

STATE OF SOUTH CAROLINA
In the Court of Appeals

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DEC 16 2014

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Shirley Robinson, Administrative Law Judge
13-ALJ-15-0047

SC Court of Appeals

Case No.: 14-000811

BOBBY RUFF, #185024.....APPELLANT

v.

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

RESPONDENT'S FINAL BRIEF

Tommy Evans, Jr.
Assistant General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250**

ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Administrative Law Court err in dismissing this appeal due to the Respondent's showing that all of the mandatory conditions were considered prior to denial?
2. Does there exist a state created liberty interest in being released on parole?
3. Should the board have a fixed term for parole eligibility, and should the Appellant be released after this term of incarceration regardless of the opinion of the Parole Board?
4. Has the Board permanently denied the Appellant an opportunity to be released on parole due to the use of his prior offense as a reason for denial, and has the Respondent failed to consider a risk assessment prior to the denial of parole?

STATEMENT OF THE CASE

On November 9, 1991, the Appellant unlawfully entered the home of eighty-six (86) year old Flora Edwards with the intent to commit a crime. Upon arrival, law enforcement found Ms. Edwards in the ransacked bedroom lying on the floor. She was unconscious, with very shallow breathing and a pillow over her face. She was immediately transported to a local hospital where she later died. An autopsy was performed on Ms. Edwards, where it was determined she died from asphyxiation. The family later examined Ms. Edwards home and determined that the person who committed this murder also took a television valued at two hundred (\$200.00) dollars.

Upon completion of their investigation, the Greenville Police Department arrested the Appellant and charged him with the offenses of murder, burglary in the first degree (burglary 1st), and grand larceny. On July 29, 1993, the Appellant appeared before the Honorable Thomas Ervin to answer to these offenses. Upon the conclusion of this appearance, the Appellant was sentenced to a period of incarceration for the remainder of his natural life for the offenses of murder and burglary 1st; and, thirty (30) days for grand larceny. At the time the Appellant committed these offenses, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty (20) years.

The Appellant appeared before the Parole Board on September 4, 2013, at the conclusion of this hearing parole was denied due to: 1) the nature and seriousness of the current offense; and, 2) the indication of violence in this or previous offense. (R.p.5). Upon being notified of this denial, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleges that the Parole Board deprived him a state created liberty interest; that the decision of denial was arbitrary and capricious; and the Board abuse its discretion by relying on immutable factors of the offense committed to deny parole. (R.p.6). The Respondent presented

defenses to the ALC, that portions of the argument raised by the Appellant goes beyond their jurisdiction; that the Board, after considering the mandatory criteria found in statute and department policy, made a reasonable denial of parole; and, there exist no violation of ex post facto or due process in the denial of parole.

On March 25, 2014, the Honorable Shirley C. Robinson, Administrative Law Court Judge, issued an order affirming the Appellant's denial of parole. (R.p.14-p.18). Upon receiving the decision of the ALC, the Appellant decided to file a notice of appeal in the South Carolina Court of Appeals. The initial brief of the Respondent defending their position follows.

ARGUMENTS

1. The Board followed the mandatory criteria, and the mandates proscribed by the Supreme Court in the *Cooper* decision.

Any final decision of an administrative agency in a contested case must be placed in writing and shall include a finding of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350 (Supp. 2013). The Respondent argues that the order informing the Appellant of his denial of parole followed the standards provided by the South Carolina Supreme Court in the case of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

In *Cooper*, the Supreme Court decided that the findings of fact were included; however, the Court determined the Parole Board neither, "offered an explanation nor indicated that it considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form." *Id.*, at 500. The Supreme Court ruled in *Cooper*, that if the Parole Board fails to consider and apply the statutory-related criteria, it has the effect of rendering an inmate parole ineligible, which warrants review by the ALC. *Id.*, at 502. The Supreme Court also established what a future Parole Board order should consist of, in *Cooper* it 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.

In the case at bar, the order of denial did conform to the *Cooper* decision. The findings of fact were the reasons provided by the Board as to why parole was denied; and, the conclusions of law are the statutes and 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. The reasons given for denial were reasonable, and followed the mandatory criteria.

In *Cooper*, the court determined that the order denying parole was unlawful due to it not presenting any conclusions of law. It was the opinion of the Supreme Court, that in order for the Board to prove that proper procedures were followed, it must not only state the 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 the mandatory policy was considered prior to the denial of parole. According to the Supreme Court, if this is shown no further review by the ALC is necessary.¹ The decision by the ALC was lawful, and should be affirmed by this Court.

¹ The Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Form 1212 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)

2. The Appellant was not denied a liberty interest by not being awarded parole pursuant to Section 24-21-700.

The Appellant alleges that the Board erred in depriving him a state created liberty interest by not awarding parole pursuant to Section 24-21-700. This section of the South Carolina Code of Laws specifically states:

Any prisoner who is otherwise eligible for parole under the provisions of this article, except that his mental condition is deemed by the Probation, Pardon and Parole Board to be such that he should not be released from confinement may, subject to approval by the Veterans Administration be released to the custody to the Veterans Administration or to a committee appointed to commit such prisoner to a Veterans Administration Hospital. Such a special parole shall be granted in the sole discretion of the Board, and, when so paroled a prisoner shall be transferred directly from his place of confinement to a Veterans Administration Hospital which provided psychiatric care.

S.C. Code Ann. §24-21-700 (Supp. 2013).

Any release under this statute remains in the sole discretion of the Parole Board. If the Board determines he should not be released, they must deny parole, and he is to remain incarcerated. Since the Board denied parole this statute does not apply.

The Appellant asserts that this denial of parole denies him a state created liberty interest. In South Carolina, parole is a privilege, not a matter of right. *Major v. S.C. Dept. of Probation, Parole and Pardon Services*, 384 S.C. 457, 682 S.E.2d 795 (2009). Parole is a creature of statute and is exclusively in the province of the legislative branch of government. *Id.* There is nothing in statute or case law that gives a prisoner a liberty interest in being released on parole. Quite the contrary, South Carolina Courts have consistently held that parole is not a right but a privilege, 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 statute 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). Although the Appellant does have a right to an impartial hearing, he does not have the right to be released on parole.

3. Sufficient evidence was presented to the Board to justify denying the Appellant an opportunity to be released on parole.

The Appellant argues that the Parole Board failed to reveal a nexus between his 1991 murder conviction and any purported dangerousness that could be present. The crime committed must be taken into consideration prior to a decision to award or deny parole. The South Carolina Code of Laws reveals the mandatory criteria that must be followed by the Parole Board. Section 24-21-640 of the South Carolina Code of Laws specifically state:

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. 2013).

One of the mandatory criteria that must be considered is the record of the Appellant before he began his incarceration. The only measure of his future dangerousness is the offenses committed.

There also exist Department criteria that, “must reflect all of the aspects of this section and include a review of a prisoner’s disciplinary and other records.” S.C. Code Ann. §24-21-640 (Supp. 2013). The Department criteria includes:

1. The risk the inmate poses to the community;

2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
3. The inmate's prior criminal record and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal conduct;
9. The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he or she will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow him/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;

15. Other factors considered relevant in a particular case by the Board.

Per South Carolina law, each of these criteria was considered during the Appellant's parole hearing. The Board does not need to reveal a nexus between the crime the Appellant committed and his future dangerousness. It should be obvious that a person who has committed murder should be considered a possible future danger to the community.

It is clear by the statute the General Assembly wanted the past actions of the inmate to be taken into consideration. If the intent of the General Assembly is clear by statute, and cannot be changed by the Court. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Where the statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning. *South Carolina Department of Transportation v. First Carolina Corporation of South Carolina*, 369 S.C. 150, 631 S.E.2d 533 (2006). All rules of statutory construction are subservient to the maximum that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *McClanahan v. Richland County Council*, 350 S.C. 433, 567 S.E.2d 240 (2002).

In his brief, the Appellant insinuates that the Board only used the facts of his offense to make a parole determination. All of the mandated criteria was considered prior to the denial of parole. If the Board determines that the current offense or their past criminal history outweighs the other criteria, that could cause them to deny parole. The General Assembly gave the Parole Board the authority to accept or deny parole, and the current offense is a major criteria that must be considered.

The Appellant also argues that the Parole Board has not provided proof of a nexus between the crime committed and his future dangerousness. The Appellant not the Board has the burden of proof to reveal that the proper measures were not made during his hearing. In administrative proceedings the general rule is that the applicant for relief, benefits, or a privilege has the burden of proof and the burden of proof rest upon who files the claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental Control*, 340 S.C. 118, 530 S.E.2d 643 (2000). The Appellant has not revealed any substantial evidence proving the Respondent was incorrect in relying on his prior offense to deny parole. The fact he broken into the home and murdered a eighty-six year old women should be sufficient evidence revealing his future dangerousness. The decision of the Parole Board was proper; and, the ALC was correct in not reversing this decision. The findings of the administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999).

In his brief the Appellant further alleges that no risk assessment tool was used prior to the decision of the Parole Board. Pursuant to South Carolina law, “the department must develop a plan that includes the 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.” S.C. Code Ann. §24-21-10(Supp. 2013). The COMPAS assessment program was used, and considered by the Board prior to their decision. This program does not guarantee the Appellant will be released on parole, it is just another factor the board must consider prior to a final decision. This assessment was used, the Appellant did not provide the ALC any evidence that this was not done; therefore, the accusations

of the Appellant is irrelevant. The Appellant has also failed to make this argument before the lower court; therefore, this argument is not preserved for appeal. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corporation v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998).

4. Using the facts of the offense as a reason for denial does not permanently deny the Appellant an opportunity for parole.

The Appellant argues that the use of his offense as a reason for denial, essentially permanently denies him an opportunity for parole. He makes this argument because the facts of the underlying crime will never change. The nature and seriousness, as well as, the amount of violence that occurred in the commission of the underlying crime must be considered. This is done due to the fact the crime committed reveals the character, and potential dangerousness of the Appellant.

It is the position of the Appellant that since the facts of the case will never change he will never be granted parole, this is untrue. There are numerous individuals currently on parole who have committed the offense of murder. The nature and seriousness of the offense is only one of numerous criteria considered by the Board. It is true that the nature of the offense will never change; however, there might be other factors the Board will view more favorably than the crime committed, and award parole at a future hearing.

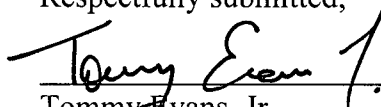
Pursuant to South Carolina law, the Department has created the above referenced criteria that encompasses the criteria found in the statute. Within this criteria there exist some aspects the Appellant can no longer change, that will go against him, (ex. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmates attitude toward it.); and, could possibly be to his advantage, (ex. The inmate's efforts to solve his problems, such as

seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems.) The overall job of the Parole Board is to review all of the information presented and make a determination. If the mitigating factors override the detrimental facts, that person would stand a better chance of being awarded parole. Even though the fact of the offense will never change, it is not unlawful to use the underlying offense as a reason to deny parole. Under South Carolina law this is a factor that must be considered by the Board, as long the Department reveals all of the criteria was considered. These reasons would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24-21-640 and its own criteria. *Cooper*, at 112 n.5. The ALC ruled that as long as it is revealed that the other criteria was considered, the use of the facts of the underlying criminal act as a reason for denial was lawful. Since the ALC did not commit an error of law, their decision should be affirmed. The Appellant Court sits to review errors in law only. *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001).

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the Administrative Law Court affirming the decision of the Parole Board be affirmed.

Respectfully submitted,



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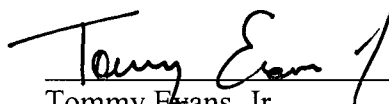
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and
with the South Carolina Supreme Court's order dated August 13, 2007.



Tommy Evans, Jr.
Assistant General Counsel

December 18, 2014

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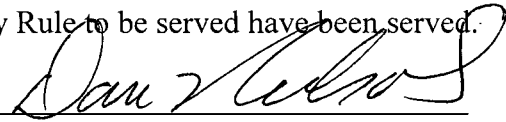
S.C. DEPARTMENT OF PROBATION, PAROLE AND
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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated December 18, 2014, on Appellant this 18th day of December, 2014, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Bobby Ruff, #185024
Kershaw Correctional Institution-HA250
4848 Goldmine Highway
Kershaw, South Carolina 29067

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



Dawn K. Nichols
Executive Administrative Assistant

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