

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Deborah Durden, Administrative Law Judge
15-ALC-15-0009
Appellate Case No: 2015-000689

RECEIVED
JUN 20 2016
SC Court of Appeals

Unpublished Opinion No: 2016-UP-204
Submitted February 1, 2016 – Filed May 11, 2016

THOMAS LOWERY, #083240.....APPELLANT

v.

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

RETURN TO APPELLANT’S PETITION FOR REHEARING

Comes now, Tommy Evans, Jr., Assistant General Counsel for the South Carolina Department of Probation, Parole and Pardon Services on behalf of the Respondent, hereby makes this Return to Appellant’s May 20, 2016, Petition for Rehearing.

The Respondent submits this Court properly affirmed the Administrative Law Court’s decision to uphold the Parole Board’s denial of the Appellant’s parole. The Respondent respectfully requests that the Appellant’s Petition be denied.

Statement of the Case

On May 28, 1976, the Appellant along with his co-defendant Marion Gibbs entered the Truluck's store in Lynchburg, South Carolina. Upon entering, the Appellant struck the victim in the head several times with a Coca-Cola bottle. After she fell she was struck several more times by the co-defendant with a pecan branch. As she lie on the floor dying, the Appellant opened the cash register and stole three hundred and sixty-nine (\$369.00) Dollars. The defendant's immediately fled the premises, they ran through the woods where they left the murder weapons, which were never recovered.

During the investigation Mr. Gibbs became a suspect and upon a lawful search of his residence the authorities recovered the stolen money, the Appellant's bloody fingerprints were found on this money. Both Defendants were arrested, and upon a lawful interrogation each confessed to committing this crime. They were then charged with the offenses of murder and grand larceny.

On September 8, 1976, the Appellant appeared before the Honorable Paul M. Moore for these offenses. Upon conclusion of this appearance, Judge Moore sentenced the Appellant to a period of incarceration for the remainder of his natural life for murder, and ten years for grand larceny. At the time the Appellant committed this offense, South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of ten years. The Appellant made his initial appearance before the Board on October 30, 1985. Upon the conclusion of this hearing, the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial hearing, the Appellant has appeared before the Board an additional fifteen times each resulting in a denial of parole. His most recent appearance occurred on January 14, 2015. Parole was denied due to: 1) the nature and seriousness of the current offense; and, 2) an indication

of violence in this or a previous offense. The Appellant then filed a notice of appeal before the Administrative Law Court (ALC).

On March 3, 2015, the Honorable Deborah Brooks Durden, Administrative Law Judge, sua sponte issued an order dismissing the Appellant's appeal, and affirming the decision of the Parole Board. Upon receiving this decision the Appellant filed a notice of appeal before this Court. On May 11, 2016, this Court decided to affirm the decision of the ALC. The Appellant now request a rehearing from this Court. The Respondent files this return, requesting that this petition be subject to dismissal due to the decision not overlooking nor misapprehending any points raised by the Appellant in the initial appeal. The Respondent will also argue that the Appellant now raises issues not initially raised before the lower court, which cannot be addressed initially on Appeal.

Argument

According to the South Carolina Appellate Court rules, "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the Court." Rule 221(a)SCACR. The Appellant has not raised any issue that has been overlooked or misapprehended by the Court. The decision of the ALC was proper, so it was rightfully affirmed by this Court.

The ALC decided that the pursuant to the *Cooper* decision the Respondent revealed in their order of denial that the mandatory statutory and policy criteria was considered. Since this was revealed the ALC does not have any further authority to review the procedure followed prior to the denial of parole. This decision was later affirmed by this Court. This case is not subject to rehearing since it was the correct decision, and the Appellant has not revealed no issue or law that was overlooked or misapprehended prior to this decision.

In *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), the Department sought reversal of a decision by the Circuit Court reversing the dismissal by the ALC.¹ The South Carolina Supreme Court concluded, “if the Parole Board fails to consider and apply the statutory created parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC.” *Id.*, at 502.

Pursuant to South Carolina law the decision of an agency must include a findings of fact and conclusion of law separately stated, See, S.C. Code Ann. §1-23-350 (Supp. 2015). Under *Cooper*, the Supreme Court decided that the findings of fact existed within the order; however, the Court determined that the Parole Board neither, “offered an explanation nor indicated that it had considered the statutory criteria or section 24-21-640 and the fifteen criteria listed on the parole form.” *Id.*, at 500. Within the *Cooper* decision the Supreme Court established what a future Parole Board order should include, 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 the proper procedure.

Id.

The order from the ALC and affirmed by this Court found that *Cooper* gave a very limited review of the denial of parole. The Supreme Court did not give the ALC the right to determine if an inmate should have been awarded parole only the right to determine if the criteria was considered prior to denial. According to *Cooper*, if the Department states within its order that the criteria was followed, no further review is necessary. The Parole Board clearly stated in its notice

¹ At the time of this decision the Circuit Court was the initial appellant court of Administrative Law Court decisions.

of rejection that it considered the statutory criteria set forth in Form 1212, which is sufficient under *Cooper. Compton v. South Carolina Department of Probation, Parole and Pardon Services*, 385 S.C. 476, 685 S.E.2d 175 (2009)

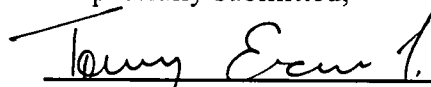
Upon the reviewing the notice of appeal and the record on appeal the ALC made the decision to affirm the decision the Board. The Administrative Law Judge may affirm any ruling, order or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit. Rule 65 SCRALC. The ALC correctly affirmed the decision of the Parole Board once it was shown in the record that the order of denial included a finding of fact, the reasons for the denial of parole, and a conclusion of law, the statutory and department criteria used to determine the denial of parole.

Within his petition for rehearing the Appellant also raises an argument that he is being unlawfully allowed only to appear before the Board on a biannual basis. This matter was not raised before the lower court so it cannot be considered initially by this Court. A question not raised in the lower court is therefore waived and cannot be raised on appeal for the first time. *State v. Johnson*, 255 S.C. 14, 17, 176 S.E.2d 575, 577 (1970).

Conclusion

The Court of Appeals can only reverse a decision of the lower court upon an error of law. The decision of the Court was proper and should not be revisited upon the Appellant's request. Therefore, the Respondent respectfully requests this Honorable Court to deny the Appellant's petition for rehearing.

Respectfully submitted,



Tommy Evans, Jr.
Assistant General Counsel

South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
June 16, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Administrative Law Court
The Honorable Deborah Durden, Administrative Law Judge
15-ALC-15-0009
Appellate Case No: 2015-000689

Unpublished Opinion No: 2016-UP-204
Submitted February 1, 2016 – Filed May 11, 2016

RECEIVED
JUN 20 2016
SC Court of Appeals

THOMAS LOWERY, #083240.....APPELLANT

v.

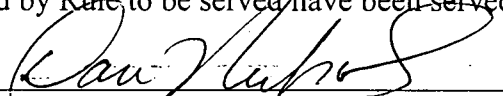
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Return to Appellant’s Petition for Rehearing dated June 16, 2016, on Appellant this 16th day of June, 2016, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Thomas Lowery, #83240
Kershaw Correctional Institution-HD235
4848 Goldmine Highway
Kershaw, S.C. 29067

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


Dawn Nichols
Executive Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



JERRY B. ADGER
Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.state.sc.us/ppp

RECEIVED
JUN 20 2016
SC Court of Appeals

June 16, 2016

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: Thomas Lowery v SCDPPPS

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of Respondent's Return to Appellant's Petition for Rehearing dated June 16, 2016, along with proof of service in the above referenced case.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tommy Evans, Jr.".

Tommy Evans, Jr.
Assistant General Counsel
TE:dn

Enclosures

cc: Thomas Lowery