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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Ralph King Anderson, III Administrative Law Judge
Trial Court Case No. 15-ALJ-15-0046-AP

Order Dismissing Appeal (S.C. Ct. App. Filed February 15, 2017)

Kenneth Green.....Respondent

v.

South Carolina Department of Probation,
Parole and Pardon Services.....Petitioner

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner hereby certifies that the Petition for Rehearing was timely made on February 23, 2017, and was ruled upon by the Court of Appeals on May 24, 2017.

QUESTION PRESENTED

1. Did the Court of Appeals err in deciding to affirm a decision of the Administrative Law Court in that the Petitioner refusal to ratify a prior decision of the Parole Board was arbitrary?

STATEMENT OF THE CASE

On October 24, 1982, the Respondent along with his co-defendant were seated at a bar in Summerville, South Carolina. They observed the victim reveal a large amount of cash to pay for his drink. When he left the bar and proceeded to the parking lot, he was immediately followed by the Respondent and his co-defendant. The victim left in his vehicle and was followed by the defendants. They proceeded to force the victim off the road along Highway 165. The Respondent exited his vehicle and approached the victim armed with a shotgun. He shot the victim in the head, killing him instantly. The Respondent and his co-defendant took twenty dollars in cash and another shotgun found in the victim's vehicle. The next day the victim's family found his body along the side of the road.

At the conclusion of the police investigation the Respondent and his co-defendant were arrested and charged with murder. On March 9, 1983, the Honorable John Hamilton Smith sentenced the Respondent to a term of incarceration for the remainder of his natural life. At the time the Respondent committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility after the service of twenty years.

The Respondent made his initial appearance before the Board on November 18, 1998. Upon the conclusion of this hearing the Board decided to deny parole. Since this initial denial the Respondent has appeared before the Board an additional fifteen times, each resulting in a denial of parole. His most recent appearance occurred on June 22, 2016, parole was denied due to: 1) nature and seriousness of the current offense; and, 2) a use of a deadly weapon in this or a previous offense.

By the time of the Respondent's first parole hearing occurred, section 24-21-645 of the South Carolina Code of Laws had been amended to require a two-thirds vote for inmate's

convicted of a violent offense. The Board treated this amendment as retroactive until this Court's decision in *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).

Following this Court's decision in *Barton* the Respondent notified the Petitioner alleging he received four votes out of six in favor of parole at his November, 2000 hearing. He argued pursuant to *Barton* he should be awarded parole. The Respondent petitioned the Board to be allowed to appear for a *Barton* hearing, and on July 22, 2015, the Respondent appeared before the Board for a hearing pursuant to *Barton*. During this hearing the Respondent provided affidavits from former Board members Bishop Sanco Rembert, Marlene T. McClain, and June Shissias, and also affidavits of this father and brother. Each of these affidavits stated that the Respondent received four votes in favor of parole at his November 2000 hearing.

At the conclusion of this hearing the Board decided that the Appellant failed to adequately prove he received the required votes to be released on parole. The Board denied the Respondent's request for a ratification of the previous Board alleged vote count. Upon being notified of this denial the Respondent filed a notice of appeal before the Administrative Law Court (ALC). Within his appeal the Respondent argued that the decision of the Board was arbitrary and capricious, or characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. The Respondent also argued that it was unlawful for the Board to allow victim testimony.

The Appellant argued that this determination was left solely to the Parole Board, and the Respondent failed to present evidence that the decision was arbitrary and capricious. The Appellant further argued that pursuant to the South Carolina law and the victim's bill of rights, a victim must be notified as to any post-conviction hearing.

Upon reviewing the briefs and arguments submitted by both parties, the Honorable Ralph King Anderson, III issued his decision on February 11, 2016. Within this order Judge Anderson decided that the Board failing to ratify the previous decision was contradictory to its own policy; and therefore, the decision was arbitrary. The ALC determined that the Board erred in failing to ratify the previous Board's four to two vote in favor of granting the Respondent parole. The ALC decided that the case must be remanded back to the Board for it to proceed as if a provisional parole order has been issued.¹ Upon receiving this order the Appellant filed a notice of appeal before the South Carolina Court of Appeals.

On February 15, 2017, the Court of Appeals affirmed the decision of the ALC. The Court of Appeals decided that the Board rendered a decision without any means of accountability and that this case be remanded for proceedings consistent with the opinion. Upon receiving this decision the Appellant filed a petition for rehearing. On May 24, 2017, the Court of Appeals issued an order denying the Appellant's petition for rehearing. This Petition for Writ of Certiorari follows.

ARGUMENT

- 1. The Court of Appeals erred in affirming the decision of the Administrative Law Court, the Petitioner did not err in refusing ratify a previous Board decision because it made a factual determination that the Respondent failed to prove he received an adequate number of votes for parole.**

The Petitioner files this petition for writ of certiorari due to the novel questions of law raised in this decision. *See*, Rule 242, SCACR. The Petitioner argues that the Court of Appeals erred in its final decision affirming the decision of the ALC. The Petitioner will argue that the decision of the Board in not ratifying the decision of a previous Board was not done arbitrarily.

¹ Because the prior issue was dispositive the ALC decided to decline to address the second issue pursuant to *Young v. Charleston Cty. Sch. Dist.*, 397 S.C. 303, 311, 725 S.E.2d 107, 111 (2012).

The ALC did not have the ability to remand this decision. Within this petition the Petitioner will reveal that there were factors that the lower Court overlooked prior to making the final decision.

Pursuant to South Carolina law, the Parole Board is the only entity with the ability to determine if an inmate should be allowed to be released on parole. Within its decision, the Court of Appeals did state that they did not think the Legislature established the Board to render decisions without any any means of accountability. The Petitioner however will argue that the determination of the ALC and later the Court of Appeals overreached their authority regarding the decision of the Board to render a decision regarding whether or not a person should be released on parole.

Pursuant to South Carolina law the Parole Board is the only entity with the ability to determine if an inmate should be allowed to be released on parole. The Parole Board has the sole authority with respect to decisions regarding the grant or denial of parole. *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). This power also extends to the ability to rescind a prior award of parole. The South Carolina Code of Laws specifically state:

A provisional parole order shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole. Upon satisfactory completion of the provisional period, the director or one lawfully acting for him must issue an order which if accepted by the prisoner, shall provide for his release from custody. However, upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

S.C. Code Ann. §24-21-645 (1981).

This gives the Board the ability to hold a *Barton* hearing to make the determination that the inmate has presented sufficient evidence revealing they received four votes at a previous hearing. If ratified, the Board shall issue an order authorizing parole which must be signed by at least a

majority of its members with terms and conditions. Then the director or one lawfully acting for him must issue a parole order which if accepted by the prisoner, provides for his release from custody. S.C. Code Ann. §24-21-650 (2015).

The decision of the ALC which was affirmed by the Court of Appeals ruled that the Board's refusal to ratify the previous Board decision was arbitrary, which allowed reversal. The Petitioner will argue that it is a novel question of law regarding the ability of the ALC and the Court of Appeals to reverse a decision of the Parole Board based on a question of fact and not one of law.

This case was initially presented to the Board due to this Court's decision in *Barton*. In *Barton* this Court decided 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 alleged to the Board that he was given four votes in favor of parole in November of 2000, and thereby should be granted parole.

The Board decided to hold *Barton* hearing due to the fact in order to grant parole there must be signatures on the parole certificate. The current Board members cannot sign a parole order for a previous Board regarding a hearing that was not held before them. "The board shall issue an order authorizing the parole which *must be signed* by at least a majority of its members with terms conditions if any." S.C. Code Ann. §24-21-650 (Supp. 1977)(emphasis added). Votes do not equal signatures, and in order for parole to be granted, Board member's signatures must be placed on the order of parole. Unless it is on the order of parole, the decision is not final; therefore, it can be denied or rescinded at a later time.

After *Barton*, there was a three-pronged procedure established by the Board that would give an inmate the ability to have a previous decision ratified by the current Board. First, the office of parole support services staff will investigate to verify if the offender possibility received these votes; second, the results of this investigation would be forwarded to the office of legal services to

verify if it qualifies under *Barton*; and third, during a full Board day the Board will hold a *Barton* hearing. Only upon the conclusion of this hearing will the Board make a determination as to whether or not sufficient evidence was revealed to support these allegations. The Board reviewed all of the information presented and made the determination that insufficient evidence was presented as to allow a ratification of a previous decision. The Petitioner will argue that neither the ALC nor the Court of Appeals have the ability to reverse this decision unless it reveals that proper procedure was not followed, or substantial evidence will show that the decision was unreasonable.

The ALC is obligated to follow the rules of the Administrative Procedures Act which follows the substantial evidence rule. "Substantial evidence" to support a finding of the Administrative Law Court is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached. *Richer v. South Carolina Dept. of Health and Environmental Control*, 393 S.C. 198, 712 S.E.2d 428 (2011). The ALC and the Court of Appeals decided that the Board failed to make a reasonable decision in the denial to ratify parole. The only evidence presented by the Appellant were affidavits from previous Board members regarding a hearing that was held fifteen years prior. Due to the time that has elapsed and the numerous hearings being held between this hearing and the present, the Board decided that this evidence was unreliable. The fact that the Board considered and rejected this evidence is reasonable. There exists doubt that the Respondent had actually received these four votes, especially since he failed to receive four votes at any hearing since. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Jervey v. Martini Environmental Inc.*, 396 S.C. 442, 721 S.E.2d 469 (S.C. App. 2012). The ALC and the Court of Appeals made

the decision that the Board should have believed the affidavits of the former Parole Board members, lends this to be a reversal based on a question of fact. The lower court making a determination as to the veracity of the prior affidavits presented is identical to an appellate court concluding that a jury erred in not believing a witness and overturning a verdict for only that reason. Courts have never been given the authority to reverse a verdict due to the failure of the jury to consider the weight of a witness's testimony. The ALC and the Court of Appeals only sit in an appellate capacity so they do not have the ability to rule on a question of fact. The appeal court has only authority to consider alleged errors of law and no right to order an original judgment for the plaintiff. *Smith v. Grant*, 15 S.C. 136 (1881).

There have been no allegations regarding any error of law committed by the Parole Board. The Petitioner conducted a hearing to allow the Respondent to present evidence in an attempt to convince the Board to ratify a previous decision. The Board considered the evidence and was not convinced the Respondent received four votes in favor of parole. The decision of the ALC actually replaced the final Board decision as to the weight of the evidence presented, in concluding that the final decision was arbitrary. The Petitioner disagrees; this decision should not have been affirmed by the Court of Appeals. Arbitrary is defined as "Determined by chance whim or impulse." AMERICAN HERITAGE COLLEGE DICTIONARY 69 (3rd ed. 1997). Nothing exists in the Board's decision that reveals their decision was a result of a whim, or impulse. The Board gave the Respondent the full opportunity to present all the evidence he wished, and made a timely final decision that was presented in writing. This reveals that this decision was not arbitrary, the Board considered all of the evidence presented, and conducted a full and fair hearing. At the conclusion of this hearing a final decision was made pursuant to South Carolina law.

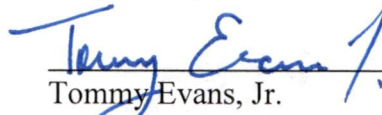
The ALC determined and Court of Appeals affirmed that there existed “uncontradicted evidence in the record to support the Board’s finding of four favorable votes and that number was the required number of favorable votes for parole.” The Petitioner argues that basing the ALC’s final decision on the evidence presented and not on any error of law is unlawful. The Petitioner is required to judge all of the facts presented and make a reasonable conclusion as to what occurred at the previous hearing. This decision cannot be reversed solely based on a question of fact. The Respondent is only allowed a hearing where the Board will consider all of the evidence presented. Then pursuant to *Cooper*, the ALC is only allowed to determine if the Board followed its criteria and Department policy. No evidence has been presented that Board failed in this measure. The Board and the Department followed procedures created by the Department for a *Barton* hearing. It is just an opinion of the ALC, which was affirmed by the Court of Appeals, that the evidence is truthful and reliable. The decision of the Board was reasonable and should have been upheld. Substantial evidence to support the administrative agency decision is not a mere scintilla of evidence, nor evidence viewed blindly from one side of the case but is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion the administrative agency reached. *Bentley v. Spartanburg County*, 398 S.C. 418, 730 S.E.2d 296 (2012).

CONCLUSION

It is clear the Respondent was given a fair hearing in which the Board was not convinced he received the four votes as he proclaimed. They decided not to ratify the decision of the previous Board, which was certainly within their right to do.

For these reasons the Petitioner respectfully submits this Court should: (1) grant this petition; (2) reverse the decision of the Court of Appeals; and (3) reverse the decision of the Administrative Law Court. If the Court grants this Petition for Certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,



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May 31, 2017

STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 05 2017

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III Administrative Law Judge
Case No. 15-ALJ-15-0046-AP

S.C. SUPREME COURT

Unpublished Opinion No.: 2017-UP-082
Submitted January 1, 2017-Filed February 15, 2017
Appellate Case Number 2016-000296

Kenneth Green, #116020,

RESPONDENT

v.

South Carolina Department of Probation, Parole and
Pardon Services

PETITIONER

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that this 31st day of May, 2017, I served the following documents by first class mail, postage prepaid as follows:

1. Petition for Writ of Certiorari; and
2. Certificate of Service;

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

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