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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR THE ADMINISTRATIVE LAW JUDGE DIVISION
The Honorable Shirley C. Robinson, Administrative Law Judge
Appellate Case Number 2014-000803

ROBERT KOON, #227826, APPELLANT

v.

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

RESPONDENT'S INITIAL BRIEF

Matthew C. Buchanan
General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services**
P.O. Box 50666
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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **WAS THERE AN EX POST FACTO VIOLATION BY THE DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES?**
2. **DID THE ADMINISTRATIVE LAW COURT ERR BY DISMISSING THE APPEAL FOR NOT EXHAUSTING ALL ADMINISTRATIVE REMEDIES?**
3. **DID THE ALC ERR WHEN REFUSING TO ADDRESS THE ALLEGED CONFLICT OF INTEREST REGARDING THE APPELLANT'S SHOWING OF EXTRAORDINARY CIRCUMSTANCES.**
4. **DID THE ALC ERR WHEN IT DENIED APPELLANT'S MOTION TO EXPAND THE RECORD.**

STATEMENT OF THE CASE

On May 29, 1998 the Appellant was convicted of Burglary second degree (Burglary 2nd) and Grand Larceny. Due to his prior record, the Appellant was determined to have two prior convictions for “serious” offenses; therefore, he was sentenced to a life sentence without the possibility of parole.¹ Upon conviction the Appellant was given a life sentence by the honorable John C. Hayes III. During his term of incarceration the Appellant appealed the conviction which was affirmed by the Court of Appeals.

The Appellant wrote the Chairman of the Parole Board requesting the sentence be commuted. On March 21, 2013, the South Carolina Department of Probation, Parole and Pardon Services (DPPPS) responded with a letter informing the Appellant that there exists no commutation of a sentence unless the person was facing a death sentence. Furthermore, the letter stated the only remedy available to the Appellant that exists was a pardon. Upon receipt of this letter, the Appellant files a notice of appeal before the Administrative Law Court (ALC).

The ALC dismissed Appellant’s appeal, finding that he is not eligible for parole. Furthermore, S.C. Code Ann. §17-25-45 outlines the process Appellant must follow in order to become parole eligible, he has not done so.

The Appellant has appealed the ALC judge’s decision, to which the Department hereby responds:

¹ Notwithstanding any other provision of law except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more convictions for a serious offense. S.C. Code Ann. §17-25-45(B)(1)(Supp. 2011).

ARGUMENTS

1. THE ALC DID NOT ERR WHEN IT RULED APPELLANT HAS NOT COMPLIED WITH THE PROCESS SET FORTH IN §17-25-45.

Appellant states in his appeal that there is no process found within §17-25-45 to become parole eligible. This assertion is incorrect, as a reading of the statute will attest.

Pursuant to South Carolina law a person sentenced to life without parole in this circumstance can be allowed to appear before the Board. The South Carolina code of laws state:

(E) For the purpose of this section only, a person sentenced pursuant to this section may be paroled if:

(1) the Department of Corrections requests the Department of Probation, Parole and Pardon Services to consider the person for parole; and

(2) the Department of Probation, Parole and Pardon Services determines that due to the person's health or age he is no longer a threat to society; and

a. the person has served at least thirty years of the sentence imposed pursuant to this section and has reached at least sixty-five years of age; or

b. the person has served at least twenty years of the sentence imposed pursuant to this section and has reached at least seventy years of age; or

c. the person is afflicted with a terminal illness where life expectancy is one year or less; or

d. the person can produce evidence comprising the most extraordinary circumstances.

S.C. Code Ann. §17-25-45(E) (1-2)(Supp. 2011)

Appellant was sentenced to life without parole pursuant to subsection §17-25-45 (B)(1), as he was convicted of a “serious” offense (Burglary 2nd), while having two prior “serious” offenses (also Burglary 2nd convictions).

Therefore, according to the statute, the Department of Corrections must first request Appellant to be considered. Then the Respondent must determine if, due to his health or age, the Appellant is no longer a threat to society. If that is met, then the Respondent must look to the

amount of time he has served and if he has reached a certain age, or if his life expectancy is less than one year or if there are extraordinary circumstances present.

That process is what the ALC determined the Appellant has not followed when it dismissed his appeal. The Respondent has not received any request from the Department of Corrections to consider him for parole, which would begin the Respondent's process of considering his current and future threat to society. Furthermore, the Appellant has served sixteen years of his sentence, and is forty-six years old.

Therefore, the ALC's dismissal of Appellant's appeal was appropriate.

2. THE ALC DID NOT ERR WHEN ADDRESSING THE FINAL AGENCY DECISION REGARDING AVAILABLE REMEDIES.

The ALC Order dismissing the Appellant's claim was not in error, as the final agency decision was correct in determining the Appellant was not eligible for parole.

A reading of §17-25-45(E)(2)(d) in a vacuum would lend one to think, as Appellant seems to, that persons sentenced to life without parole under §17-25-45 are parole eligible so long as they can produce evidence of extraordinary circumstances. This is, of course, incorrect.

As discussed *supra*, the only time when an inmate serving a life sentence under §17-25-45 must show extraordinary circumstances is after the Department of Corrections has requested and the Respondent has determined the inmate is not a threat to society due to age or illness, but the inmate has not met the other statutory conditions.

When a court looks to interpret a statute to determine the intention of the legislature, the court must apply the literal meaning first. *First South Savings Bank, Inc. v. Gold Coast Associates*, 301 S.C. 158, 390 S.E.2d 486 (1990). Although the Appellant asks this Court to construe the language against the state in this case, only when a genuine ambiguity exists should

the rule of lenity be applied. *Bryant v. State*, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009).

Therefore, when, as is the case in the present case, the statute is clear and unambiguous, the language of the statute controls.

3. THE ALC DID NOT ERR WHEN REFUSING TO ADDRESS THE ALLEGED CONFLICT OF INTEREST REGARDING THE APPELLANT'S SHOWING OF EXTRAORDINARY CIRCUMSTANCES.

The Appellant alleges that, because one of his prior burglaries was of a probation branch office in Cherokee County, Respondent cannot objectively determine whether the evidence he has presented rises to extraordinary circumstances.

This allegation falls short for two reasons. First, as discussed above, his attempt to show extraordinary circumstances is improper and untimely. Even if the Respondent were to find his evidence compelling, Appellant fails to meet the other prerequisites for parole eligibility under §17-25-45(E). As a result, the Respondent cannot make a determination, and this inability has no relation to any sort of bias, perceived or otherwise.

Secondly, the fact that the Appellant had burglarized a probation office sixteen years ago is immaterial. Being a state agency, the State of South Carolina and Respondent has been through numerous different administrations in the past sixteen years. The Respondent's director, executive management team, legal director and a large amount of staff have changed in the interim.

While an individual may have a long memory about being the target of a criminal act, it is simply not so for a state agency such as Respondent. Consequently, the ALC properly declined to rule on the Appellant's accusations of bias.

4. THE ALC PROPERLY DENIED APPELLANT'S MOTION TO EXPAND THE RECORD.

Appellant sought to include his evidence of extraordinary circumstances in the record of the ALC, which was properly denied. As noted in footnote 1, the ALC Rules 58 and 61 control appeals to that court, and “those matters not considered by the agency during its review will not be considered by this Court.” ALC Order, April 1, 2014, p. 3 fn.1.

ALC Rule 58(B) states that the record shall include evidence received or considered by the agency. In this case, the Respondent did not consider the information provided by Appellant in his bid to show extraordinary circumstances for parole eligibility because he had not met the threshold requirements of being recommended for review by the Department of Corrections and a determination of low risk to society due to age or illness.

Because the ALC did not need to review the evidence in order to reach its proper conclusion, the ALC correctly followed its rules when it refused to allow the Appellant expand the record.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the Appellant's appeal be Dismissed.

Respectfully submitted,

Matthew C. Buchanan
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P.O. Box 50666
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BY: 

Matthew C. Buchanan
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Attorney for the Respondent

Columbia, South Carolina
August 7, 2014

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DESIGNATION OF MATTER

The Respondent proposes no additional matter be included in the Record on Appeal.



Matthew Buchanan
General Counsel

August 7, 2014

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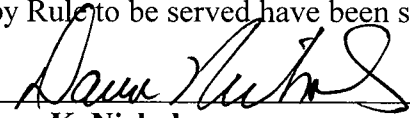
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES, RESPONDENT

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 along with Respondent's Motion Objecting to the Appellant's Designation of Matter* dated August 7, 2014, on Appellant this 6th day of August, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Robert Koon, 227826
Lieber Correctional Institution
PO Box 205
Ridgeville, South Carolina 29472

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

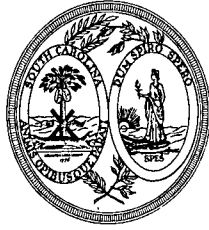


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August 7, 2014

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201


RE: Robert Koon v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original of the *Initial Brief of Respondent, Designation of Matter* and the original and six (6) copies of *Respondent's Motion Objecting to Appellant's Designation of Matter*, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,


Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Robert Koon