

79

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Philip Lenski, Administrative Law Judge
Case No. 14-ALJ-15-0026

Appellate Case No. 2014-002592

RECEIVED

DEC 31 2014

SC Court of Appeals

Alfonso Ware, 168464,

Appellant,

v.

South Carolina Dept of Probation
Parole and Pardon Services,

Respondent.

INITIAL BRIEF OF APPELLANT

Alfonso Ware

Alfonso Ware
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210

TABLE OF CONTENTS

TABLE OF CASES	Page	3
STATEMENT OF THE CASE	Page	5
STATEMENT OF ISSUES ON APPEAL	Page	7
STANDARD OF REVIEW	Page	8
ARGUMENT ONE	Page	9
ARGUMENT TWO	Page	13
CONCLUSION	Page	16

TABLE OF CASES

<u>CASES:</u>	<u>PAGE(S):</u>
Atlantic Const. Builder and Contractors, L.L.C. v. Lewis, 2012 WL 1700145	12
Bagley v. SCDPPPS, 2014 WL 4217379	11
Barton v. SCDPPPS, 2013 WL 3366669	11
Cooper v. SCDPPPS, 377 SC 489, 661 SE2d 106 (2008)	11
Divine v. Robbins, 385 SC 23, 683 SE2d 286 (Ct. App. 2009)	11
Garris v. Governing Board of S.C. Reinsurance Facility, 511 SE2d 48 (1998)	14
Hawkins v. Bruno Yacht Sale Inc., 353 SC 174, 420 SE2d 843	11
Hill v. Dept. of Health and Environmental Control, 698 SE2d 612 (2010)	8
Hinton v. SCDPPPS, 357 SC 327, 592 SE2d 335	14
Ex Parte Littlefield, 540 SE2d 81	13
McKinney v. Pedery, 2013 WL 4082327	12
Media Gen. Commc'ns, Inc. v. S.C. Dept of Revenue, 388 SC 138, 694 SE2d 529 (2010)	11
Miranda v. Nissan Motor Co. Ltd, 714 SE2d 30	12
S.C. Dept of Soc. Serv. v. Basnight, 346 SC 241, 551 SE2d 274, 278 (Ct. App. 2001)	15
Zamivino v. Arnold, 531 F.2d 687	11

S.C. CONSTITUTION AND STATUTE:

PAGE(S):

S.C. Appellate Court Rules, Rule 208 (B)(1)(D)

11

S.C. Constitution Article 1 §24

12, 13

§1-23-610 (B)

8

§24-21-640

9, 10, 13

OTHERS:

PAGE(S):

Doctrine of Res Judicata

14

Res Judicata

14, 15

Law of the Case Doctrine

12

Victim Bill of Rights

11, 12, 13

STATEMENT OF THE CASE

The Appellant, Alfonso Ware Jr., 168464, was found guilty June 25, 1990 of murder. The Appellant was sentenced to life in prison.

The Appellant's first parole hearing and rejection was held on November 29, 2009; then January 4, 2011; after appellant received his last Notice of Rejection, date April 9, 2014; he filed a Petition for a rehearing dated April 17, 2014; after receiving the Board's Final Decision dated May 29, 2014.

The Appellant then filed a Notice of Appeal with the 'ALC' Administrative Law Court dated June 11, 2014 and filed on the same date, and assigned to the Honorable S. Philip Lenski on June 16, 2014.

The Appellant filed his Original (Initial Brief of Appellant) Brief to the Administrative Law Judge 'ALJ' August 18, 2014; The Respondent filed their Brief September 9, 2014; The Appellant followed with his Reply Brief September 18, 2014; and the Honorable S. Philip Lenski, ALJ Order to Dismiss filed on October 9, 2014; The Appellant filed a 59(e), Motion to Reconsider the Order of Dismissal October 17, 2014; the ALC did not respond to the said motion, but replied by sending another copy of the order on November 6, 2014; to which December 3, 2014, Appellant filed a Notice of Appeal to the S.C. Court of Appeals and a formal notice to all parties received on the same date

December 3, 2014; whereas the Appellant is appealing the two (2) issues on appeal; and the Appellant brief supporting arguments follows.

STATEMENT OF ISSUES ON APPEAL

1. Did the South Carolina Department of Probation, Parole and Pardon Services, apply improper criteria in deciding Appellant's parole, thereby making the Appellant ineligible for parole.
2. Did the South Carolina Department of Probation, Parole and Pardon Services, go outside of the criteria for the granting of parole, when the parole board asked the Appellant about the victim, when they knew that the victim is deceased.

STANDARD OF REVIEW

In an appeal from an Administrative Law Court ('A.L.C.') decision the Administrative Procedures Act ('A.P.A.'), provides the appropriate standard of review. S.C. Code Ann. §1-23-610(B) (Supp 2012).

This court will only reverse the decision of a A.L.C. if that decision is:

- (A) in violation of constitutional or statutory provisions,
- (B) in excess of the statutory authority of the agency,
- (C) made under unlawful procedure,
- (D) affected by other error of law
- (E) clearly erroneous in view of the reliable, probative, and evidence on the whole record, or
- (F) arbitrary, capricious or characterized by an abuse discretion, or unwarranted exercise of discretion.

id "The court may not substitute it's judgment for the judgment of the (A.L.C.) as to the weight of the evidence on questions of fact." (alteration added). In determining whether the A.L.C.'s decision was supported by substantial 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 A.L.C. reached. Hill v. Dept. of Health and Environmental Control, 698 SE2d 612 (2010).

ARGUMENT ONE

1. DID THE SOUTH CAROLINA DEPT. OF PROBATION, PAROLE, AND PARDON SERVICES, APPLY IMPROPER CRITERIA IN DECIDING APPELLANT'S PAROLE. THEREBY MAKING APPELLANT INELIGIBLE FOR PAROLE?

The point here is very simple. The South Carolina Parole was vested with the power, by the South Carolina Legislature to create specific criteria for the granting of parole. See, S.C. Code Ann. §24-21-640. However, what the Respondents have created is a criteria for the consideration of parole.

Define: Specific, Granting, Consideration.

Specific: Of, relating to, or designating a particular or defined thing; explicit <specific duties> Black's Law Dictionary Ninth Edition pg. 1528.

Granting: To give or confer (something), with or without compensation. Black's Law Dictionary Ninth Edition pg. 769.

Consideration: Something (such as an act a forbearance or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act. Black's Law Dictionary Ninth Edition pg. 347.

The Respondent have failed to address the very simple point that there is a vast difference in specific criteria for the granting of parole and a criteria for parole consideration. The Appellant argues and what the Respondents have created proves

this. The Appellant does not argue the power of the Board to create the criteria or the Board's power to use the criteria, but only that what has been created and what the General Assembly gave the Board the power to create is not the same. The General Assembly state in S.C. Code Ann. §24-21-640 (statute) create a specific criteria for the granting of parole.

The South Carolina Code of Law 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.

The criteria that was ordered by the General Assembly must reflect all of the aspect of this section and include a review of the prisoner's disciplinary and other records. S.C. Code Ann. §24-21-640 (Supp 2013).

Looking at definition of the words specific, granting, and consideration, it is clear that what has been created by the Board and used to deny appellant's parole is not what the General Assembly wanted. Thereby making appellant ineligible for parole. A fact that has not been addressed by the Board.

The issue here is of statutory interpretation, "we must employ

the rule of statutory construction to ascertain and effectuate the intent of the General Assembly. See, Hawkins v. Bruno-Yacht Sale Inc., 353 S.C. 174, 420 SE2d 843" "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature" Media Gen. Commc'ns, Inc. v. S.C. Dept. of Revenue, 388 S.C. 138, 694 SE2d 529 (2010). The statutory language must be construed in the light of the intended purpose of the statute. The Board's decisions must not be arbitrary and capricious nor based on impermissible considerations. See, Zamivino v. Arnold, 531 F.2d 687. If the Board deviates from or fails to render its decision consideration of the appropriate criteria, it essentially abrogates a prisoners right to parole eligibility and thus infringes on a state-created liberty interest". See, Cooper v. S.C.D.P.P.P.S., 377 S.C. 489, 661 SE2d 106 (2008), Barton v. S.C.D.P.P.P.S., 2013 WL 3366669, and also Bagley v. S.C.D.P.P.P.S., 2014 WL 4217379. Our State's highest courts has ruled that the Board must follow the intent of the General Assembly in statutory interpretation.

Respondents assert a right to use Victims Bill of Rights as a reason to use ~~xxx~~ victim impact testimony in making parole decisions, however, this is not legally permissible. Victim rights end, at the PCR hearings.

By not addressing a valid critical appeal issue within their formal brief Respondents have abandoned the issue. See, S.C.A.C.R. Rule 208 (B)(1)(D), Divine v. Robbins, 385 S.C. 23, 683 SE2d 286 (Ct.App.2009)(noting when a party fails to cite authority or when

the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal, and therefore not reserved for our review).

Law of the Case Doctrine applies here because the Respondent's have failed to address the issue as raised before the ALC. An unappealed ruling right or wrong is the law of the case. See, Atlantic Const Builder and Contractors, L.L.C. v. Lewis, 2012 WL 1700145. The Appellate Court will affirm unless the Appellant appeals all grounds because the unappealed ground will become the law of the case and the law of the case doctrine, both apply when a party does not challenge an issue on appeal where there has been an opportunity to do so. See, McKinney v. Pedery, 2013 WL 4082327, Miranda v. Nissan Motor Co. Ltd., 714 SE2d 30.

On page 5 of their response the parole board argues that "the attitude and opinion of the victim" must also be considered. They go on to say the South Carolina Code of Laws specifically state: The director must give a thirty day written notice of any board hearing during which the board will consider parole for a prisoner to the following persons:

- (1) any victim of the crime

They also list the Victim Bill of Rights and the S.C. Const. Art. 1 §24. In quoting these the Respondents state the following: A victim must "be informed of any proceeding when any post-conviction action is being considered and be present at any post-conviction hearing involving a post-conviction release decision".

"The Board did not commit any unlawful action by obtaining the opinion of the other parties. This notification is required pursuant to South Carolina Law. In making this declaration the Respondent left off one very important part of the S.C. Const. Art. 1 §24, "A victims rights under the Victim Bill of Rights terminate when the criminal proceedings and Post-Conviction Action against the alleged perpetrator are resolved". See, Ex Parte Littlefield, 540 SE2d 81. Once a criminal case has been resolved and the defendant is sentenced, the alleged victim loses his victim status under the Victim Bill of Rights.

ARGUMENT TWO

2. DID THE SOUTH CAROLINA DEPT. OF PROBATION, PAROLE, AND PARDON SERVICES, GO OUTSIDE OF THE CRITERIA FOR THE GRANTING OF PAROLE, WHEN THE ~~XXXXXX~~ PAROLE BOARD ASKED THE APPELLANT ABOUT THE VICTIM WHEN THEY KNEW THAT THE VICTIM IS DECEASED?

Respondent again have attempted to change this issue! They admit that they may rely on the fact of the offense as part of the Appellant's record prior to incarceration, however, when a member of the parole board asked about the victim Robert Chanon, when they knew the victim was deceased. This line of questioning went beyond the record and into the facts of the condition of the victim. What must be considered is the offense and not the facts surrounding the offense. Nowhere in the statute §24-21-640 or any

of the Amendments thereto, is it permitted to use the consideration of the facts in making the parole decision.

The South Carolina Supreme Court in Hinton v. S.C.D.P.P.P.S., 357 S.C. 327, 592 SE2d 335 "we find it unacceptable that the parole board should look to the so called "facts" of the case to make this determination, for facts are almost always disputed, and neither this court nor the parole board has any way of extricating which particular 'facts' the jury decided were true and which were not.

The Doctrine of Res Judicata applies, this doctrine is commonly known as the claim preclusion, are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly, Garris v. Governing Board of S.C. Reinsurance Facility, 511 SE2d 48 (1998).

The three elements that prove res judicata are: 1. Identify of the parties (S.C.D.P.P.P.S., Alfonso Ware Jr. 168464); 2. Identity of the subject matter (the fact of the appellants conviction); and 3. Adjudication of the issue in the former suit (the facts of the appellates conviction were litigated in Lexington County Court of General Sessions in June 25, 1990). To continue to litigate the facts of that conviction is an egregious substantial and procedural due process violation.

The Respondents will contend that a parole hearing is not litigation. Appellant disagrees. Litigation: Able to be contested or disputed. Black's Law Dictionary Ninth Edition pg. 944. The Appellant was allowed to appear before the parole board to address

accusations and present any mitigating evidence! At the parole hearing aggravating factors are presented by victim witness, law enforcement, family members. A parole hearing is in fact litigation on the very facts of Appellant's conviction. Res Judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action. See, S.C. Dept. of Soc. Serv. v. Basnight, 346 S.C. 241, 551 SE2d 274, 278 (Ct.App.2001).

CONCLUSION

This Honorable Court should reverse the decision of the Administrative Law Court ('A.L.C. '), because the decision of the court is clearly erroneous because the statute is clear and the interpretation by the Court and the Board is in violation of the statute. Making this decision unlawful, arbitrary, capricious, and abuse of discretion.

The issue represented in this appeal effect many other similarly situated individuals who go before the parole board in this State.

Alfonso Ware

Alfonso Ware
BRCI/Monticello 242; 168464
4460 Broad River Road
Columbia, SC 29210