

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Court Judge
Case No. 14-ALJ-15-0028-AP

Appellate Case No. 2015-000196

JAMES TINSLEY, #171943,.....APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,..... RESPONDENT

INITIAL BRIEF OF RESPONDENT

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 ISSUE ON APPEAL

- 1. Did the Administrative Law Judge err in deciding that the Parole Board considered the appropriate criteria in the denial of the Appellant's parole?**

STATEMENT OF THE CASE

On October 11, 2006, the Spartanburg County Sheriff's Department was called to Holiday Kamper regarding the theft of a 2007 Discovery motor home. This motor home was worth two hundred and eighteen thousand (\$218,000.00) dollars. On December 5, the Spartanburg County Sheriff's Department received a call from the Henderson County Sheriff's Department in North Carolina. They called to inform the Spartanburg authorities, the stolen motor home was recovered in Cherokee, North Carolina. The mobile home was lawfully searched, inside, the Appellant's paperwork, and fingerprints were found. The Appellant was later found, arrested and charged with the theft of the motor home.

On January 22, 2008, the Oconee County Sheriff's Department was contacted by the Iredell County Sheriff's Department in North Carolina, concerning the theft of four wheelers. It was reported that an individual just purchased two stolen four wheelers from the Appellant. The North Carolina authorities later learned that a Polaris dealership was broken into, and several four wheelers along with their trailers were stolen. While searching a storage building rented by the Appellant, officers of the Oconee County Sheriff's Department discovered, two more Polaris 700 four wheelers were found. These were also stolen from North Carolina. The Appellant was later arrested and charged with three counts of receiving stolen goods.

On July 31, 2008, the Appellant appeared before the Honorable J.C. Nicholson to answer to the offense of two counts of receiving stolen goods over five thousand (\$5,000.00) and possession of a stolen motor vehicle. Upon the conclusion of this appearance, Judge Nicholson sentenced the Appellant to a ten (10) year period of incarceration, suspended upon the service of seven years, with five years probation, for possession of a stolen motor vehicle, and receiving stolen goods; and, five years suspended to five years probation, for a second count of receiving

stolen goods. While serving this sentence the Appellant again appeared before the Honorable Roger Couch on November 10, 2010, for receiving stolen goods. He was sentenced to a ten (10) year period of incarceration suspended upon the service of three years, and five years probation.

At the time the Appellant committed these offenses South Carolina law allowed parole eligibility upon the service of one-fourth of a sentence. On April 9, 2014, the Appellant appeared before the Parole Board. Upon the conclusion of this hearing, the Board decided to deny parole due to a failure to successfully complete a previous community supervision program. Upon being notified of his denial of parole, the Appellant requested the Board reconsider their decision. After receiving this request, the Board decided to review the Appellant's file once again. It was then decided that the reasons for this request did not affect the final decision of the Parole Board; therefore, the request for reconsideration was denied.

Upon the denial of reconsideration, the Appellant decided to file a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleged he never violated any supervision program, so the reason for denial was incorrect. The Respondent argued that according to Department records the Appellant violated supervision four times. The Respondent also argues that the Appellant never provided information revealing he did not violate supervision. The Respondent also argued the Board followed the mandatory conditions, so the denial of parole was lawful.

After reviewing briefs submitted by each party, the Honorable S. Phillip Lenski, Administrative Law Judge, determined that the Respondent did reveal they followed the appropriate criteria. The Court also decided the ALC does not have jurisdiction to review the factual basis for the Board's decision. Due to this reasoning Judge Lenski decided to affirm the decision of the Parole Board.

After receiving the decision of the ALC the Appellant decided to file this notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant argues that the ALC erred in finding they do not have jurisdiction in reviewing the factual conclusion of the Parole Board. The Respondent argues that the ALC was correct in their affirmation of the decision of the Parole Board. The Appellant argues that his previous cases were expunged; therefore, the decision of the Parole Board was made with incorrect information. The Respondent argues that this is a question of fact that can only be determined by the Parole Board, and the Board has shown that the proper criteria was considered. Since the Respondent has shown proper criteria was considered prior to denial, the ALC was correct in affirming the decision of the Parole Board.

ARGUMENTS

1. The Appellant never presented any substantial evidence regarding his prior violations, so the decision of the ALC was correct.

The Appellant argues that he never violated a supervision program; therefore, his denial of parole was made with incorrect information. The Appellant has the burden of proving that his parole was revoked due to incorrect information. In administrative hearings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof test upon one who files a 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 also argues that his previous offenses were expunged, however, no order of expungement was ever presented to the Board. Even if expunged this would not automatically allow the Appellant to be granted parole, only a matter that would be considered. When it comes to the granting or denial of parole, numerous factors must be considered one of which is the prior

record of the Appellant. The General Assembly created criteria that must be considered prior to the decision of the Parole Board. 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)

The record of the Appellant prior to imprisonment is one of the criteria the Board must consider. The prior inability of the Appellant to successfully complete supervision, must be considered by the Parole Board. If the Appellant cannot successfully complete a previous supervision program, that must be taken into consideration, prior to making a determination to release the Appellant on parole.

The Appellant argues that his previous offenses were expunged, so the Parole Board made a decision on incorrect information. This matter is a question of fact; therefore, the Courts do not have the authority to review this decision. The Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(Supp. 2013). There has been no sufficient evidence presented by the Appellant revealing his convictions were expunged, or that he did not previously violate supervision. This was a sufficient reason for denial that was not subject to reversal. The ALC was correct in affirming the decision of the Parole Board. S.C. Code Ann. §1-23-600(Supp. 2013)

No substantial evidence has been presented by the Appellant revealing he has not previously violated supervision. This denial of parole was reasonable, a previous failure to complete a supervision program must be considered prior to parole determination. The Board can

also consider if a previous offense was expunged; however, the Appellant failed to provide any substantial evidence revealing his previous offenses were subject to expungement. The findings of the Appellant panel are presumed correct and will only be set aside if unsupported by substantial evidence. *Lark v Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). The Appellant has not presented any evidence that should lead the Board or any Court to believe his allegations. No sufficient substantial evidence was presented to lead the ALC to conclude that parole was denied unlawfully. Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached. *Palmetto Alliance, Inc v South Carolina Pub Serv Comm'n*, 282 S.C. 430, 319 S.E.2d 695 (1984). The Appellant failed to provide any substantial evidence revealing that it was unreasonable for the Board to deny parole. This reveals that the ALC made the proper decision in affirming the decision of the Parole Board.

The Appellant argues that he has a liberty interest in parole, due to an expectation of release established in section 24-21-640 of the South Carolina Code of Laws. There exist a liberty interest in being considered for parole; however, there exist no liberty interest in being granted parole. In South Carolina parole is considered 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). There is nothing found in statute, or case law revealing that a prisoner has a liberty interest in being granted parole. It is quite the contrary, the 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 a protected liberty interest in parole, but only a hearing to determine parole eligibility). Although, the Appellant does have a right to an impartial hearing, which he has been receiving on a yearly basis, he does not have a right to be released on parole. There is no constitutional 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 also argues that he has been denied due process. There exist no violation of due process in his denial of parole. The Appellant was allowed to appear before the Parole Board to raise any information in mitigation, including any information regarding receiving an expungement of his previous cases; or, the information regarding the violation of his previous supervision cases being incorrect. The United States Supreme Court acknowledged that a person facing a revocation of parole has minimal due process rights; however, a distinction between a person currently on parole, and a person seeking parole was made in *Greenholtz*.¹

The Appellant also argues that he was denied equal protection, due the fact the Board allegedly used false information in the denial of his parole. To establish an equal protection violation, a party must show that a similarly situated person received disparate treatment. *TNS Mills, Inc v South Carolina Dept of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (S.C. App. 1998). The identical criteria was followed in his case as in all other cases brought before the Parole Board. The Appellant has not presented any evidence that he was considered differently, or that he was

¹ There is a crucial distinction between being denied a conditional liberty one has, as in parole and being denied a conditional liberty that one desires. The parolees in *Morrissey* (and probationers in *Gagnon*) were at liberty and has such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments of normal life " 408 U S at 482, 92 S Ct at 2600 The inmate here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison *Greenholtz*, at 2105

denied criteria considered to other inmates. Since no evidence of unfairness was shown, there exist no denial of equal protection; the decision of the ALC should be affirmed.

2. The ALC was correct in deciding that the Board followed the mandates proscribed in *Cooper*; therefore, their decision should be affirmed.

A final decision shall include a findings of fact and conclusions of law separately stated. S.C. Code Ann. §1-23-350(Supp. 2013). It is the Appellant's position that the ALC had jurisdiction over this case, due to the fact incorrect evidence was used in the denial of parole. The Respondent argued and the ALC agreed, that since it was provided that all of the criteria was considered prior to denial, the denial of parole was lawful pursuant to the South Carolina Supreme Court decision 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 a finding of fact was included; however, the Court determined that 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 decided 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 warrants review by the ALC. *Id.*, at 502. In *Cooper*, the Supreme Court established what future Parole Board orders 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 conformed with the *Cooper* decision. The findings of fact were the reasons provided as to why parole was denied; and, the conclusion of law are the statute 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 reason given for denial were reasonable and followed the mandatory criteria. Since the Board is the sole authority to deny parole, which is not appealable; this denial of parole should be affirmed. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole and Pardon. *Brown v State*, 306 S.C. 381, 412 S.E.2d 399 (1991).

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 were considered prior to the denial of parole. According to the Supreme Court, if this is shown no further review by the ALC is necessary.² Since it was shown that the Parole Board considered all of the mandatory criteria found in statute and Department policy, the ALC was correct in affirming the decision of the Parole Board.

The Appellant argues that he is not questioning his denial of parole but the method and procedure used by the Board to make the decision to deny his parole. Within his brief the Appellant cites two cases, *Steele v. Benjamin*, and *Jernigan v. State*, 340 S.C. 256, 531 S.E.2d 507 (2000), he argues that within these cases the Appellant challenges the method and procedure used by the

² 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)

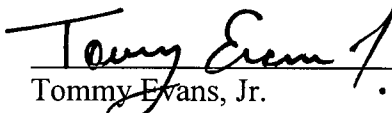
Board in the denial of parole. The Appellant argues that these cases relates to the custody status employed by the Board against the Appellant. The *Steele* and *Jernigan* cases relate to annual verses bi-annual appearance before the Parole Board. These cases had nothing to do with custody status, which is totally the responsibility of the Department of Corrections. The Director of the Department of Corrections shall have the power to prescribe reasonable rules and regulations governing the humane treatment, training, and discipline of prisoners, and to make provision for the separation and classification of prisoners according to sex, color, age, health, corrigibility, and character of offense upon which the conviction of the prisoner was secured. S.C. Code Ann. §24-1-140(Supp. 1993). Any custody status is determined by the Department of Corrections and not the Respondent. The Parole Board's decision did not relate to the Appellant's current custody status. The Appellant is being heard annually pursuant to South Carolina law, the *Steele* and *Jernigan* case does not apply.

Pursuant to *Cooper*, the ALC was only responsible to determine if the procedure and criteria established through law and policy was considered prior to the denial of parole. It is clear by the order of denial the mandatory criteria was considered prior to parole determination. The Appellant argues that the Board considered false information prior to making their decision. The Appellant never provided substantial evidence disputing the information provided to the Board. Since the Appellant failed to present substantial evidence proving his allegations, and, the Board revealed their decision was based on the mandatory criteria, the denial of parole was lawful. The determination by the ALC affirming the decision to deny parole was proper, and should be upheld by this Court.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in cursive script that reads "Tommy Evans, Jr." is written over a horizontal line.

Tommy Evans, Jr.
Legal Counsel

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Attorney for the Respondent

Columbia, South Carolina
March 18, 2015

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
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Appellate Case No. 2015-000196

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v.

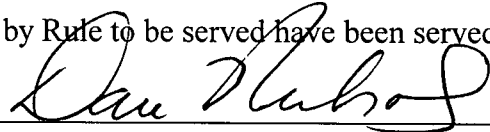
SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated March 18, 2015, on Appellant this 18th day of March, 2015, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

James Tinsley, #171943
Allendale Correctional Institution
PO Box 1151
Fairfax, S.C. 29827

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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March 18, 2015

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
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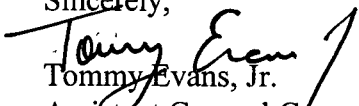
RE: James Tinsley v. SCDPPPS

Dear Ms. Kitchings:

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

Thank you for your assistance in this matter.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures

cc: James Tinsley

State of South Carolina

Department of Probation, Parole, and Pardon Services

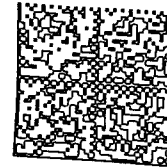
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