STATE OF SOUTH CAROLINA

In The Court of Appeals

Appeal From the Administrative Law Court

S. Phillip Lenski, Administrative Law Judge

Appellate Case No: 2015-000196

James Tinsley, #171943,. . . . . Appellant,

-vs-

South Carolina Department of Probation, Parole,
and Pardon Services, ... Respondents.

INITIAL BRIEF OF APPELLANT

James D. Tinsley, #171943
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Appellant Pro se

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STATEMENT OF CASE

This is an appeal filed by James Tinsley, an inmate incarcerated with the South Carolina Department of Corrections. On April 9, 2014, the South Carolina Department of Probation, Parole and Pardon Services ("DPPPS") notified Appellant that the South Carolina Parole Board ("Board") rejected him for parole. (R.O.A. pg.).

On April 20, 2014; April 24, 2014; May 4, 2014 and May 26, 2014, the Appellant sent serveral letters to the board requesting reconsideration on the basis that the board had relied upon false information in making its decision and requested that the false information be removed from his records. (R.O.A. pgs.

The board denied his request for reconsideration in a letter dated May 29, 2014, (R.O.A. pg.) and have argued that Appellant violated parole four (4) times even though this claim is not supported by any evidence.

On June 13, 2014 the Appellant filed a notice of appeal with the Administrative Law Court ("ALC" or "ALJ") seeking review of the boards' "use of false information" in making its decision and an order directing the board to remove the false information from his records.

As grounds for the appeal, the Appellant contended that the boards sole basis for denial of parole, - the failure to successfully complete a community supervision program - was based upon false and incorrect information inasmuch as he has never failed to complete a community supervision program and therefore his Constitutional Due Process Rights had been violated.

The ALJ filed an order on January 14, 2015 Affirmining the parole boards actions on the basis that the ALC has limited authority to review the "denial of parole",[1] and must be upheld so long as the board considered the appropriate criteria. (R.O.A. pg.) This, the ALJ seems to suggest, applies even when the criteria itself was based upon false information.

Appellant seeks an appeal of that decision because he believes that the "Appropriate Criteria" argument is a legal position limited to specific situations and that the ALC does have authority to review an agencies actions if those actions allegedly violated a constitutional right on some other basis. For this reason, this appeal follows.

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[1] This court may find that the ALJ should not have been reviewing the "denial of parole", but rather, should have been reviewing whether it was lawful to maintain or "use false information" to a significant constitutional degree. The fact that the violation occurred during a parole proceeding may not be controlling. The use of false information could just as easily been used against Appellant in a prison disciplinary hearing or to justify a more restricted custody status. In fact, had Appellant been aware of the false information in his files prior to the parole hearing, he would have sought its expungment, and if denied, he would have appealled that decision which would not have been connected to any denial of parole at all. However, because of the parole boards policy preventing inmates from viewing their files, Appellant did not discover the false information until he was notified by the board that they had relied upon it to deny him parole.

ARGUMENT

DID THE ADMINISTRATIVE LAW JUDGE ERR IN FINDING THAT THE ALC WAS WITHOUT AUTHORITY TO REVIEW A PAROLE BOARDS USE OF FALSE INFORMATION ?

I. STATUTORY CREATED LIBERTY INTEREST

(A) APPROPRIATE CRITERIA REVIEW UNDER S.C. Code, §24-21-620

Although there is no Federal Constitutional Right which requires States to provide parole, Board of Pardons v. Allen, 482 U.S. 369 (1987), States that do employ parole systems, must comply with the commands of the Fourteenth Amendment in the operations of those programs. Scott v. Illinois Parole and Pardon Bd., 669 F.2d 1185, 1188 (7th Cir. 1979), cert. denied, 459 U.S. 1048 (1982); Huston v. Dowd, 960 F.2d 718, 720 (8th Cir. 1992); Rose v. Mitchell, 443 U.S. 545, 547 (1979). A liberty interest protected by due process of law can thus be created by a State Statute. Allen, supra, at 376-78.

In Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003), the South Carolina Supreme Court held that an inmate has a liberty interest in parole "eligibility" under S.C. Code, § 24-21-620, but that this particular Statute did not create a liberty interest in the granting of parole itself. Id. at 149 n.4. See also: Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106, 111-12 (2008); and Sullivan v. SCDC, 355 S.C. 437, 586 S.E.2d 124, 127 (2003).[2]

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[2] Furtick and Cooper did not consider whether a liberty interest might be created by other Statutes such as § 17-1-40(A); §§ 30-4-10 to 30-4-165 or the Privacy Act. Appellant believes that these Statutes confer jurisdiction on the ALC to enforce Appellants due process rights not to have false information used against him. See: Sellers v. Bureau of Prisons, 959 F.2d 307 (1992)(recognizing that privacy act prevents adverse decisions based on a failure to maintain accurate records).

In Appellants view, the denial of parole based upon false information as to one (1) of the fifteen (15) criteria that must be appropriately considered by the board under S.C. Code, § 24-21-620, amounts to a failure to adhere to statutory requirements in rendering a decision.

One of the factors that must be considered is specifically whether Appellant was successful "under any previous supervision" program. See: Cooper, supra, at 109 FN2 (criteria for parole consideration, # 3) and (R.O.A. pg.)(same).

If the board relied upon false information in considering this specific criteria - which was the only reason given for denying parole,-- it must be considered tantamount to a failure to consider the criteria appropriately.

To suggest that the parole board now operates as the Wild, Wild West and may use false information against prisoners to deny their parole, or do anything they please with total immunity; are not held accountable by the courts - even when they violate the Constitution - and have no fear of punishment or reprimand goes against basic principals of law. Pruitt v. State, 274 S.C. 565, 567-68, 266 S.E.2d 779, 780 (1980)(courts must intercede when infringements reach constitutional dimensions); Cooper, supra, (prisoner has right to require parole board to adhere to statutory requirements in making its decision).

Consider the following. Suppose inmate "A" and inmate "B" both go up for parole but the board somehow confuses the two inmates files and uses inmate "A's" file against inmate "B" and uses inmate "B's"

file against inmate "A". The board denies inmate "B" parole based upon inmate "A's" file. Would this be constitutional so long as the board considered the appropriate criteria? Of course not! This is basically what has happened to Appellant. The board has used false information or information connected to another James Tinsley or some other person, to deny Appellant parole.

The board cannot be said to have considered the appropriate criteria if they are utilizing false, incorrect or inaccurate information in their deliberations. By relying on false information in Appellants file, the board "has exceeded its authority and treated Appellant arbitrarily and capriciously in violation of due process". Monroe v. Thigpen, 932 F.2d 1437, 1442 (1991). It is axiomatic that the information relied upon by the board must be truthful, accurate, trustworthy and supported by "substantial evidence". Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742, 756 (2000)(court may substitute its judgment for that of an agency on questions of fact, when those facts are not supported by substantial evidence): McQuillion v. Duncan, 306 F.3d 895, 906 (2002)(due process violated because none of the grounds cited by parole board for denying parole supported by "some evidence").

For these reasons, Appellant believes that the ALC did have jurisdiction to review the parole boards actions even under Furtick and Cooper.

(B) REASONABLE EXPECTATION REVIEW UNDER S.C.Code, § 24-21-640.

Appellant further believes that he has a liberty interest created

by S.C. Code, § 24-21-640 for the granting of parole itself, if he meets certain criteria. Our Supreme Court has previously held that S.C. Code, §§ 24-21-610 and 24-21-620 create no liberty interest in being granted parole and they are correct. See: Furtick, at 149 FN4. However, they did not address whether or not a liberty interest is created by S.C. Code, § 24-21-640.

Whether or not certain acts violate the Federal Constitution is a Federal question for which State courts should seek guidance from federal decisions.

A liberty interest can be created by a State Statute that creates an "expectation of parole". Allen, supra, at 376-78. This remains true even after Sandin v. Connor, 515 U.S. 472 (1995). See: Wilson v. Kelkhoff, 86 F.3d 1438, 1446 n.9 (7th Cir. 1996)("It appears that the court [in Sandin] intended to leave undisturbed the cases holding that a protectable liberty interest exists in parole statutes that create an "expectancy of release"); Ellis v. District of Columbia, 84 F.3d 1413, 1417-18 (D.C. Cir. 1996)(same).

S.C. Code, § 24-21-640 states:

> **"The board must carefully consider 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 impared thereby; and that suitable employment has been secured for him".

In Appellants view, if an inmate meets those criteria, he has a reasonable expectation that he will be granted parole. Otherwise, the criteria would be meaningless. See: Scott, supra, at 1188 (The

Illinois Statute providing that "the board shall not parole a person eligible for parole if it determines that..." created liberty interest); Winsett v. McGinnes, 617 F.2d 996, 1007 (3rd Cir. 1980) (regulations governing work release program that require prisoner to meet certain criteria for eligibility created liberty interest), cert. denied, 449 U.S. 1093 (1981); Dowd, supra, at 720 (Missouri Statute that mandated parole once all statutory and regulatory guidelines met created liberty interest for prisoner).

Most States have come to believe that a liberty interest is not created unless the statute uses mandatory language such as "shall" or "must", but as the above cases teach, that mandatory language is not determinative. What is determinative is whether the Statute requires the prisoner to meet certain criteria.

With this in mind, § 24-21-640 requires prisoners to show: a disposition to reform; that in the future he will probably obey the law and lead a correct life; that his conduct has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impared; and that he has obtained suitable employment.

Thus, if a prisoner meets these criteria, he should have a reasonable expectation that he will be granted parole. Otherwise, the denial would be arbitrary and capricious if the board denied parole even where the prisoner met the criteria. Here, the board determined that Appellant probably would not obey the law and lead a correct life because they relied upon false information that he had previously failed to complete a supervision program.

Mandatory language that a prisoner is entitled to parole is one

way in which a liberty interest may be created, but an expectation of parole is another. For this reason Appellant beleives that a liberty interest is created by § 24-21-640 because it creates a reasonable expectation that an inmate will be granted parole if he meets those criteria. Here, Appellant met all the criteria, and it appears he would have been granted parole, had the board not relied upon false information in their files. Therefore, Appellant believes that the ALC did have jurisdiction to review the denial of parole under this specific statute.

II. INDEPENDENT CONSTITUTIONAL VIOLATION

In connection, Appellant believes the ALC has jurisdiction to review parole cases if a constitutional violation is based upon some foundation other than whether the board considered the appropriate criteria.

In the case sub-judice, the ALC has authority to review "contested cases" involving for instance a constitutional violation, but where no constitutional violation occurs, the ALC is without authority to review an uncontested case.[3]

Simply put, in cases where there is no constitutional violation, the court must look elsewhere to determine if some other failure to follow mandated criteria might convert a legitimate process into an unconstitutional one. This was the problem faced by the court in

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[3] This is a contested case under S.C. Code, § 1-23-310(3) because Appellant has a right to have the boards "use of false information" reviewed by the ALC to determine if they violated his due process rights. For example, an appeal may be used to challenge other constitutional rights

Furtick. But where the actions complained of violate the constitution on some other basis, the ALC already possesses authority to review the matter to determine if the Appellants rights were violated.

What is missed by the DPPPS and the ALJ's decision is that the United States Supreme Court and each of the Circuits, have repeatedly found that the use of false information constitutes a due process violation in its own right.[4] In other words, it amounts to a constitutional violation regardless of what other criteria may or may not have been considered. That violation gives the court jurisdiction.

Furtick and Cooper did not address the issue of whether a prisoners claim of false information in his files might state a claim of constitutional magnitude. Whether a federal constitutional

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violations arising from disciplinary hearings, custody status or other conditions of confinement. Al-Shabazz, supra, at 756 (Quoting Brown v. Evatt, 470 S.E.2d 848 (1996)(inmate has no liberty interest in particular custody status as long as the challenged conditions are not otherwise violative of the constitution)). Likewise, a prisoner may have no right to parole, and the parole board is free to routinely deny parole, as long as the boards actions are not otherwise violative of the constitution.

[4] This seems to be based upon a determination that there is a conditional liberty interest in being under the less restrictive conditions of parole. Such challenges may be expressed more appropriately as attacks on "custody status". Al-Shabazz, at 750. Clearly there are less restrictions on one's liberty while on parole than on those behind prison fences. Apparently, it is of importance that the Federal Courts have held that a person on parole or probation is still "in custody". Jones v. Cunningham, 371 U.S. 236, 243 (1963)(prisoner is "in custody" when released on parole because it constitutes a significant restraint on personal liberty); Jones v. Jerrison, 20 F.3d 849, 852 n. 2 (8th Cir. 1994)(same). They are not free to leave the Country, usually cannot leave the State, but can maintain jobs, earn an income, have children and have conditional liberty far beyond that of prisoners.

right has been violated is a federal question for which State Courts should seek guidance from federal decisions. State v. Gregorie, 339 S.C. 2, 528 S.E.2d 77 (2000)(relying upon federal courts interpretation of double jeopardy rights in Burk v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)); State v. Horne, 319 S.E.2d 703 (1984)(relying upon federal courts interpretation of ex post facto law in Bouie v. City of Columbia, 84 S.Ct. 1697 (1964)):

Here, the use of false information is a constitutional violation because the parole board may not engage in flagrant or unauthorized action and the parole statute does not allow the board to rely on false information in their determinations. See: Monroe v. Thigpen, 932 F.2d 1437, 1442 (1991)(due process violated because board relied upon false information when denying parole); McQuillion v. Duncan, 306 F.3d 895, 906 (2002)(due process violated because none of the grounds cited by parole board for denying parole supported by "some evidence"); Paine v. Baker, 595 F.2d 197, 201-02 (4th Cir. 1979) (due process violated by parole boards use of false information to deny parole); Townsend v. Burke, 334 U.S. 736 (1948)(the use of criminal records which are untrue, whether caused by carelessness or design, is inconsistent with due process of law); Goldhardt v. Contrast Lowrance v. Coughlin, 862 F.Supp. 1090, 1099 (1994)(recognizing a Constitutional Right to accurate information in a parole file).

In Paine, supra, the Fourth Circuit held that not all uses of false information in a prisoners file will rise to the level of a due process violation. For instance, the court noted that "We

do not think that an administrative decision regarding such purely internal matters as" [false information about] "work assignments" [such as claiming the prisoner worked in ground keeping when he really worked as a barber] "within the prison would reasonably affect a subsequent decision such as eligibility for parole". Id. at 202. In other words, under those conditions the use of false information would be harmless.

However, if the information "is relied on to deny parole or statutory good-time credits, or to revoke probation or parole, the inmate's conditional liberty interest is at stake and the due process clause is called into play." Id. Here, it is clear the parole board relied upon the false information to deny parole because it is the only reason given for the denial. It suggests that parole would have been granted had the false information not influenced the boards decision. Therefore, in this context, the use of false information was not harmless. Moreover, it also violated Appellants Rights under Equal Protection because other inmates are considered for parole using accurate information, but Appellant was considered for parole using false information. See: Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

Obviously, "any period of incarceration implicates a sufficient liberty interest to trigger due process requirements". Steele, supra, at 503. The use of false information as grounds for parole denial produces sufficient risk of prolonged incarceration - by at least one year - and increases the measure of punishment attached to the covered crimes. The use of false information essentially abrogates Appellants right to parole eligibility because the board

refuses to expunge it from Appellants files, which suggests they intend to continue to use it as a basis to permanently deny Appellant parole.

The differences between Furtick and this case is that in Furtick there was no "independent" constitutional violation to provide the court with authority to review the case. There the court was limited to review only when certain criteria were not followed under S.C. Code, § 24-21-620, which would convert the matter into a constitutional violation. Furtick challenged the "denial of parole" as a constitutional violation - even though the court has held that there is no "right" to parole, only a "privilege". Appellant has a constitutional standing based upon an independent claim that false information was used against him in violation of due process and equal protection of the law. Appellant does have a "right" not to have false information used against him. This is not simply a "privilege".

Assuming arguendo, that Appellants claim must be reviewed under Furtick, he contends that just as in Thigpen, supra, the board did not adequately consider the appropriate criteria because §24-21-620 cannot be read as granting the board the discretion to rely upon false information in determining whether to grant parole. Id. at 1442. Here, the use of false information means the boards actions are constitutionally offensive because their practices are malicious and in bad faith when applied to the Appellant.

III. METHOD AND PROCEDURE EMPLOYED BY PAROLE BOARD

Finally, even if this court is of the opinion that the ALC does not have jurisdiction to review "denial of parole" cases - even if a constitutional right is violated on some other basis - Appellant believes that he would nevertheless be entitled to review under the principals of Steele v. Benjamin, 362 S.C. 66, 606 S.E.2d 499 (2004) and Jernigan v. State, 340 S.C. 256, 531 S.E.2d 507 (2000). There the court seemed to recognize a distinction between cases in which a prisoner challenges the "denial of parole" and cases in which he challenges the "method and procedure employed by the parole board in reaching its decision". Id.

In Jernigan an inmate challenged the boards change from an annual parole review to a biannual review and claimed that this change amounted to a violation of the ex post facto clause of the Federal and State Constitutions.

Clerly the change to a biannual review did not constitute a permanent denial of parole. It only extended his incarceration for at least one more year. These cases also failed to involve the boards consideration of appropriate criteria under § 24-21-620. Nevertheless, the court found that those cases constituted non-collateral matters and were thus appropriate for review under the APA.

In Cooper, the court recognized that "the fact that the parole board did not permanently deny Cooper parole is not dispositive and the ALC erred in summarily dismissing the appeal on that basis... As noted in Steele, a sufficient liberty interest may be implicated to trigger due process requirements even though the parole boards'

decision did not constitute a permanent denial of parole eligibility". Id. at 111.

What these cases teach is that there are circumstances in which a parole boards actions violate the constitution and create a conditional liberty interest even if the board does consider appropriate criteria and even if their actions do not constitute a permanent denial of parole eligibility.

Like Steele and Jernigan, this court could also construe Appellants claim not as a challenge to the "denial of parole", but rather, as a challenge to his "custody status"; a denial of equal protection, or as an appeal of the boards "retention and use of false information; failure to expunge the false information after being notified of the error and failure to provide a new hearing without considering the false information."

For these reasons, the Appellant believes that the ALC had jurisdiction under Steele and Jernigan to review, at the very least, the method and procedure of using false information in reaching its decision.

Based upon the foregoing, it appears that Furtick and Cooper cannot stand for the proposition that judicial review is improper or unavailable in this context. To the contrary, prior case law teaches that such review must be available to determine whether the challenged actions are within the sentence imposed **"and are not otherwise violative of the constitution"**. Al-Shabazz, supra, at 756. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and **judicial review.** Id. at 750.

A PCR is no longer an appropriate route to obtain review of an agencies final decision in a non-collateral or administrative matter. (i.e. cases in which the inmate does not challenge the validity of a conviction or sentence). Id. at 749. If the ALJ's decision were correct, not only would the DPPPS have violated Appellants due process rights, but the ALC would also deprive Appellant of due process by failing to provide "judicial review" of these type claims.

Review, although limited in scope, must be provided in some form. The most practical and obvious solution is that agencies final decisions, are subject to review pursuant to the APA. Id. at 752. While courts endorse a limited judicial review and adopt a "hands off" approach involving internal proceedings concerning prisoners, they must intercede when the infringements complained of by an inmate reach constitutional dimensions. Pruitt, supra. Here, the parole boards use of false information rises to constitutional dimensions and necessitates the courts involvement to prevent the continued abuses.

The issue before the court today, requires a favorable decision for the Appellant on at least one or more of the above arguments. Otherwise, any unfavorable decisions would deprive prisoners and other citizens of a remedy to prohibit the parole board and other agencies from utilizing false information against them. This is a line for which Society is not prepared to cross.

CONCLUSION

Premises considered, the ALJ erred in summarily dismissing Appellants appeal for lack of jurisdiction. The ALJ's reasoning and reliance upon Furtick and Cooper was misplaced.

Appellants substantial rights have been violated by the ALJ's decision because it has allowed the use of false information to go uncorrected and has deprived Appellant of judicial review before the ALC. It was affected by a misinterpretation or other error of law and was clearly erroneous in view of the whole record. While this court should not substitute its judgment for that of the ALC when the decision is based upon substantial evidence, here, there is no evidence to support the ALJ's decision and the ALJ's ruling is in conflict with basic principals of law.

For these reasons, Appellant prays that this Honorable Court reverse the ALJ's decision and enter an order granting Appellant the relief requested in his initial appeal,[5] or in the alternative, remand the case back to the ALC for further proceedings, findings of fact and a decision that is consistent with the law and Appellant's rights.

Respectfully submitted,

s/ James Douglas Tinsley, II

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[5] Appellant sought the expungment of the false information; a new hearing without the use of the false information; a declaratory judgment instructing DPPPS that using false information is a constitutional violation; costs and disbursements in bringing this action and monetary damages.