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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No.: 2016-000225

DAVID ROSE, #91858,.....RESPONDENT

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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2. **Did the Administrative Law Court err when it issued a remedy that it may not grant?**

3. **Did the Administrative Law Court err in deciding that the *State v. Barton* decision should be applied retroactively?**

STATEMENT OF THE CASE

On April 6, 1978, the Respondent along with his co-defendant Jack B. Oliphant approached a child near his home in Laurens County, South Carolina. Upon asking the child to show them directions to a nearby address, he was forced into a vehicle and driven to Greenville. They held him captive for eighteen hours demanding a ransom for his return. Upon hearing on the radio the authorities were actively searching for this child, the defendant's decided to release the child to a nearby rural area. Both defendants were later found, arrested and charged with the offenses of kidnapping.

On May 22, 1978, the Respondent appeared before the Honorable James Moore for the offense of kidnapping. Upon completion of this appearance the Respondent was sentenced to a term of incarceration for the remainder of his natural life.[1] At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for kidnapping parole eligibility upon the service of ten years.

The Respondent was granted parole in 1987, but failed to report for years. Finally in 1991, an arrest warrant was issued, he was then placed in absconded status. It was later discovered that he was residing in Florida. He was extradited to South Carolina and his parole was revoked on June 14, 2000. The Respondent's first appearance before the Parole Board after his revocation was on June 20, 2001, during which time the Board denied parole.

On August 30, 2004, the Respondent filed an application for post-conviction relief. (R.p.273-p.279). Within this application, the Appellant made the claim that he received four votes in favor of parole based on a statement by a cousin that he received four "yes" votes. The Respondent requested a recording of the hearing, which did not list the vote count. This was a

[1] Co-Defendant Jack Oliphant was also give a life sentence for the offense of kidnapping. He was paroled on February 21, 1986, he currently remains on parole and now residing in the state of Georgia.

post-conviction relief action against his Public Defender Michael Turner and his parole attorney Alvin Neal, and did not name the Appellant Department of Probation, Parole and Pardon Services. (R.p.277). The Attorney General responded and argued that the Circuit Court does not have jurisdiction, but jurisdiction falls upon the Administrative Law Court (ALC). On March 3, 2006, the Honorable Wyatt T. Saunders ordered the PCR be dismissed without prejudice so it can be presented before the ALC. (R.p.261-p.266). Judge Saunders ordered that if the ALC decides not to hear this case, the Respondent has the right to re-file before the Circuit Court.

The Respondent delivered a request for parole on April 17, 2006. The Appellant refused the request for parole. The Respondent then filed a notice of appeal before the ALC, on May 12, 2006. (R.p.280). On May 14, 2007, the Honorable John D. Geathers, Administrative Law Court Judge, issued an order dismissing the appeal. It was his opinion that the ALC did not have jurisdiction over this offense. (R.p.281-p.282).

On February 26, 2014, the Respondent filed a summons and complaint against the Appellant in Circuit Court. (R.p.222-p.227). The Appellant filed a motion to dismiss arguing that due to the South Carolina Supreme Court decision of *State v. Furtick*, the Circuit Court does not have jurisdiction. A hearing regarding the Appellant's motion to dismiss was held before the Honorable Frank R. Addy, on May 19, 2014. Upon the conclusion of this hearing, Judge Addy denied the Appellant's motion and ordered the Department to conduct an investigation to determine if he has received four votes at the conclusion of his 2001 hearing. (R.p.245-p.246).

During this investigation the Appellant discovered that the recording of the 2001 parole hearing had been destroyed. Even though the Respondent had a copy of this recording, the only thing produced to the Appellant was an affidavit from his cousin Carlos Bell. (R.p.268-269). Within his affidavit Mr. Bell stated that the Respondent's lawyer spoke to a Department employee in the

common area who informed him that the Respondent received four votes, who in turned informed Mr. Bell. The Appellant determined that this was not sufficient evidence and denied Respondent's request for parole. (R.p.267). Upon being notified of this denial, the Respondent filed a notice of appeal before the ALC.

Administrative Law Judge Deborah Brooks Durden reversed the Appellant's determination that the Respondent did not receive enough votes to be granted parole and ordered the matter be remanded to the Board to determine conditions for release on parole. (R.p.150-155). In her ruling, she determined that the matter of the vote count had already been litigated between the Appellant and the Respondent, that the Appellant failed to produce a scintilla of evidence refuting the Respondent's claim to have received votes, and that the decision in *Barton v. S.C. Dept. of Probation, Parole and Pardon Services* should be applied retroactively to this matter.

The Department appeals the ALC's ruling in this matter, and intends to show that the ALC was incorrect in determining the vote count had already been resolved, and that the Supreme Court's decision in *Barton* was never intended to be applied retroactively. The Appellant's arguments follows. (R.p.148-p.149).

STANDARD OF REVIEW

The Administrative Procedures Act (APA) provides the appropriate standard of Review. S.C. Code Ann. §1-23-610(B) (Supp. 2012). The Court may reverse the decision of an ALC if that decision is a) in violation of constitutional or statutory provisions; b) in excess of the statutory authority of the agency; c) made upon unlawful procedure; d) affected by other error of law; e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or f) arbitrary or capricious or characterized by an abuse of discretion or clearly

unwarranted exercise of discretion. *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).

ARGUMENTS

1. **The Administrative Law Court erred in its determination that the vote count had been litigated, and that the Appellant relied upon substantial evidence that the Respondent failed to receive votes sufficient to receive parole.**

In its ruling, the Administrative Law Court (ALC) placed great emphasis on the fact that the Department did not take a position against the Respondent's position that he received a favorable vote count in his Post-Conviction Relief action (PCR) following his denial of parole in 2001. However, the ALC fails to take into account that the PCR is an action taken against his attorneys and would not have been served on the Department.[2] Furthermore, the Attorney General's Office, which did respond to the action, made a motion to dismiss for improper jurisdiction and to remand the case to the Administrative Law Court because it involved the routine denial of parole – a preliminary motion that does not address the substantive matters within the claim. *See Kerr v. State*, 345 S.C. 183, 547 S.E.2d 494 (2001) (addressing the threshold issue of jurisdiction before addressing the matter of parole eligibility).

By taking up the initial matter of the proper venue, the Attorney General's Office never needed to respond to the allegation that the Respondent received four votes in favor of parole. In fact, by filing a PCR matter, the Respondent only challenged the effectiveness of his attorneys. The matter of the vote count was irrelevant for the PCR because the Respondent's attorneys had nothing to do with how the Parole Board voted. *See* S.C. Code Ann. §17-27-20 (Supp. 1969).

[2] The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the solicitor of the circuit in which the applicant was convicted and a copy to the Attorney General. S.C. Code Ann. §17-27-40(Supp. 2014).

All subsequent hearings and rulings for the Respondent's case involved the proper jurisdiction of Respondent's case – whether it was properly before the circuit court or the ALC. At no point did the Department concede that the Respondent received four votes. In fact, it was not until Judge Addy ordered the Department to conduct an investigation on May 19, 2014, that the matter of the vote count became an issue.

The Respondent expects the Appellant to grant a criminal offender release from incarceration based solely on hearsay testimony submitted through an affidavit submitted by his cousin Carlos Bell. According to this affidavit the Respondent's attorney spoke to an unnamed employee of the Department who informed him that the Respondent received four affirmative votes. His lawyer in turn informed all of them of the vote count, was paid by Mr. Bell, and they all left the premises. No further action was ever made by this attorney regarding this decision, no motion for reconsideration, or appeal was filed, even though he was paid for the entire process. The Respondent could have been told this vote by his attorney only to assure payment. This was the only information presented, so the Department was well within its authority to determine that the Respondent's claim is not sufficient to submit the case to the Board.

Any release on parole lies totally with the Parole Board, "no such prisoner may be paroled until it appears to the satisfaction of the board." S.C. Code Ann. §24-21-640 (Supp. 2014). The only authority to sign an order of release to parole is the Parole Board. Importantly, the order authorizing parole must be *signed* by the majority of members of the Board. S.C. Code Ann. §24-21-640 (Supp. 2014). Without the signatures of the Board, the Department has no authority to order the release of an inmate to parole.

The ALC has ordered the Respondent be released on parole pursuant to the South Carolina Supreme Court decision of *Barton v. S.C. Dept. of Probation, Parole and Pardon Services,* 404

S.C. 395, 745 S.E.2d 110 (2013). The South Carolina Supreme Court decided in *Barton* that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole is in violation of ex post facto.

The Respondent has yet to prove he has received four votes. In administrative proceedings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof rest upon 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 Respondent failed to present sufficient evidence proving he has received the required votes to be granted parole. The only evidence presented to the Department is an affidavit written by his cousin, which is full of hearsay testimony. He never presented affidavits from Board members who sat on that hearing. Other inmates have done so in order to prove they have received the requisite votes to be granted parole. The Respondent never presented or sought the Department employee his lawyer supposedly spoken to, nor his sister Kathy Todd who was also supposedly present; nor has he presented an affidavit from his lawyer confirming this conversation. Inmates have included affidavits from their attorney confirming the vote count, the Respondent has failed to do so.

The recording of the hearing in question contained no final vote count. Instead, the chairman just states "David Lee Rose rejected 1 and 5."[3] (R.p.108).There are other instances which the chairman had announced "the inmate was rejected 4 to 2." In the present case, there was also no deliberation, nor a final vote count mentioned. It is therefore safe to assume that the Respondent was denied unanimously. (Supp. R.p. 65, lines 4-6). There was no evidence presented to the contrary, and that assumption can be as easily made, especially since he has not received any votes

[3] The 1 and 5 mentioned are the reasons for denial and not the final vote.

since 2001. (R. p. 69 lines 11-16). The Respondent is under the assumption that since he provided only a hearsay affidavit he should be automatically release on Parole. The Respondent failed to give a full faith effort to gather sufficient substantial evidence that would convince the Department to release him on parole.

As noted earlier, the Department cannot release an inmate on parole without a signed order authorizing parole from the Board. §24-21-640. It should be considered reasonable that the Department not release anyone on parole when the only evidence presented is a biased statement from the inmate's cousin. If the Board believed the Respondent failed to provide sufficient evidence to verify a ratification of a Board's previous vote that determination must be upheld. The findings of an administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety,* 334 S.C. 357, 513 S.E.2d 619 (1999). Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo,* 276 S.C. 130, 276 S.E.2d 304 (1981).

The ALC chooses to ignore the evidence that the Respondent received no votes in favor of parole and makes the claim that the Department had no evidence to refute the Respondent's biased hearsay testimony. The ALC ignored the recording's lack of deliberation, which is customarily included in a split vote. (Supp. R.p. 65 lines 4-6). The Board has not awarded the Respondent a single vote in favor of parole in the following fourteen years of hearings. (R.p.69, lines 11-16). His parole was just revoked just a year earlier; he has not received any votes since being revoked; there was no mention of the vote count or any deliberation as in other hearings occurring at that time. He absconded supervision from 1991 till 2000 a total of nine years, and was not found in

South Carolina but in the state of Florida. The Parole Board is usually inclined to deny parole upon a recent revocation. (R.p. 55, line 16 to pg. 56, line 3).

2. The ALC issued a remedy that cannot be provided by the Courts.

The ALC does not have the ability to reverse a decision made by the Parole Board, nor can it require the Board to release someone on parole. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the denial of parole to a potentially eligible inmate by the Department of Probation, Parole and Pardon Services. S.C. Code Ann. §1-23-600 (Supp. 2014). Because the ALC ordered that the Board convene a hearing pursuant to *Barton* for the sole purpose to imposing conditions of parole, the ALC made itself the determining body regarding parole. That responsibility was never given to the courts. 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 Pardons. *Brown v. State,* 306 S.C. 381, 412 S.E.2d 399 (1991). Section 24-21-640 specifically provides for the Board to consider the complete record of a prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility. *State v. McKay,* 300 S.C. 113, 386 S.E.2d 623 (1989).

The Respondent seems of the opinion that a *Barton* hearing is just a rubber stamp of the Parole Board. That is untrue. A decision of the Department pursuant to *Barton* is three fold. First, the office of Board Support Services will conduct an investigation to verify if the prisoner has possibly received the proper number of votes; second, the Office of Legal Services will verify if it qualifies under *Barton;* and, third, the Board holds a hearing during a full board day. The Respondent failed to get through the first stage due to his lack of reliable information proving he received the required number of votes to be granted parole. This denial of parole was proper and not subject to remand, and the ALC does not have the authority to reverse.

3. The two-thirds rule announced in *Barton* does not apply retroactively.

The ALC conducted a collateral review of the denial of the Respondent's parole in 2001. It erroneously ruled that *Barton* should be applied retroactively because it was an ex post facto analysis and that "ex post facto claims are non-collateral matters." (Citing *Steele v. Benjamin*, 362 S.C. 66, 71, 606 S.E.2d 499 (Ct. App. 2004). The ALC erroneously equates the ex-post facto analysis in *Barton*, which analyzed the two-thirds vote requirements for violent offenses, with the present question of whether *Barton* was intended to be applied retroactively.

Specifically, the *Barton* court did not state that its interpretation of the two-thirds rule set forth in section 24-21-645(A) should apply retroactively to cases on collateral review. "The question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision." *Talley v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007)(*citing, Teague v. Lane,* 489 U.S. 288, 300 (1989). That the *Barton* court was silent to this issue implies that it did not intend for its ruling to apply retroactively, but only in future hearings. In fact, the law does not support *Barton's* retroactive effect. In *Talley*, the South Carolina Supreme Court adopted the United States Supreme Court's ruling in *Teague* that new procedural rules should not apply retroactively except criminal law-making power to penalize. *Talley*, at 543. This exception cannot apply to this case. The second exception occurs when a new rule amounts to a "watershed rule" of procedure. *Id.*, at 543. A "watershed rule" is a new rule requiring that procedures implicit in the concept of ordered liberty to be observed during a hearing – a rule that "implicate[s] the fundamental fairness and accuracy of the proceeding." *Id.* The *Barton* ruling did not announce such a rule. In the context of post-conviction administrative parole hearings, inmates only have a protected right to the hearing, not to parole itself. *Furtick v. S.C. Department of*

Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003). Inmates are due minimum due process which is provided by notice and hearing.[4] *Id.*, at 598. The *Barton* court plainly stated that §24-21-645(A) was ambiguous and subject to more than one interpretation. *Barton,* at 416. The Court did not find that the minimum due process an inmate must receive also includes a protected right to a *particular interpretation* of §24-21-645(A), only the Department (and the South Carolina Administrative Law Court) had wrongly interpreted the statute. Here the Respondent received sufficient due process because he was notified of the hearing where he appeared with counsel. The *Barton* ruling does not apply retroactively to his case.

A further policy argument must be made in favor of applying *Barton* prospectively only. The Parole Board and the Department historically did not record the vote counts of inmates who did not receive enough votes to be granted parole. The only time the votes were memorialized was in the actual order authorizing parole, which was required by statute. "The board shall issue an order authorizing the parole which must be signed by at least a majority of its members with terms and conditions, if any, but at least two-thirds of the members of the board must sign orders authorizing parole for persons convicted of a violent crime..." §24-21-640. Nowhere in the statute is it stated that the vote count must be recorded and preserved, and it cannot be expected that the Department should have had the prescience to predict the ruling of *Barton.*

Respondent's claim that he received four votes in favor of parole is baseless hearsay from a biased source. To hold that *Barton* is retroactive invites more claims from family members and friends who claim to recall hearing in the distant past that a particular inmate has received enough votes for parole. Without records to refute those claims, potentially every inmate who has had a

[4] It may be that *Teague*, *Talley*, and their descendants, which had examined new rules of *criminal* procedure, cannot apply to a judicial interpretation of a statute establishing *civil* procedure in post-conviction administrative law hearings. *See generally, Hamm v. South Carolina,* 403 S.C. 461, 744 S.E.2d 503 (2013).

parole hearing prior to 2001 stands to be released on parole based on the retroactive application of *Barton*. This ruling would invite countless fraudulent claims for parole – a result that can be avoided through the prospective application of *Barton* only.

CONCLUSION

Based on the foregoing reasons the Appellant respectfully requests that the ruling of the Administrative Law Court be reversed.

Respectfully submitted,

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Columbia, South Carolina
May 27 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No. 15-ALC-0033-AP

Appellate Case No. 2016-000225

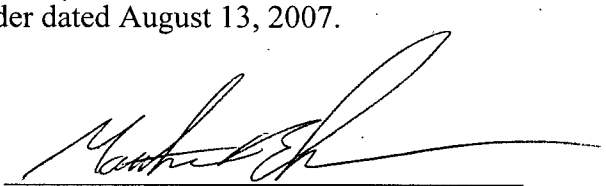
DAVID ROSE, #91858,.....RESPONDENT

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.



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General Counsel

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AND PARDON SERVICES,.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within *Final Brief of Appellant* dated May 27, 2016, on Respondent this 27th day of May, 2016, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Travis Dayhuff, Esquire
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I further certify that all parties required by Rule to be served have been served.

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May 27, 2016

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street- 5th Floor
Columbia, South Carolina 29201

RE: David Rose v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original and fourteen (14) copies of the *Final Brief of Appellant*, along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Matthew C. Buchanan
General Counsel

MCB:dn
Enclosures

cc: Travis Dayhuff, Esquire

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