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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Phillip Lenski, Administrative Law Judge
13-ALJ-15-0025

JEREMIAH DICAPUA,.....APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

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1. **Did the Respondent deny the Appellant a state created liberty interest by revoking his parole, and later denying him a parole opportunity?**

2. **Was the Appellant denied a state created procedural and substantive due process of law?**

STATEMENT OF THE CASE

On November 3, 1980, the parents of the victim Jessie James Warr, III had not seen nor heard from him in four months. They proceeded to contact the authorities to file a missing persons report. During the investigation, the authorities interviewed the Appellant who informed them that Mr. Warr was his roommate at the time of his disappearance. Later a reliable informant revealed to authorities that the Appellant confessed that he murdered Mr. Warr. He informed the authorities that the Appellant told him what Mr. Warr was wearing at the time of his murder, and that he was shot in the head or neck area. When the body was discovered, the clothing and gunshot wounds were identical to what was told by the informant. The Appellant was then arrested and charged with the offense of murder.

On December 11, 1980, the Appellant appeared before the Honorable James Moore for the offense of murder. Upon conclusion of this appearance, Judge Moore sentenced the Appellant to a period of incarceration for the remainder of his natural life. At the time of the Appellant's conviction, South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon the service of twenty years.

On February 7, 1996, while an inmate at Campbell Work Center, the Appellant escaped custody. He was later found in Baltimore, Maryland, arrested, extradited to South Carolina, and charged with the offense of escape. On October 22, 1996, the Appellant appeared before the Honorable Joseph Wilson for the offense of escape, he was sentenced to an additional one year period of incarceration.

On July 1, 1999, the Appellant made his initial appearance before the Parole Board. Upon conclusion of this appearance, the Board decided to deny the Appellant an opportunity to be released on parole. The Appellant was ultimately granted parole after his next appearance on

August 9, 2000. The Appellant remained on parole until his arrest and conviction for the offense of distribution of cocaine, and possession with intent to distribute cocaine. Due to a failure to refrain from the violation of state law, the Parole Board decided to revoke the Appellant's parole on July 26, 2007.

This conviction was set aside by the Honorable Michael Baxley. That decision was appealed by the State and brought before the Court of Appeals. The Court of Appeals reversed the decision of the lower court. *State v. DiCapua*, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007). Writ of Certiorari was granted by the South Carolina Supreme Court, and the Supreme Court reversed the decision of the Court of Appeals. They decided that Judge Baxley had the authority to *sua sponte* order a new trial. *State v. DiCapua*, 383 S.C. 394, 680 S.E.2d 292 (2009).

The Appellant brought this reversal to the attention of the Parole Board on subsequent parole hearings held on March 16, 2011, and April 3, 2013. The Board decided to deny parole on both occasions. His last denial occurred on April 3, 2013, parole was denied due to: 1) nature and seriousness of the current offense; and, 2) a prior record indicates poor community adjustment. Upon being notified of his last rejection, the Appellant requested a reconsideration. On June 7, 2013, the Appellant was notified that the matter raised in the request did not affect the final decision of the Parole Board, so the request for reconsideration was denied. After this denial, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleged that the Board's failure to reinstate people upon his conviction being set aside violates South Carolina law. The Respondent argued that the conviction being set aside has no bearing on the decision of the Parole Board, and the Board is the sole authority as to the determination of parole.

On April 16, 2014, the Honorable S. Phillip Lenski, Administrative Law Judge issued an order relating to this case. Within this order Judge Lenski decided that pursuant to the South Carolina Supreme Court case of *Cooper v. S.C. Dep't of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106, the ALC only has "jurisdiction over claims that an appellant was denied eligibility for parole and claims that the Board failed to consider the appropriate criteria so as to be tantamount to a denial of parole eligibility." Lenski order p.3 The lower court ruled that as long as the Board consider all of the mandatory criteria before making a decision, the Court could not grant relief to the Appellant. The ALJ correctly decided to affirm the decision of the Parole Board.

Upon receiving the decision of the ALJ the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within this appeal, the Appellant alleges that the Board denied his liberty interest due to his parole being revoked due to a verdict that was later set aside. The Respondent argues that by committing this crime the Appellant violated parole, a decision that solely lies with the Parole Board. The Respondent will also argue that the Board followed the *Cooper* decision by relaying in the order that the mandatory criteria was followed prior to the denial of parole. The brief supporting the above referenced arguments follows.

ARGUMENTS

1. **The Appellant does not have a liberty interest in being granted parole, so the decision of the Parole Board did not violate any liberty interest.**

The Appellant argues that his original revocation of parole occurring in 2007 denied his liberty interest in parole, because the conviction that caused the revocation was later overturned. The decision to revoke a person's parole solely lies with the Parole Board. The Appellant violated one

of the standard conditions of parole which was provided once he was released from incarceration.[1] Upon arrest, it is the duty of the parole agent to issue process in order for the Appellant to be brought before the Parole Board.[2] Once the case brought before the Board, they shall be the sole judge as to whether or not a parole has been violated and no appeal therefrom shall be allowed. *S.C. Code Ann. §24-21-680(*Supp. 1981). Every paroled prisoner remains in the legal custody of the Board and may at any time be imprisoned on its order. *Sanders v. MacDougall*, 244 S.C. 160, 135 S.E.2d 836 (1964).

The Appellant argues that since his offense was overturned his parole revocation was unlawful and denied him a liberty interest. The Appellant has a liberty interest in appearing before the Board; however, that interest does not exist when it comes in being granted parole. South Carolina Courts have consistently held that parole is a privilege not a right, and there exist no liberty interest in being granted parole. *Sullivan v. South Carolina Department of Corrections*, 355 S.C. 437, 586 S.E.2d 124 (2004)(parole is a privilege not a right); *Steele v. Benjamin*, 362 S.C. 66, 606 S.E.2d 499 (2004)(the distinction is that the review or consideration for parole is a right granted by statue whereas parole is only a privilege.); *James v. S.C. Dept. of Probation, Parole and Pardon Services*, 376 S.C. 392, 656 S.E.2d 399 (2008)(inmate did not have protected liberty interest in parole, but only a hearing to determine parole eligibility). The Appellant's parole was lawfully revoked due to his involvement in this crime. According to the facts presented, the Board decided that the Appellant violated the law; thereby, violated one of the mandatory conditions. This revocation was lawful and not subject to reversal by the ALC.

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[1] I shall not violate any Federal, State, or Local laws, and I shall contact my agent if I am arrested or questioned by law enforcement official for any reason whatsoever. (SCDPPPS order of parole, Form 91)

[2] Upon failure of any prisoner released on parole under the provisions of this chapter to do or refrain from doing any of the things set forth and required to be done by and under the terms of his parole, the parole agent must issue a warrant or citation charging the violation of parole. *S.C. Code Ann.* §24-21-680(Supp. 1977).

2. The decision of the ALC was lawful pursuant to the *Cooper* decision.

The ALC made the determination that the decision to deny parole was lawful pursuant to the *Cooper* decision. In *Cooper*, the Supreme Court decided that the findings of facts were included; however, the Court determined that the Parole Board neither, "offered an explanation nor indicated that it had considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form." *Cooper*, at 500. The Supreme Court ruled, 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 under *Furtick*[3] warrants review by the ALC. *Id.*, at 502.

In *Cooper*, the Supreme Court established what future Parole Board orders should consist of, *Cooper* 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., at 500.

In the case before the Court, the order of denial did conform with the *Cooper* decision. It included a findings of fact and conclusions of law separately stated. *S.C. Code Ann.* §1-23-350 (Supp. 2013). The findings of fact were the reasons provided by the Board as to why parole was denied; and, the conclusions of law are the 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.

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[3] *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003).

The Appellant argues that the reasons given for denial no longer apply, this is due to the fact his prior drug offense was set aside. He argues that the nature and seriousness of the current offense; and, his prior criminal record indicating a poor community adjustment, no longer exist. The Appellant believes that the use of these reasons for his denial of parole was unlawful.

Within South Carolina law, the Board has certain criteria they must consider prior to a decision. According to the South Carolina code of laws:

> 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. 2012).

It is the position of the Appellant that the nature and seriousness of the current offense does not apply due to the drug offense being set aside. This reason for denial applies to the murder offense not the subsequent drug offenses. It is also the Appellant's position that the second reason for denial should not apply due to the offense being set aside. Even without those drug offenses the Appellant still has a false statement to bank, false pretenses, and murder on his record. The reasons for denial is left solely up the Parole Board because it is a question of fact, which is not subject to Court review. The court cannot substitute its judgment for that of the agency as to the weight of evidence on questions of fact. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

In the *Cooper* case the Board made the mistake in failing to include the statute or policy that was considered prior to denial. In the opinion of the Court, in order for the Board to prove that the 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 mandatory policy was considered prior to denial. According to the Supreme Court, if this is shown no further action by the ALC is necessary. If the Parole Board clearly states in its order of rejection that it considered the statutory criteria set forth in Form 1212 no other review 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).

The ALC based its decision on the fact the Respondent followed the *Cooper* case by stating the reasons for denial and the statute or Department policy considered prior to rejection. Since the Board clearly followed the mandatory criteria prior to denial the ALC made the proper decision to affirm a denial of parole. 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(C)(Supp. 2013).

3. The revocation and denial of parole never violated due process.

The Appellant argues that he was denied due process due to the fact his parole was revoked using a conviction that was later overturned. He argues that his revocation was made due to a crime he did not commit. The revocation of parole is totally up to the Parole board and there exist a lesser burden of proof to be met for the Board to revoke parole. The authority of the Parole Board should be identical to the Court in a probation revocation. This court has previously held that the authority of a revoking court in a probation case should always be predicated upon an evidentiary showing of a fact tending to establish a violation of the terms and conditions. *State v. Hamilton*, 333 S.C. 642, 511 S.E.2d 94 (1999).

The fact his case was overturned is not relevant. There was a sufficient showing to the Board that the Appellant committed the crime. The Appellant exchanged drugs for money with a police

informant. Upon his arrest, the police found drugs in his possession; and, the Appellant admitted that the informant gave him one hundred and sixty dollars. *DiCapua,* at 397. The drugs found on the Appellant is a violation of the law, thereby, a violation of a condition of parole. That event alone makes this revocation lawful. Nothing exist in the criteria that states an offender must be convicted of committing the crime in order to have their parole revoked. The criteria states, "I shall not violate any Federal, State, or local law," it does not state "I shall not be convicted." If there exist an evidentiary showing that the offender has violated the law he is subject to a revocation, regardless if that crime was later overturned.

The United States Supreme Court has established in the case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2594 (1972) that minimal due process exist prior to the revocation of parole. In *Morrissey*, the Court created a criteria that must be followed prior to a parole revocation. The Court stated that due process requires: a) written notice of claimed parole violations; b) disclosure of evidence against him; c) opportunity to be heard in person and to present witnesses and documentary evidence; d) right to confront and cross-examine adverse witnesses, unless hearing officer specifically finds good cause for not allowing confrontation; e) "neutral and detached" hearing body such as a traditional parole board; and, f) written statement by factfinders as to evidence relied on and reasons for revocation. *Morrissey,* at 489. The Appellant never raises an issue with the procedure followed by the Board during his revocation.

The Appellant has raised this fact at each parole hearing since his revocation. The Board has taken it under consideration but continues to deny him an opportunity to be released on parole. This decision is well within the rights of the Parole Board as long as they can show the proper procedures were used. There does not exist a due process right to be released on parole just the right to a hearing, which he receives every two years pursuant to South Carolina law. There exist

no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). The Appellant has not revealed to the ALC that he was denied an opportunity to appear before the Board prior or after his revocation, so there exist no violation of due process.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the decision of the Administrative Law Court affirming the decision of the Department be upheld.

Respectfully submitted,

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August 11, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Phillip Lenski, Administrative Law Judge
13-ALJ-15-0025

Case No.: 14-001097

JEREMIAH DICAPUA .....APPELLANT,

v.

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 and Designation of Matter dated August 11, 2014, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, this 11th day of August, 2014, addressed to:

Jeremiah DiCapua, #105096
McCormick Correctional Institution
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McCormick, South Carolina 29899

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

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August 11, 2014

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Jeremiah DiCapua v. SC Department of Probation, Parole and Pardon Services

Dear Ms. Kitchings:

Enclosed please find the original Initial Brief and Designation of Matter in the above referenced case along with proof of service in the above-referenced case.

Thank you.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn

cc: Jeremiah DiCapua