

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, Chief Administrative Law Judge
Case No. 15-ALC-15-0056-AP

Appellate Case No.: 2016-000530

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AUG 25 2016

SC Court of Appeals

CHARLTON DAVIS, #231377,.....APPELLANT

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- 1. Did the Respondent fail to follow the mandates proscribed by the South Carolina Supreme Court in the *Cooper* opinion?**
- 2. Did the Respondent err in denying parole due to the Appellant's prior offense without evidenced based rational nexus between the offenses and the Appellant's present behavior?**

STATEMENT OF THE CASE

On June 19, 1994, the Appellant unlawfully entered the home of the victim while armed with a knife. He threatened the victim, fondled her, and attempted to force her to perform sexual intercourse. Her resistance caused him to stop the attack. He then stole two hundred dollars and vacated the residence. The Appellant was later caught, arrested and charged with the offenses of burglary in the first degree (burglary 1st), armed robbery, and assault with intent to commit criminal sexual conduct in the first degree (assault w/intent to commit CSC 1st).

On February 1, 1996, the Appellant appeared before the Honorable R. Markley Dennis, Jr., for each of these offenses. Upon the conclusion of this appearance the Appellant was sentenced to a forty year term of incarceration for the offense of burglary 1st; twenty-five years for armed robbery; and, fifteen years for assault w/intent to commit CSC 1st.

The Appellant made his initial appearance before the Board on June 22, 2011. Upon the conclusion of this appearance the Board decided to deny the Appellant an opportunity to be released on parole. He has since appeared before the Board an additional two times each resulting in a denial of parole. The Appellant's most recent appearance occurred on September 9, 2015. Upon the conclusion of this hearing the Board decided to deny parole due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) the use of a deadly weapon in this or a previous offense. (Supp. R.p.1). Upon being notified as to his denial of parole the Appellant decided to file a notice of appeal before the Administrative Law Court (ALC).

Within this appeal the Appellant alleged that he is being unlawfully denied parole due to the use of the facts of his prior offense as a reason for denial. The Appellant alleged that the denial of parole due to these reasons violate Parole Board policy. The Respondent argued that the denial

of parole followed the parameters proscribed in the South Carolina Supreme Court decision of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*. The Respondent further argued that the facts of the offense must be applied in making the determination of whether or not an inmate should be released on parole.

On February 11, 2016, the Honorable Ralph King Anderson, III, Chief Administrative Law Judge issued his decision. He decided that the Board revealed they followed the proper procedure in denying the Appellant's parole, and dismissed the Appellant's appeal. (Supp. R.p.3-7). Upon receiving the order of dismissal the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant alleges that the Board did not follow the mandate in the *Cooper* opinion; he also alleged that the Board denied parole by considering his prior offense without any evidence revealing a rational nexus between the original offense and his present behavior.

The Respondent argues that the Board revealed they considered all of the mandatory criteria; and, the Appellant is requesting results that the Court cannot award. The ALC properly determined that the Board followed the mandatory criteria; therefore, the decision of the lower court should be affirmed. The brief supporting these arguments follows.

ARGUMENT

1. The ALC was correct dismissing this appeal due to the fact that the Respondent followed the mandates proscribed by the Supreme Court in the *Cooper* opinion.

Any final decision of an administrative agency in a contested case must be placed in writing and shall include a finding of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350(Supp. 2015). The Appellant argues that the order of denial is too vague as to the reasons for denial, and fails to reveal any nexus between his prior offense and his prison record. However, the order of denial clearly reveals the criteria found in statute and Department policy, as well as the

risk assessment considered prior to the denial of parole. This order followed the standards provided by the South Carolina Supreme Court in the case of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). The Court decided in *Cooper*, that the ALC has limited review of the decision of the Board, and can only determine if the mandatory criteria was followed. If this is shown no other determination can be made by the ALC, other than affirming the decision of the Parole Board. The ALC was correct in dismissing the Appellant's appeal.

In *Cooper*, the Supreme Court decided that the findings of fact were included; however, the Court determined the Parole Board neither, "offered an explanation nor indicated that it had considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form." *Id.*, at 500. The Supreme Court ruled in *Cooper* 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 under *Furtick* warrants review by the ALC. *Id.*, at 502¹

The Supreme Court established what future Parole Board orders should consist of, in *Cooper* it specifically state:

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.*

¹ In *Furtick* the South Carolina Supreme Court determined that the ALC had jurisdiction to hear a inmate's appeal from the Department of Probation, Parole and Pardon Services that he was not eligible for parole, since an inmate has a liberty interest in gaining access to the Parole Board. *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003).

In the present case the order of denial did conform with the *Cooper* decision. It included a findings of fact and conclusion of law separately stated. The findings of fact were the reasons provided by the Board as to why parole was denied; and, the conclusion of law are the statutes, factors, and assessments used to determine the denial of parole. The order is clear, the criteria within the statute, the mandatory policy, and risk assessment were considered prior to the denial of parole. The reasons given for the denial of parole were reasonable and followed the mandatory criteria. Since the Board is the sole authority to deny parole, and this authority is not appealable by the Court; the denial of parole should be affirmed.

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, an order must not only state the findings of fact, but the statute and policy considered in reaching this conclusion. The order delivered to the Appellant was clear, the criteria within the statute, mandatory policy, and risk assessment 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 Therefore, the ALC did not commit any error in their decision. The decision to dismiss this appeal should be affirmed.

2. The Parole Board considered each of the mandatory criteria prior to denial; therefore, the decision of the ALC was lawful.

The Appellant argues that the Board refused to reveal a nexus existed between his prior offense and his current prison record. For an inmate to be denied parole there does not need to be a showing of a nexus between his prior offense, and prison record. All the board needs to do is consider his prior record, prison history, and risk assessment, to make a determination as to

² The Parole Board clearly stated in its order of rejection that it considered 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).

whether the inmate would make a good candidate on parole. The Board also needs to consider if society will be safe by releasing him into the public.

The General Assembly created criteria that must be followed prior to any Board decision.

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 the rigors of the 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. 2015).

The General Assembly also made it mandatory that the Board create a policy that must be considered prior to the awarding of parole.³ This criteria includes for example, the Appellant record before, and after conviction; opinions of the victim, solicitor, law enforcement, and sentencing judge; and character adjustments he made while incarcerated; and, how much support from the family and community the Appellant will receive if released from incarceration.⁴ This is an

³ The Board must establish written specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include review of a prisoner's disciplinary and other records. S.C. Code Ann. §24-21-640(Supp. 2015).

⁴ A form given by the Department outlines the relevant criteria for parole consideration. This form lists the following non-inclusive criteria: 1) The risk the inmate poses to the community; 2) The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it; 3) The inmate's prior criminal records and his/her adjustment under any previous programs or supervision; 4) The inmate's attitude toward his/her family, the victim, and authority in general; 5) The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself; 6) The inmate's employment history, including his/her job training and skills and his/her stability in the work place; 7) The inmate's physical, mental and emotional health; 8) The inmate's understanding of the cause of his/her past criminal conduct; 9) The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems; 10) The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment; 11) The willingness of the community into which the inmate will be released to receive the inmate; 12) The willingness of the inmate's family to allow him/her to return to the family circle; 13) The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole 14) The feelings of the victim's family, and any witnesses to the

extensive process that the Board applies to each inmate appearing before them, including the Appellant. (Supp. R.p.2). One of the mandatory criteria that must be considered is, “the nature and seriousness of the offender’s offense, the circumstances surrounding that offense, and the prisoner’s attitude toward it,” another is, “the inmate’s adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself.” These Two major aspects the Board must consider are apart and separate and one does not rely on each other.

The Appellant is of the opinion that the Board must show some connection between the prior crime and his present inmate record. This is untrue, the inmate could have a perfect prison record; however, if the Board decides there exist a possible future dangerousness to the community, or there is a possibility he would not succeed supervision, parole can be denied. This can be determined by the violence of the prior offense or the inmate’s prior failure to complete a supervision program. The prior offenses of burglary 1st, armed robbery, and assault w/intent to commit CSC 1st are classified violent offenses pursuant to South Carolina law.⁵ The legislature has placed a huge responsibility upon the Parole Board. The first and foremost factor that must be considered is whether an inmate will continue to be a threat if released to society. The Board must be absolutely convinced that the release of the Appellant on parole not be a determinant to society. The Board must also be convinced that the inmate will be successful and not violate. Until the Board can be completely satisfied that his release will not cause any harm to the community he cannot be granted parole. Once this satisfaction is made the Appellant’s parole can be awarded.

crime about the release of the inmate; 15) Other factors considered relevant in a particular case by the Board. *Cooper*, at 495 n. 2

⁵ For purposes of definition under South Carolina law, a violent crime includes the offenses for burglary in the first degree (Section 16-11-311), armed robbery (Section 16-11-330(A)); criminal sexual conduct first and second degree (Section 16-3-656); attempt to commit any of the above offenses (Section 16-1-80) S.C. Code Ann. §16-1-60(Supp. 2015)

Only the Board has the responsibility to review the record presented, apply the criteria, and make the final determination as to whether or not that inmate should be paroled. We conclude that §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). If the Board has yet to believe he should be released on parole he would remain incarcerated until parole is awarded, or he completes his sentence.

Another criteria considered is the risk assessment which is mandatory pursuant to South Carolina law. The South Carolina Code of Laws specifically state:

The department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contributed to criminal behavior, which the parole board shall use in making parole decisions, including additional objective criteria that may be used in parole decisions. S.C. Code Ann. §24-21-10(F)(1)(Supp. 2015).

The risk assessment utilized by the Department is referred as the Correctional Offender Management Profiling for Alternative Sanctions, or COMPAS. The risk assessment tool is conducted for each prisoner prior to appearing before the Parole Board. The results of each assessment is always provided to the Board for consideration prior to their final decision.

The order of the Board revealed the risk assessment was considered prior to the Board's decision. The order of denial states, "After careful consideration of (4) actual risk and needs assessment factors pursuant to Section 24-21-10(F)(1)." The order revealed that the COMPAS risk assessment tool was applied, and considered by the Board prior to the denial of parole. The Respondent has shown all of the mandatory criteria was considered so the decision of the ALC was correct.

The Appellant also makes accusations that the Parole Board failed to follow all of the mandates prior to his denial of parole. He made these allegations without providing any proof to the ALC. The Appellant has the burden of proving the Board denied parole without considering all of the mandatory criteria. 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 rest upon the 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 ALC does not have the authority to remand a decision without being presented any evidence of wrongdoing. There has been no substantial evidence provided by the Appellant to support any of his allegations. 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). The substantial evidence provided by the Board reveals all of the criteria was considered, and that the decision was reasonable. Substantial evidence is evidence which considering the record as a whole allow reasonable minds to reach the conclusion that the administrative agency reach in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). The ALC found it reasonable for the Board to deny the Appellant an opportunity to be released on parole due to the nature and seriousness of the offense of burglary 1st, armed robbery, and assault w/intent to commit CSC 1st, the indication of violence that occurred in the commission of these offenses, and the use of a knife in the commission of this offense. This denial of parole was reasonable, and the Board abided by the criteria. This denial of parole was lawful pursuant to South Carolina law.

3. The Court does not have the ability to grant the Appellant what he is requesting.

The Appellant request the Court to vacate the final decision of the ALC and the Parole Board for a supervised reentry term parole release date. The responsibility of parole eligibility lies with the Parole Board. This Court does not have the ability to award parole that lies solely with the Parole Board. "No prisoner may be paroled until it appears to the satisfaction of the board." S.C. Code Ann. §24-21-640 (Supp. 2015). The question of parole eligibility is separate and independent from the court's authority to sentence an offender. *McKay*, at 115. 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).

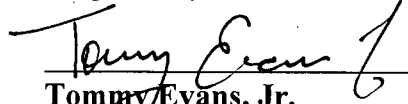
The ALC can only remand the case back to the Parole Board, this Court does not have the authority to reverse the Board's decision and award parole. However, any remand can only occur upon the determination that the Board made a decision that constitutes an error of law. The Appellant Court sits to review errors in law only. *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). There exist no error in law, the Board followed the mandatory criteria, which was reflected in the order of denial.

Even if there was an error the ALC did not have the ability to reverse a decision of the Parole Board. An administrative law judge shall not hear an appeal from an inmate in 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(D)(Supp. 2015). The ALC only has the ability to remand a case if there is a showing that the mandatory criteria was not considered. If there was no sufficient evidence presented to reveal that the Board failed to consider the criteria the ALC must affirm. The ALC made the correct decision in affirming the decision of the Board, and dismissing the Appellant's appeal. So this Court should affirm the decision of the ALC.

CONCLUSION

Based on the above referenced reasons the ALC has not committed an error in law; therefore their decision to dismiss this appeal was correct. The Respondent respectfully request this Court to affirm the decision of the ALC.

Respectfully submitted,



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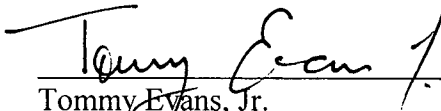
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CERTIFICATE OF COUNSEL

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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August 24, 2016