2d 426, 428 (2011). Appellant contends the victim's prior arrest for criminal domestic violence allows him annual parole hearings. No court has made a determination that there exists credible evidence proving Appellant was a victim of a history of criminal domestic violence. Under S.C. Code Ann § 24-21-645(D), Appellant, having been convicted of a violent crime, must wait two years before any reappearance before the Board, as Appellant has not proven through credible evidence that Section 16-25-90 is applicable.

Appellant alleges that his sentence was enhanced by the Department.[2] Appellant became eligible for parole twenty years after his sentence began, in accordance with South Carolina law. Appellant has appeared before the Board on September 8, 2010, October 10, 2012, and is

[2] Appellant lists an additional nine factors to argue that his punishment has been enhanced. None of these factors have any bearing on a parole hearing, nor do any of these factors establish that Appellant is eligible for parole. These nine factors go beyond the jurisdiction of the ALC.

scheduled to appear in October of 2014. Appellant was scheduled for a hearing in 2013; however, this scheduled hearing was in error and was rescinded. Appellant thought that when a Parole Examiner interviewed him and administered the COMPAS risk assessment that the Board adjusted his parole review to annual as opposed to biennial. However, the schedule for a parole hearing was in error, as Appellant is only allowed to appear before the Board every two years. This was a mistake of the Department, and pursuant to South Carolina law, the scheduled parole hearing was rescinded. Therefore, Appellant's sentence has not been enhanced.

ORDER

IT IS THEREFORE ORDERED that Appellant's Appeal is **DENIED.**

AND IT IS SO ORDERED.

Carolyn C. Matthews

CAROLYN C. MATTHEWS
Administrative Law Judge

June 16, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the party(ies) or their attorney(s).

This 16th day of June 2014

BY _____
Judicial Law Clerk