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.: 2016-ALJ-15-0034-AP

Appellate Case No.: 2017-000663

DENNIS DAVIS, #288558.....APPELLANT

v.

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

INTIAL BRIEF OF RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

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

ATTORNEY FOR THE RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITES

CASES

STATUTES

STATEMENT OF ISSUE ON APPEAL

1. **Did the lower court err in affirming the decision of the Respondent denying the Appellant's parole eligibility due to his prior drug convictions?**

STATEMENT OF THE CASE

On March 8 and April 5 of 2013, the Appellant was caught in the possession of a quantity of marijuana. In both instances the Appellant was arrested and charged with the offenses of possession with intent to distribute marijuana. (PWID marijuana) Upon further investigation it was determined that the Appellant was previously convicted on two separate occasions for drug offenses. Upon this determination, the Appellant's offense was upgraded to a third offense.

On May 21, 2014, the Appellant appeared before the Honorable Edward G. Wellmaker for two counts of PWID Marijuana 3rd offense. (PWID marijuana 3rd) Upon the conclusion of this appearance the Court sentenced the Appellant to a one hundred and twenty-five month period of incarceration for each count. In 2010, the General Assembly passed the South Carolina Reduction of Recidivism Act, which went into effect in January 2011. This law allowed persons convicted of third drug offenses parole eligibility only if their prior convictions were for possession of a controlled substance. The Respondent conducted an investigation to make a determination of the Appellant's parole eligibility. The Respondent discovered that on October 25, 2002, the Appellant was convicted of Trafficking crack cocaine. Due to this previous conviction the Respondent determined that pursuant to South Carolina law he is not eligible for parole. On June 27, 2016, the Appellant was informed that due to his prior drug conviction he is not eligible for parole.

Upon receiving this correspondence the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argued that it was not the intention of the General Assembly for a person with a third drug offense to be denied parole eligibility. The Appellant further argued that the denial of parole due to the "no parole" classification is unlawful pursuant to the Bolin decision. The Respondent argued that the Appellant was convicted of a third drug offense, and his prior offenses were not solely for possession;

therefore, he is not eligible for parole. The Respondent further argued that the Appellant in the Bolin was convicted of a second drug offense, so Bolin does not apply.

On February 22, 2017, the Honorable Deborah Brooks Durden issued an order affirming the decision of the Respondent. Within this order the ALC determined that the Respondent's interpretation of the law was lawful and should be upheld. Upon receiving the ALC determination the Appellant filed a notice of appeal before the South Carolina Supreme Court. Per order of the Supreme Court dated March 21, 2017, the case was transferred to the Court of Appeals.

Within this appeal the Appellant argues that the ALC erred in their decision to affirm the decision of the Respondent. The Appellant is of the opinion that the statute allows him to become parole eligible just not eligible to receive a probationary sentence. The Appellant makes an attempt to compare this case to the Bolin decision. The Respondent argues that the decision of the ALC was correct. Due to the Appellant serving a conviction for a third drug offense and with prior drug offenses not being for possession, he is not eligible for parole. The Respondent will also argue that Bolin is not on point with the present case; it does not apply and should not be considered by this Court. The initial brief of the Respondent follows.

ARGUMENTS

1. **The ALC was correct in their determination that the Respondent did not err in deciding that the Appellant is not eligible for parole due to his prior drug convictions.**

The Appellant filed a notice of appeal before the ALC to decide on the validity of the determination of the Respondent in denying the Appellant's parole eligibility. The ALC has jurisdiction over this cause of action due to the decisions of the South Carolina Supreme Court in Al-Shabbaz v. State, 338 S.C. 334, 527 S.E.2d 724 (2000), and Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2002). The Supreme Court in each of these decisions gave the ALC the ability to review the Respondent when they decided that an

individual is not eligible for parole, which gives appellant jurisdiction to this court upon the final decision of the ALC.

In Al-Shabbaz, the South Carolina Supreme Court created a new avenue by which inmates could seek review of a final decision of a state agency in "non-collateral" matter related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately the Court of Appeals pursuant to the Administrative Procedures Act. Al-Shabbaz, at 376. In Al-Shabbaz, the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed; and, (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status." Id., at 369.

In Furtick, the Court noted that appealable final decisions by the Board arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The Court held that in order to determine whether an inmate's claim against the Department is entitled review by the ALC, it is first necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. Furtick, at 149. The Court decided that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. Id. The ALC had the ability to make this decision in an appellant capacity. They can only make a determination regarding if the Respondent followed the law in the denial of parole eligibility. In that capacity, the decision of the ALC was lawful. The fact the Respondent followed South Carolina law in the denial of the Appellant's parole eligibility.

The Appellant argues that the Respondent erred in making the determination that he is not eligible for parole due to his prior conviction for trafficking crack cocaine. The ALC was correct in affirming this decision. The South Carolina Code of Laws specifically states:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this item for a third or subsequent offense in which **all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d)**, may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

S.C. Code Ann. §44-53-370(b)(2)(2016)(emphasis added).

The Appellant argues that due to the last sentence of the statute he is eligible for parole. This is incorrect. Within the statute it clearly states that an inmate convicted of a third drug offense is eligible for parole only if their prior drug offenses were for possession. If the legislature wished for inmates convicted of a third or greater drug offense be allowed parole regardless of their prior record that condition would not be in place. That last sentence relates to individuals serving a third offense whose only priors are for possession. Those individuals are eligible for parole but not probation, this does not apply to the Appellant. It is clear by the wording of the statute, the General Assembly wished for an individual convicted of a third offense not be eligible for parole, unless their prior drug offenses are only for possession. This is the intention of the General Assembly and followed by the ALC. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996).

In reading the entire statute it is clear that the legislature wished all prisoners convicted of a first or second offense be allowed parole eligibility. The statute clearly states, "a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." S.C. Code Ann. §44-53-370(b)(2)(2016). If the Legislature wished for all individuals who have

committed prior drug offenses regardless of their severity parole eligibility the statute would have not limited parole eligibility for third offenders who priors were only for possession. The Appellant reads one sentence and expects the Court to only apply that sentence and no other portion of the statute to his case. That would be unlawful, as the entire statute must be applied including the portion that specifically denies the Appellant parole eligibility. Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801(1992).

The Legislature never intended for all individuals sentenced to a drug offense under this statute parole eligibility. The Appellant is of the opinion that this law was created to allow inmates easier access to the Parole Board, which is true. This law was created in order for there be a reduction of inmates, and to allow for evidence based practices to be applied in order to lower the amount of recidivism; however, there are limitations. The General Assembly wished for individuals with a first and second offense, to be allowed parole eligibility. They also wished third offenders to be allowed parole eligibility **only** when all the prior drug offenses were for possession. Because this does not apply to the Appellant he was lawfully denied parole eligibility, which was correctly upheld by the ALC.

It is clear that the intention of the General Assembly was to allow parole only for certain drug offenders. If an offender does not fit the criteria he cannot be eligible for parole. The Appellant only uses a single sentence to support his argument and totally ignores the entire statute which clearly denies him parole eligibility. The ALC was correct in considering the entire statute in making their decision in affirming the decision of the Respondent. A Court should consider not merely the language of the particular clause being construed, but the word and its meaning in

conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997). It is clearly the intent of the legislature that if an inmate does not fall under the criteria within this statute he should not be granted parole eligibility. The Appellant failed to fall under this criteria so he was denied parole eligibility pursuant to South Carolina law. This decision was lawfully made by the Respondent and properly upheld by the ALC, who followed the intent of the legislature. A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956).

The statute clearly states that parole is only afforded to a person convicted of a third or subsequent offense if their prior drug offenses were only for possession. That criteria would not have been included if the General Assembly wished all individuals regardless of the amount of prior drug offenses be allowed parole eligibility. If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no need to employ rule of statutory interpretation, and the court has no right to look for, or impose another meaning. Pachal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890, 892 (1995). The terms of the statute are clear; no individual with a third drug offense can be allowed to appear before the Parole Board unless all of their prior drug convictions are only for possession. The Appellant has a prior offense for trafficking crack cocaine so he is not eligible for parole. Since it was applied properly the decision of the ALC was correct and it should be affirmed. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002).

2. The Bolin decision does not apply to the present case so it was proper for the ALC not to consider it in the final decision.

Within his brief the Appellant mentions the South Carolina Court of Appeals decision of Bolin v. S.C. Dept. of Corrections, 425 S.C. 276, 781 S.E.2d 914 (2015). In Bolin this court decided:

> Defendant's convictions for second-offense conspiracy to manufacture methamphetamine were no longer no-parole offenses, for which defendant was required to serve 85% of the sentence before being eligible for parole, following effective date of Omnibus Crime Reduction and Sentencing Reform Act, even though the Act did not amend definition of the term "no parole offense" in statue describing types of offenses for which offender was not eligible for parole, where Act amended separate statutory provision to indicate that "notwithstanding any other provision of law," a person convicted and sentenced as first or second offender pursuant to that subsection was eligible for parole.

Bolin, at 276

The Court in Bolin decided that a second offense PWID or Distribution is paroleable, and not an 85% offense. This is due to the statute allowing an inmate sentenced to a second offense parole eligibility. The Appellant is currently serving a sentence for PWID marijuana 3rd, so Bolin does not apply.

The General Assembly created the Omnibus Crime Reduction and Sentencing Act of 2010. This law stated that notwithstanding any other provision of law a person sentenced to a first or second offense for possession with intent to distribute methamphetamine is eligible for parole; however, since this offense was a C-Felony it still fell within the "no parole offense" classification. In Bolin, the Court decided that the law changed, so the offense of the Appellant was no longer a "no parole offense." So inmates serving a sentence for these offenses are no longer subject to the eighty-five percent term of mandatory imprisonment.

The offense the Appellant is currently serving is classified as a C-Felony the law specifically states that any person sentenced to an A, B, or C felony is not allowed parole. The law

never changed allowing parole eligibility for PWID Marijuana 3rd. The Appellant is responsible for serving at least eighty-five percent before any release from incarceration. The statute states notwithstanding any other provision of law which means an earlier statute does not apply. *See,* Stone v. State, 313 S.C. 533, 443 S.E.2d 544 (1994)(were two statutes are in conflict the more recent and specific statue should prevail so as to repeal the earlier general statute.) The Appellant is of the opinion that this applies to his offense; however, it does not. This only applies to an individual who has committed first and second offenses, or a third offense only when the priors are only for possession, which does not apply to the Appellant. The Bolin decision was clear, the statute changed for first and second offenders so they are the only ones that are guaranteed parole eligibility. There are extra criteria that must be met for a person serving a third offense. The Appellant does not satisfy these criteria so he cannot be allowed parole eligibility. According to the statute the Appellant is not eligible for parole on a third offense unless their prior offenses are only for possession. That is not the case in this cause of action. The ALC did not right thing in affirming the decision of the Appellant, a decision that should be upheld by this Court.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests the final decision of the Administrative Law Court be affirmed.

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

Columbia, South Carolina
June 13, 2017

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.: 2016-ALJ-15-0034-AP

Appellate Case No.: 2017-000663

DENNIS DAVIS, #288558.....APPELLANT

v.

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

CERTIFICATE OF SERVICE

I, Dawn Nichols, Executive Assistant, hereby certify that I have served the within the *Initial Brief of Respondent and Designation of Matter,* dated June 14, 2017, on the Appellant this 14th day of June, 2017, by depositing a copy of same in the United States mail, postage paid, addressed to:

Dennis Davis, #288558
Turbeville Correctional Institution-TA-111
1578 Clarence E. Coker Highway 378
Turbeville, S.C. 29162

I further certify that all parties required by Rule 54 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

HENRY McMASTER
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.dppps.sc.gov/

June 14, 2017

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

RE: Dennis Davis v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original *Initial Brief of the Respondent and Designation of Matter,* along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures

cc: Dennis Davis

State of South Carolina
Department of Probation, Parole, and Pardon Services
2221 DEVINE STREET, SUITE 600, POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250

TJP

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