

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

PHILLIP A. BROWN

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002400

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether petitioner was denied due process when he was not given notice and an opportunity to be heard at a subsequent parole hearing when his parole was denied?

STATEMENT

On June 23, 1983, petitioner appeared before the Hon. Walter T. Cox in Richland County and pled guilty to murder, burglary in the first degree, and armed robbery. A life sentence was imposed for murder along with a consecutive life sentence for burglary, and a concurrent twenty-five (25) year sentence for armed robbery. (App. p. 47-p. 48).

Petitioner filed this current application for post-conviction relief on October 26, 2011. Petitioner alleged that his parole was unlawfully revoked without minimal due process and that he was denied the right to counsel for his revocation proceeding. (App. p. 1- p. 7).¹ Respondent filed a return and motion to dismiss dated November 1, 2011. Respondent alleged that the application for post-conviction relief should be summarily dismissed for failure to comply with the filing procedures of S.C. Code § 17-27-45 (a) which deal with the one year statute of limitations. (App. p. 8 - p. 13). A hearing was held on respondent's motion on July 17, 2014, before the Hon. Casey L. Manning. Petitioner was present and was represented by Adam S. Tesh, Esq. Respondent was represented by Megan E. Harrigan, Assistant Attorney General. (App. p. 14-p. 23).

On September 19, 2014, Judge Manning issued an order granting respondent's motion to dismiss (App. p. 47- p. 52). Petitioner filed a Rule 59(e) Motion to Alter or Amend dated October 9, 2014. (App. p. 54-p. 57). Respondent filed a return to the motion. It was dated October 17, 2014. (App. p. 58-p. 62). On October 20, 2014, Judge Manning issued an order denying the Rule 59 (e) motion. (App. p. 63-p. 66).

The petition follows:

¹ The Administrative Law Court held that petitioner's parole was not revoked he was just denied parole.

ARGUMENT

Petitioner was denied due process when he was not given notice and an opportunity to be heard at a subsequent parole hearing when his parole was denied.

The background to petitioner's due process complaint is presented in the Administrative Law Court (ALC) order of dismissal filed on October 14, 2011:

“On April 4, 2010, the Board made a decision to grant parole to Appellant upon the satisfaction of eight specific criteria. However, upon notification to the victim's family and the Kershaw County Sheriff's Department, both informed the Board that they received no prior notification of Appellant's parole hearing. Pursuant to state law, victims and/or their family, the solicitor, and law enforcement are required to be notified prior to an inmate's parole hearing. Both the victim's family and the sheriff's department requested to be heard by the Board prior to it issuing a final decision regarding Appellant's parole. A second hearing was held by the Board on September 8, 2010, and the victim's family, the Kershaw County Sheriff, and the Fifth Circuit Solicitor were allowed to present opinions to the Board concerning the release of the Appellant on parole. Upon the conclusion of this rehearing, the Board denied parole to Appellant based upon the reasons set forth in its September 9, 2010 denial letter.” (App. p. 39).

The ALC then went on to frame petitioners issue and resolve it as follows:

“Appellant argues that the denial of parole was done without the benefit of a hearing, and thus, violated his due process rights. This argument must fail. Appellant was allowed to appear before the Board at the first hearing, but, because the requirements of § 24-21-610 relative to notice to the Solicitor, law enforcement and victims family had not been met, the hearing was not complete. There is no requirement that Appellant must appear at the same hearing at which the victim's family, solicitor's office, and law enforcement appear. Appellant appeared before the

Board prior to it making a decision regarding his parole, and it considered all the evidence and arguments by the individuals appearing before the Board, on both dates. Because appellant has no right to cross-examine at the parole hearing, there was no due process violation in appellant's absence from September 8, 2010 Board hearing. See Fleming v. Murray, 888 F. Supp. 734 (D.C. Vir.1994). Even if there were a due process violation, Appellant has not shown how he was prejudiced by such a violation. Leventis v. S.C. Dep't of Health and Env'tl. Control, 340 S.C. 118, 131-32, 530 S.E. 2d 643, 650 (Ct. App. 2000) ("To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process.").

Conditional Parole:

Appellant next argues that he had a vested interest in the granting of his conditional parole, and the Board's decision violated his right to due process. I disagree. In Morrissey v. Brewer, 408 U.S 471, 92 S.Ct. 2593 (1972), 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 the case of Greenholz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100 (1979). In Greenholz, the Court determined that there is no constitutional or inherent right of the convicted person to be conditionally released before the expiration of a valid sentence. Thus, in the present case, Appellant's argument that he had a vested liberty interest in the granting of his conditional parole is simply without merit.² No individual has a right to be awarded parole; rather, the individual has right to a hearing. Because Appellant was never released on parole, the rights established under Morrissey do not apply in the instant case." (App. p. 42- p.42).

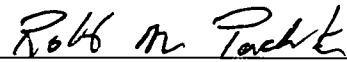
The PCR court held that petitioner was collaterally stopped from arguing that his parole was unlawfully revoked, as that issue had already been fully litigated and it was “determined that petitioner was rather denied parole.” (emphasis in original) (App. p. 51).

The reasoning by both the ALC and the PCR court is flawed. In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970), the Supreme Court of the United States held that notice and an opportunity to be heard are essential requirements of due process. While petitioner did get to appear at the first hearing and present his case, he was not given notice or an opportunity to be heard at the subsequent hearing. He was not allowed to offer any rebuttal to what was being said about him. That is where the due process violation occurred.

CONCLUSION

Petitioner's writs should be granted and his case should be remanded for a full hearing on parole.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

PHILLIP A. BROWN

PETITIONER,

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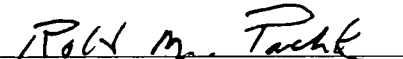
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Phillip A. Brown states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on na. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Phillip A. Brown.

Respectfully submitted,



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

This 12th day of May, 2015

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CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan Jameson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Phillip A. Brown, # 118100, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 12th day of May, 2015.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of May, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.