

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable John D. McLeod, Administrative Law Judge
Case No. 16-ALJ-0018-AP

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SC Court of Appeals

Case No. 2016-002131

JOHNNY BURTON, #213281,.....RESPONDENT

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

- 1. Was the Appellant denied due process when he was not informed of the COMPAS risk assessment?**

STATEMENT OF THE CASE

On January 22, 1994, the Respondent while attending a party shot the victim in the chest, lower back, and buttocks. The victim was still alive when the authorities arrived so the Respondent was initially charged with the offense of assault and battery with intent to kill. Three days later the victim died due to these gunshot wounds. The Respondent was subsequently charged with the offense of murder, and possession of a weapon during the commission of a violent offense.

On April 12, 1994, the Respondent appeared before the Honorable H. Hall for both of these offenses. Upon conclusion of this appearance, the Court sentenced the Respondent to a period of incarceration for the remainder of his natural life for the offense of murder; and five years for possession with a weapon during the commission of a violent crime. The Court ordered that these offenses are to be served consecutively.¹ At the time the Respondent committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

On February 19, 2014, the Respondent made his initial appearance before the Parole Board. Upon the conclusion of this hearing the Board decided to deny the Respondent an opportunity to be released on parole. (R.p.31). Since this initial hearing the Respondent once again appeared before the Parole Board on April 20, 2016. At 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. (R.p.6). Upon being notified of this denial the Respondent filed a notice of appeal before the Administrative Law Court (ALC). (R.p.29). Within this appeal the Respondent argued that he was unlawfully denied parole in violation of the eighth amendment and due process. The Appellant

¹ The Appellant completed his sentence for the charge of possession of a firearm during the commission of a violent offense on January 25, 1999:

argued that the Respondent was allowed to appear before the Board so there exists no violation of any of the Appellant's Constitutional rights.

On October 12, 2016, the Honorable John D. McLeod, Administrative Law Court Judge issued an order. Within this order the ALJ determined that due to the failure to notify the Respondent of the risk assessment requirement the Board violated his due process rights. The lower court reversed and remanded the decision for another hearing to be held within thirty days of the date of the order. (R.p.1-p.3). The court also ordered that the Respondent must be made aware of the COMPAS assessment prior to his hearing.

Upon receiving the order from the lower court the Appellant filed this appeal. Within this appeal the Appellant will argue that the Respondent was not denied due process in not notifying him of the COMPAS requirement. The Appellant will further argue that it is not feasible for an inmate to be allowed to appear before the Board within a thirty day time period. This is due to the mandatory thirty day notice that must be given to the victim's family, solicitor, and law enforcement pursuant to South Carolina law. Therefore, the lower court is ordering the Board to accomplish something that cannot be done without violating South Carolina law. The Appellant's final brief supporting these defenses follows.

ARGUMENT

1. The Respondent was not denied due process in not being notified of the COMPAS assessment prior to the hearing.

The Respondent alleges that a failure to inform him of his COMPAS risk assessment was in violation of his due process rights. The Respondent should have been aware of this assessment since it was applied to him prior to his 2014 hearing. The Respondent also had access to the South Carolina Code of Laws which in 2011 established the risk assessment requirement.

As part of the South Carolina Crime Reduction and Sentencing Reform Act of 2010 the Board is required to consider a risk and needs assessment prior to any decision regarding parole. 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 to as the Correctional Offender Management Profiling for Alternative Sanctions or COMPAS. This risk assessment tool is conducted for each prisoner prior to them appearing before the Parole Board. The results of each assessment is provided to the Board and considered prior to their final decision. The lower Court decided that the Respondent was denied due process due to him not being notified of this assessment prior to his appearance before the Parole Board. Due to how the assessment is conducted previous notice would not be of any assistance. This argument should be considered moot, and the decision of the ALC should be reversed. A case becomes moot when judgment, if rendered will have no practical effect upon the existing controversy. *Mathis v. S.C. State Highway Department*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Other Department criteria relates to things the Respondent can do to improve himself while incarcerated (ex. the inmates adjustment while in confinement, including his/her progress in counseling therapy, and other similar programs designed to encourage the inmate to improve himself/herself).(R.p.7). COMPAS relates to factors regarding his offense, family structure, any previous gang activity, criminal history, any history of substance abuse, prior employment history, his attitude and beliefs about laws, people in authority, work, drugs and alcohol, and if his living

environment is stable, with whom he will be living and what type of neighborhood it is. NORTHPOINT PARTICIPANT'S GUIDE COMPAS CORE AND REENTRY pp. 91-93. These and other matters are addressed in numerous questions asked to the inmate as part of the assessment. At the conclusion an assessment is made regarding his chance of reoffending. These results are considered by the Board. This is only one of the numerous criteria considered by the Board prior to their final decision.

The ALC determined that failing to inform him of this risk assessment violates due process. According to South Carolina law the Board is required to establish written, specific criteria for granting of parole and provisional parole. This criteria must be made available to all prisoners at the time of their incarceration and the general public. S.C. Code Ann. §24-21-640 (Supp. 2015). There is nothing written in the statute that requires COMPAS notification. Since that notification is not required, it was not a violation of due process to not provide it to the Appellant. If the General Assembly wished this prior notification be made they would have made this notification mandatory as all of the other criteria.

It is clear in the statute that the General Assembly wished inmates and the public to be made aware of Department created criteria. **The criteria must be made available to all prisoners at the time of their incarceration and the general public.**” S.C. Code Ann. §24-21-640 (Supp. 2015)(emphasis added). This language is not contained in the statute regarding a risk assessment. If the General Assembly intended to make notice of the risk assessment mandatory it would have stated this as in the above referenced statute. This was never an intent of the legislature; therefore, not unlawful to not give notice of this criteria. When the nature of restrictive language is irresolvedly ambiguous, prudence dictates that we adopt the interpretation least likely to run afoul

of the legislature's restrictive intent. *Hinton v. S.C. Dept. of Probation, Parole, and Pardon Services*, 357 S.C. 327, 592 S.E.2d 335 (2005).

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), the Court decided that the ALC can determine if the Board failed to consider the mandatory criteria in the determination of parole. In *Cooper*, the Court decided that if the Parole Board failed to consider and apply all the statutory-related parole criteria it has the effect of rendering an inmate ineligible for parole, which warrants review by the ALC. *Id.*, at 502. In *Cooper*, the Supreme Court established what future Parole Board orders should consist of, 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, 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 *Cooper*, the Court only required that all the mandatory criteria be considered and placed in the order to reveal that the criteria was considered prior to the final decision. The order of denial in the present case does reveal that the risk assessment was considered. No case law nor statute requires that the inmate must be notified that the COMPAS assessment will be considered prior to the final decision. This is due to the fact the inmate has no ability to alter the results of the assessment so any prior knowledge would be of no assistance.

The Respondent argues that he had no prior knowledge of this assessment; however an assessment was completed prior to his 2014 hearing. This assessment required his participation, so he must have been aware of its existence. He participated in answering the questions as part of

this procedure to get a final result. The Respondent never revealed any prejudice in not being notified prior to the final decision that the COMPAS assessment was going to be considered. So the ALJ should never have granted the Respondent a reversal. To warrant reversal the Respondent needed to show both error of the decision and the resulting prejudice. *See, Burroughs v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002).

Even if there exists any errors in not notifying him of this assessment, the ALC should have determined this to be harmless. Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis. *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013). This failure to notify the Respondent of this COMPAS assessment has not caused any prejudice. The Respondent has failed to reveal that this notice caused his denial, and it was not stated by the Board as a reason for denial. A failure to consider this assessment might bring a legitimate argument of error; however, the Board did consider this assessment which is reflected in the order of denial.

The Appellant also argues there exists no violation of due process in not giving notice of the COMPAS requirement. In the United States Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), the Court acknowledged that a person having his parole revoked does not have minimal due process rights. However, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979), a distinction was made between a person currently on parole and a person seeking parole.² In *Greenholtz*, the Supreme Court determined there exists no conditional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Greenholtz*, at 2104. The Appellant

² 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 as such could "be gainfully employed and [were] free to be with family and friends and to form other enduring attachments to a normal life." *Greenholtz*, 408 U.S. at 482, 92 S.Ct. at 2600.

was allowed to appear before the Board where he was allowed to present evidence in his favor. It was shown in the order of denial that the mandatory criteria and risk assessment were considered prior to denial, so there exists no violation of due process.

2. The ALJ made an order that cannot be accomplished due to the notice requirements found in South Carolina law.

The ALJ ordered the Department hold a hearing within thirty days of the date of his decision. Pursuant to South Carolina law, a thirty day notice must be given to the solicitor, law enforcement, and victims in order for them to be present at the hearing which is a right pursuant to the victim's bill of rights. The director must give a thirty-day written notice of any hearing during which the Board will consider parole for a prisoner to the following persons: 1) any victim of the crime who suffered damage to his person as a result thereof or if such victim is deceased, to members of his immediate family to the extent practicable; 2) the solicitor who prosecuted the prisoner or his successor in the jurisdiction in which the crime was prosecuted; and, 3) the law enforcement agency that was responsible for the arrest of the prisoner concerned. S.C. Code Ann. §24-21-221 (Supp. 1991) This statute exists due to the fact all victims have the right to attend any hearing of the offender, pursuant to the victims bill of rights.³ It is not feasible for the Department to schedule a hearing and give the proper individuals the notice required by law within the thirty day time period ordered by the ALJ. The victims have a right to be present in order for this to be a valid hearing. The Department must wait until the victims, law enforcement, and the solicitor have been notified and agree to a specific date where they can be present. This must be completed prior to the hearing being scheduled. There is no possible way for the Department to be able to abide to

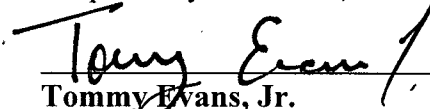
³ To preserve and protect victims' rights to justice and due process regardless of race sex, age, religion, or economic status, victim of crimes have the right to, be informed of any proceeding when any post-conviction action is being considered, and be present at any post-conviction hearing involving a post-conviction release decision. S.C. Const. art. I, §24 (10).

the order of the ALJ and conform to the statutory requirements. The Appellant asks for this case to be either reversed or at least remanded in order for the ALJ to create another order that can be followed by the Appellant without violating South Carolina law.

CONCLUSION

Based on the foregoing reasons the ALC incorrectly remanded the final decision of the Parole Board; therefore the Appellant respectfully requests the final decision of the Administrative Law Court be reversed.

Respectfully submitted,



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January 6, 2017

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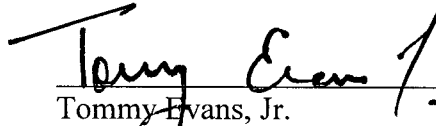
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CERTIFICATE OF COUNSEL

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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June 6, 2016

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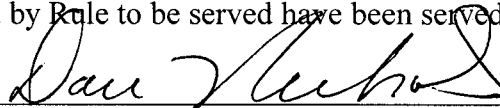
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PAROLE AND PARDON SERVICES.....APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Final Brief of Appellant dated January 6, 2017, on Respondent this 6th day of January, 2017, by
depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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



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