

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge
Case No.: 13-ALJ-15-0027-AP
Appellate Case No. 2014-001047

Ronald Tate, #114188,.....Appellant,

v.

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

APPELLANT'S INITIAL REPLY BRIEF

Ronald Tate

Ronald Tate, #114188
Appellant

Perry Correctional
Institution Q2 B220
430 Oaklawn Road
Pelzer, S.C. 29669

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SC Court of Appeals

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Ronald Tate, #114188,.....Appellant,

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CERTIFICATE OF SERVICE

I, Ronald Tate, #114188, (Appellant), hereby certify that I have served the within Initial Reply Brief of Appellant dated October 31, 2014, on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to the attorney of record. Also, a copy of same to S. Phillip Lenski, ALCJ, as addressed below:

Tommy Evans, Legal Counsel
2221 Devine St., Suite 600
SCDPPP'S P.O. Box 50666
Columbia, S.C. 29250

Hon. S. Phillip Lenski
Administrative Law Court
1205 Pendleton St., Suite 224
Columbia, S.C. 29201

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

Ronald Tate
Ronald Tate, #114188
Appellant
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STATEMENT OF ISSUE ON APPEAL

1. Has the Board retroactively applied Section 16-1-60 of the South Carolina Code of Laws to Appellant defining his crime as violent in violation of the ex post facto clause?
2. Has the Board denied Appellant a liberty interest in parole in applying the current version of 24-21-640 instead of the version in effect at the time his offense?
3. Has Respondent followed the law by allowing Appellant to appear before the Board on an annual basis?
4. Has cumulative changes in parole laws since the Appellant's conviction violate the ex post facto clause?

STATEMENT OF THE CASE

Appellant was indicted at the 1982 term of the Greenville County grand jury for the offense of murder, assault and battery with intent to kill, armed robbery, housebreaking, grand larceny of a vehicle. Appellant appeared before the Honorable Frank Epps, on December 18, 1982, and proceeded to a jury trial and was sentence shortly thereafter for all of the offenses and received a life sentence plus fifty-five years.

At the time of appellant's conviction and sentence S.C. Law provided that an individual serving a life sentence for murder would be eligible for parole following completion of twenty-years of his sentence. Appellant initially appeared before the Board of Probation, Parole and Pardon Services (the Parole Board) on April 1, 1998, after completing sixteen (16) years of his sentence through the award of earned work credits. The parole board denied Appellant parole following that hearing, and on thirteen subsequent occasions.

The reasons for denial was due to 1) nature and seriousness of current offense; and, 2) the use of deadly weapon in this offense or previous offense; and, 3) indication of violence in this offense or previous offense. Appellant's most recent appearance before the Board on June 12, 2013, is at issue here.

Appellant contends that the Respondent's fail to follow the mandatory criteria promulgated by Parole Board in 1982 and applied an amended version of section 24-21-640 instead. Appellant contends that he is being treated as a violent offender when appearing before the parole board. Appellant contends that the Board alters the frequency of his parole eligibility each year denying him annual 12 month parole hearings.

Finally, Appellant contends that the cumulative changes in the parole laws and amendments when considered in total since his offense and conviction produces a sufficient risk of increasing the measure of punishment attached to his crime, violating Federal and State ex post facto clauses as applied retroactively. U.S.C.A. Const. Art. 1, § 10 cl; 1; const. Art. 1. § 4; Code 1976, § 24-21-640.

ARGUMENT

Has The Board Retroactively Applied Section 16-1-60 In Violation Of Ex Post Facto?

Respondent claims that they never classified the Appellant as a violent offender, however, Appellant appears before a "violent Offender" board each year.

In Barton, The Supreme Court, Toal, C.J., held that:

- (1) Statutory amendment requiring that parole for persons convicted of a violent crime be approved by at least two-thirds of the members of Parole Board, in contrast to prior version of statute allowing Parole Board to authorize parole by a majority of its members, violated federal and state Ex Post Facto Clauses as applied retroactively; and
- (2) authorization of parole for persons convicted of a "violent crime" does not require a vote of at least two-thirds of the seven-member board without regard to how many members actually attend a parole hearing, but instead requires only a two-thirds vote of the members participating in a hearing.

In the case of Thalma Barton, who pleaded guilty for the offense of murder on May 11, 1982, the Parole Board erred by applying the current version of section 24-21-645 instead of the version of that statute in effect at the time she committed her crime. Section 24-21-645 speaks directly to "Parole and provisional orders," within the context of review schedule following "parole denial of prisoners confined for violent crimes." "Two-thirds of the members of the board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60". S.C. Code Ann. § 24-21-645 (Supp. 2012)." In Barton, the Court held that retroactive application of section 24-21-645 constitutes an ex post facto violation, and inmates convicted of a violent crime must only convince two-thirds of the Parole Board members participating in their hearing. Also, the Board "produced a sufficient risk of increasing the measure of punishment," attached to a violent crime, citing Jernigan, 340 S.C. at 264-65, 531 S.E.2d at 511 (relying on Lynce v. Mathis, 519 U.S. 433, 444-45, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997)). Barton's crime was committed on May 10, 1982 and the Board treated her crime pursuant to 16-1-60 same as Appellant who committed his crimes shortly after Barton on August 13 1982.

Here, by view of the probative and substantial evidence on the record. This Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach whether the parole board viewed appellant's crime under Section 16-1-60 of the S.C. Code. & S.C. Code § 24-21-645 (A) (Supp. 2012).

Has The Board Denied Appellant A Liberty Interest In Parole In Applying The Current Version Of 24-21-640 Instead Of The Version In Effect At The Time Of His Offense?

Respondent admits that they are using the current criteria in S.C. Code Ann. §24-21-640 (Supp. 2013, instead of the version of S.C. Code Ann. §55-612 (Supp. 1962), and, admit that the two statutes only differ by the word "shall" being replaced by the word "may". After careful review, the statutes are similar but different. Appellant submits that this legislative change to language suggests that legislature understood that the "shall" they changed to "may" cabin the Parole Board's discretion, and mandated Board to grant parole if prisoner meet legislative criteria. However, the change, because of addition to section 24-21-640 by Act 100 of 1981 failed to remove cabin from Board's discretion, that stated in part:

"The Board shall establish criteria for the granting of parole and provisional parole. Such criteria shall reflect all aspects of this section."

In 1990 Act 510 changed all remianing shall(s) of 24-21-640 to "must" except for one shall that did not relate to parole criteria, but punishment of no parole for two violent crimes pursuant to 16-1-60. However, legislation did not amend Section 24-21-13 of Act 100 of 1981, that mandated Board establish policy and procedures for the granting of parole.

In response to directive of addition to section 24-21-640 of Act 100 of 1981 Parole Board promulgated (SCDC 19-109, Jan. 1982) that was provided all prisoners, that stated:

The South Carolina Parole and Community Corrections Board is mandated under code of laws of South Carolina 1976 Section 24-21-640 to consider "circumstances warranting parole: Section 55-612 specifically stated:

The Board shall carefully consider the record of the prisoner before and after imprisonment, and no such prisoner shall be paroled until it shall appear 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 interests of society will not be impaired thereby; and that suitable employment has been secured for him.

In contrast, the current criteria specifically states:

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, suitable employment has been secured for him.

These two versions are structured differently. And, if the current version is the same, there would have been no need for a change in language from "shall" to "may" release if certain conditions were met (emphasis added.)

Appellant who's crime occurred in 1982 clearly has a protected liberty interest in parole, for if he met criteria of 24-21-640 (55-612, 62 Code), the Board was mandated to grant parole. And all prisoner's who crimes occurred prior to July 1991, when Board changed criteria they promulgated for the granting of parole, had a protected liberty interest in parole.

A regulation or policy statement need not necessarily be a rule of law in order to create a liberty interest. Lucas v. Hodges, 730 F.2d 1493 (DC Cir. 1984)

In Greenholtz v. Nebraska, 442 U.S. 1, 99 S.Ct. 2100 (1979), the Court indicated that, although there is no constitutional right to parole, a protected liberty interest may be created by statutes governing parole in a given jurisdiction, id. at 7-11, 99 S.Ct. 2103-2106. In United States v. ILL. Parole & Pardon Bd., 669 F.2d 1185 (1982), the Seventh circuit found a protected liberty interest in the Illinois parole statute, that stated: "The Board Shall Not Parole A Person Eligible For Parole If It Determines That:" The Court went on to find: Illinois has simply stated the rule in the negative-the Board shall not release the inmate if one of the conditions is found." id at 1188.

In Board of Pardons v. Allen, 482 U.S. 369, 107 S.Ct. 2415 (1987), the Supreme Court again addressed the question of a State parole statute creating a liberty interest in parole criteria, applied the Greenholtz and held:

We reject the argument that a statute that mandated release unless certain findings are made is different from a statute that mandates release "if" "when" "or" subject to "such findings being made. Any such statute "creates" a presumption that parole release will be granted." Greenholtz, supra at 12, 99 S.Ct. at 2106. Board of Pardons v. Allen, at note 10 referred to U.S. Ex Rel Scott v. Ill Paorle and Pardon Bd., 669 F.2d 1185, approving of it's findings.

Hense, Section 24-21-640 (55-612, 62 Code), and criteria promulgated by Parole Board, as it existed prior to 1991 gives prisoners, and

Appellant a liberty interest in parole criteria, because Section 24-21-640, like the statute at issue in Allen, Greenholtz, uses mandatory language (shall) to creat[e] a presumption that parole will be granted when the designated findings are made. See, Allen, 107 S.Ct. at 2420; Greenholtz, 99 S.Ct. 2106, and Scott v. Ill, 669 F.2d 1185.

Respondent argues that there is nothing written in statute or case law revealing a prisoner has a state created liberty interest in being released on parole, and that the original wording in this statute does not create a liberty interest in being released on parole. The Board is mistaken, in McQuillion v. Duncan, 306 F.3d 895, 900 (9th Cir. 2002), the Court found that the parole scheme "uses mandatory language and is largely parallel to the schemes found in Greenholtz and Allen," therefore, a liberty interest was created, and that it is clear that "California's parole scheme gives rise to a cognizable liberty interest in release on parole, McQuillion, 306 F.3d at 902.

Has Respondent Followed The Law By Allowing Appellant To Appear Before The Board On An Annual Basis?

Respondent has not and will not follow the language of the law as it applies to Appellant's annual reviews. Respondent claims at the time Appellant committed this offense South Carolina Law allowed upon the denial of parole a case "can" be reviewed "every twelve months thereafter." S.C. Code Ann. §24-21-620 (Supp. 1981). Section 24-21-620 of the 1976 Code was amended in 1981 to read: Upon a negative determination, the prisoner's case "shall" be reviewed every twelve months thereafter for the purpose of such determination." Here, the Board attempts to mislead the Court.

At the conclusion of Appellant's June 19, 2013 hearing, he had a total of (14) parole hearing denials. Appellant's initial hearing was on April 1, 1998. If Respondent followed the law, Appellant would have appeared before the parole board for the (16th) time on June 19, 2013.

Respondent refers to the 1999 and 2010 hearings as unforeseen, postponed, rescheduled, but there is no record to indicate that appellant reappeared before a parole hearing in either of these instances. The Board has misled this Court and cannot produce (16) parole hearing records upon the Court's request!

The following is a list of Appellant's parole hearing's after denial of parole:

April 1, 1998; May 24, 2000; May 22, 2001; July 17, 2002; July 16, 2003; July 18, 2004; July 13, 2005; July 26, 2006; August 29, 2007; October 8, 2008; November 17, 2009; February 9, 2011; May 9, 2012; and June 19, 2013.

Appellant has a total of (14) hearings on record by the Parole Board. If Appellant would have had the 1999 and 2010 hearing's rescheduled they would be on record and would amount to (16) parole denials by the board. The math is simple, if respondent had followed the law as they alleged then they should produce the record as evidence of same.

The record before the court is clear, appellant has not received annual reviews pursuant to past or present law and mislead the ALC into substituting his judgment in favor of the board as to the weight of the evidence on question of fact. The ALC's decision was not supported by 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. Hill v. S.C. Dep't of Health and Env'tl. Control, 389 S.C. 1, 9-10, 698 S.E.2d 612, 617 (2010).

The ALC's decision is in violation of constitutional and statutory provisions, made upon unlawful procedure and affected by other error of law. The validity under the statutory scheme in affect when appellant committed his crime he was eligible for parole every (12) months and statutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of pre-existing parole eligibility. Roller v. Cavanaugh, 984 F.2d 120 (4th Cir. 1993).

Has Cumulative Changes In Parole Laws Since Appellant's Conviction Violate The Ex Post Facto Clause?

Appellant stands by his initial argument that there have been major changes in the parole process that, taken together, create a significant risk of an increased penalty, as with the passage of Act 462, of 1986, the Omnibus Criminal Justice Improvement Act that retroactively applied to all inmates who were incarcerated before it's enactment.

In 1981 Act 100 was enacted that applied to all prisoner's incarcerated during that time. It is a state-created-vested-benefit-property interest that Appellant is permanently entitled to. All prisoner's whose crimes occurred prior to June 3, 1986 are permanently entitled to all benefits of Act 100 of 1981. To deny Appellant or any prisoner whose crime occurred prior to June 3, 1986 is constitutionally

unlawful in violation of the Fourteenth Amendment.

Act 100 of 1981 in part provided Appellant with vested benefits of 4 of 7 votes / majority vote for the granting of parole; annual mandated parole eligibility reviews after denial and mandated the Parole Board to establish specific criteria for the granting of parole, by addition to Section 24-21-640; and benefit of earned work credits, and extended work release, as it did other benefits.

The entire 1981 Act 100 was a benefit vested by the State permanently, by the legislative enactment to the Appellant, evident and expressed clearly by legislative language of the act; that the Appellant has a clear claim of entitlement to, having property and liberty interests in such vested benefits.

The Omnibus Criminal Justice Improvement Act amended and changed "all" relative parole statutes since Appellant's 1981 offense and have produced a significant risk of increasing the measurement of punishment attached to his crime.

Courts must examine the cumulative changes in the parole laws since an inmate's conviction. Garner, defined the framework for determining the requisite risk by instructing lower courts to first consider the risk inherent in the wording of the statute itself and then, alternatively, to explore the evidence of the statute's practical implementation. 529 U.S. 255, 120 S.Ct. 1362. The rules of constitutional law pronounced in Garner remains the proper standard by which to measure an ex post facto violation.

The substantial evidence is in the record, Respondent does not want this Court to undue the retroactive damage that the current parole laws have committed.

CONCLUSION

The ALC failed to examine the factors and evidence presented by appellant, and, substituted his judgment for the judgment of the parole board as to the weight of evidence on question of fact presented by appellant. The ALC's decision was not supported by substantial evidence of the whole record. This Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion. Hill, 389 S.C. 1, 9-10. (2010). Also, the substantive rights of appellant have been prejudiced because the finding, the conclusion, and decision of the ALC was affected by other error of law.

Cooper v. S.C. Dept. of Prob., Parole and Pard. Serv's. 377 (S.C. 489, 499, 661 S.E.2d 106, 111-12 (2008))

The overall changes when considered in total effects an inmates personal right to statutorily correct parole review, and have significantly disadvantaged appellant in violation of the ex post facto clause.

Ronald Tate
Ronald Tate, #114188
Appellant

October 31, 2014

Ronald Tate, #114188
Perry Correctional
Institution Q2 B220
430 Oaklawn Road
Pelzer, S.C. 29669

October 31, 2014

The Honorable Jenny Kitchings
Clerk, of the S.C. Court of Appeals
1015 Sumter Street-5th Floor
Columbia, S.C. 29201

RE: Ronald Tate v. SCDPPPS
Appellate Case No.: 2014-001047

Honorable Kitchings:

Enclosed please find the original Initial Reply Brief of Appellant
along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,



Ronald Tate, #114188
Appellant

cc: S. Phillip Lenski
Tommy Evans, Jr.

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Pelzer, S.C. 29669

Honorable Jenny Kitchings, Clerk
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