

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge
Court Case No. 17-ALJ-15-0007-AP

Appellate Case No. 2017-001904

BERNARD BAGLEY, #175851,.....APPELLANT

v.

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SC Court of Appeals

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

RESPONDENT'S INITIAL BRIEF

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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Parole Board considered information that was expunged from Bagley's criminal record in making its decision and thereby deviated from the statutory criteria?
2. Did the Parole Board used inaccurate information as a basis to deny Bagley parole?
3. Did the Parole Board use false information to deny Bagley parole?

STATEMENT OF THE CASE

On August 23, 1990, upon getting into an argument with his wife the day before, the Appellant discovered she resigned from her job; withdrew money from their bank account; and left with their daughter traveling to her mother's house in Eastover, South Carolina. Upon discovering this the Appellant traveled from Raleigh North Carolina to Eastover to confront her. Upon arrival he kicked in the front door of his mother-in-law home, and inquired about a possible affair. During the ensuing argument the Appellant shot his wife twice causing her death.

The Appellant was later indicted by the Richland County Grand Jury for the offense of murder. On April 12, 1991, he appeared before the Honorable Dan Laney to answer to this offense. At the conclusion of this appearance the Appellant was sentenced to a term of incarceration for the remainder of his natural life for the offense of murder. At the time he committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant made his initial appearance before the Parole Board on September 8, 2010. Upon the conclusion of this hearing the Board denied parole. Since this initial appearance the Appellant has appeared before the Board three additional times, each resulting in a denial of parole. His last appearance occurred on March 15, 2017. Parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; and, 3) a use of a deadly weapon in this or a previous offense.

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 was denied parole due to incorrect information; and the Board considered a conviction that was expunged. The Respondent in return argued that the Board did not consider incorrect information

nor an expunged conviction. The Respondent also argued that the Board considered the criteria found in statutory law and department policy; and the Appellant failed to provide proof that the Board failed to apply the mandatory criteria.

On August 15, 2017, the Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge issued his decision. Within his order Judge Anderson determined that the Appellant failed to prove the Board did not follow the criteria, or denied his parole due to an expunged offense. The ALC decided to affirm the decision of the Board in denying the Appellant an opportunity to be released on parole.

After receiving the order of the lower court 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 considered an expunged offense in the denial of parole; that the Board considered certain variables in violation of due process and equal protection; and his competency evaluation prior to his conviction in 1991 was a factor that influence the Board when they decided parole. The Respondent will argue that the lower Court was correct in their decision due to the fact the Appellant has failed to reveal any proof of any of these allegations. The Respondent will also argue that the Board had proved they considered the mandatory criteria found in statutory law and department policy as well as the mandatory risk assessment. The Respondent will also argue that his prior competency evaluation for his initial trial was never made an issue before the lower court. So it cannot be considered, nor is relevant to the case presented to the lower court. The brief of the Respondent supporting these arguments follows.

ARGUMENTS

1. The ALC was correct in determining that the Board followed the mandates in *Cooper* so the decision of the Parole Board was lawfully affirmed.

The Appellant argued that the Board was unlawful in considering an expunged record. He made these allegations due to the listing of an indictment number on the sentencing sheet of the murder conviction. The order of denial followed the decision of the South Carolina Supreme Court in *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). The ALC was proper in affirming the decision since it was a routine denial of parole. The Board provided proof that they followed the mandatory criteria prior to denial. So the ALC had no authority to remand the decision back to the Parole Board.

The General Assembly created criteria that must be applied to each parole consideration.

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 of the rigors of his 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(2016)

As well as the criteria found in South Carolina law. The Board applied criteria developed in Department policy pursuant to South Carolina law.¹ As part of the South Carolina Reduction of Recidivism 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 Law states:

¹ 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 a review of a prisoner's disciplinary and other records. S.C. Code Ann. §24-21-640(2016).

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)(2016)

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.

In *Cooper*, the Court decided that a finding of fact was included; however, the Parole Board neither, “offered no explanation nor indicated that it considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form.” *Id.*, at 500. The Supreme Court decided that if the Parole Board fails to consider and apply the statutory-related criteria, it has the effect of rendering an inmate parole ineligible which warrants review by the ALC. *Id.*, at 502.

In *Cooper*, the Supreme Court established what a future order of denial should consist of, in *Cooper* it 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 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.

In *Cooper*, the Supreme Court gave the ALC the very narrow ability to review the process conducted by the Parole Board. If it is shown that the Board followed the mandatory criteria, the ALC does not have any further ability to review the final decision. In the present case the order of

denial included language that revealed a findings of fact which were the reasons for denial; and conclusions of law which are the criteria, statutes, factors, and risk assessment considered prior to the final decision. The Supreme Court decided that if all of these things are revealed no further review by the ALC is necessary.² The Respondent revealed that all of the criteria was considered so this denial of parole was lawful and not reversible. 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 (2016).

The Appellant argued that the Board unlawfully used his prior record in the denial of parole. It is his opinion that the Board considered an expunged conviction in the denial of parole. The Appellant has failed to reveal any evidence to this, and this was rightfully not accepted by the ALC due to that reason.

2. The Appellant made egregious allegations that he has provided no proof so it should not be considered.

The Appellant alleges that the Board considered his expunged record; had a paternalistic and protective attitude toward women; and, did not wish to grant parole due to his age. It is his position that the Board did not wish for the Department of Veteran Affairs to be responsible for his well-being if released so they denied parole. These allegations are unproven, and unfounded so this Court should not take any of these allegations into consideration.

This Court has in the past placed the burden of proof on the Appellant in cases that question the decision of an Administrative body. 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

² The Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the 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, 684 S.E.2d 175 (2009).

files the 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 Appellant failed to present any evidence that any of these allegations are true. The Board's job is to use the mandatory criteria found in statute and department policy, as well as the risk assessment to determine if the Appellant is not a risk to the community if released. The evidence presented to the ALC clearly showed that the criteria was considered prior to the final decision. None of the allegations were ever proven by the Appellant so the ALC did not correct thing by not considering these allegations. The decision of the ALC was lawful and revealed no error of law, so it should be upheld by this Court.

The Appellant alleges that the Board violated his rights to due process and equal protection. It is his position that due to these unproven egregious allegations he was denied these Constitutional rights.

The Board never denied the Appellant the right to due process. In the United States Supreme Court case of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2594 (1972) the Court acknowledged that a person having his parole revoked does have minimal due process rights. In *Greenholtz v. Inmates of 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.³ However, the Appellant is allowed minimal due process rights when appearing before the Parole Board. He has a right to a hearing before an impartial Board, receive the decision in writing. The Appellant was allowed to appear before the Board, and thereby allowed to present evidence in

³ 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 normal life." 408 U.S. at 482, 92 S.Ct. at 2600. The inmates here on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison. *Greenholtz*, at 2105.

mitigation. The Board issued a final decision in writing which revealed a finding of fact and conclusion of law separately stated.⁴

The Appellant also alleges a denial of equal protection. The Appellant has provided no proof that he was treated any differently than any other inmate appearing before the Parole Board. He appeared before the identical board with the identical criteria considered as all other inmates. Since the Appellant was convicted of committing a classified violent crime pursuant to S.C. Code Ann. §16-1-60,⁵ he is obligated to receive two-thirds affirmative votes in order to be granted parole.⁶

There was no difference what has occurred during the Appellant hearing, and any other hearing. The Appellant appeared before the identical Board as all other inmates and the mandatory statutory and policy criteria, as well as the risk assessment was considered. The Board considered the same criteria as all other inmates. There exist no violation of equal protection. To establish an equal protection violation, a party must show that a similarly situated person received disparate treatment. *TNS Mills, Inc. v. South Carolina Department of Revenue*, 331 S.C. 611, 503 S.E.2d 171 (S.C. App. 1998) The Appellant has failed to reveal any evidence that his determination was considered differently than any other inmate. Since there exist no evidence of unfairness this does not raise to the standard to be considered a violation of equal protection.

⁴ A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. S.C. Code Ann. §1-23-350(2016).

⁵ For purposes of definition under South Carolina law, a violent crime includes the offenses of: murder (Section 16-3-10). S.C. Code Ann. §16-1-60(1991).

⁶At least two-thirds of the members of the board must authorize and sign orders authorizing parole for person convicted of a violent crime as defined in Section 16-1-60. S.C. Code Ann. §24-21-645(2016).

3. The Appellant failed to raise this allegation before the ALC so it should not be considered by this Court.

The Appellant argues that his competency evaluation on his original murder case was a factor in the decision of the Parole Board. He argues that his original conviction is unlawful in that he was incompetent during his trial in 1991. This is an argument that he is initially presenting before this Court and was never presented to the ALC, so it should not be considered.

The Appellant's initial brief before the ALC raised the issue of: 1) The Parole Board considered information that was expunged from his criminal record in making its decision and thereby deviated from the statutory criteria; 2) The Parole Board used inaccurate information as a basis to deny Bagley parole; and, 3) The Parole Board is using false information to deny Bagley parole. This matter was never addressed by the ALC, because it was never raised. Since it is being initially raised before this Court it should not be considered. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014).

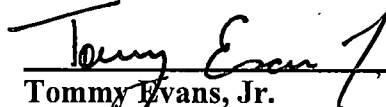
Even if it was raised prior to this appeal the ALC would not have any jurisdiction regarding this matter. The Appellant argues that his previous conviction was unlawful because he was not competent to stand trial. This is a matter that should have been addressed on appeal after his conviction in 1991. That matter goes beyond the jurisdiction of the Parole Board, or the ALC. The Parole Board cannot make decisions regarding the initial trial of an inmate, but only consider the actual conviction and the facts surrounding it. The ALC only has the ability to hear appeal regarding either the decision of the Department to deny parole eligibility, or if the Board followed the mandatory criteria. See, *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003); and, *Cooper v. S.C. Dept. of Probation, Parole and Pardon*

Services, 377 S.C. 489, 661 S.E.2d 106 (2008). This is a matter that should have been raised on appeal immediately after the conviction not over twenty years later. This is a matter that the Board cannot control nor can the ALC can rule upon. This matter was not presented to the lower court for a ruling and even if it was the ALC would not have the ability to rule. This Court should ignore this argument for it being not preserved or irrelevant.

CONCLUSION

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

Respectfully submitted,



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November 13, 2017

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IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court
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BERNARD BAGLEY, #175851,.....APPELLANT

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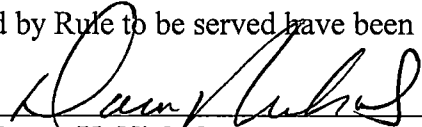
S.C. DEPARTMENT OF PROBATION, PAROLE
AND PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Initial Brief of Respondent and Designation of Matter, dated November 13, 2017, on Appellant
this 13th day of November, 2017, by depositing a copy of the same in the United States mail,
postage prepaid, addressed to:

Bernard Bagley, #175851
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, S.C. 29067

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



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November 13, 2017

The Honorable Jenny Kitchings
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RE: **Bernard Bagley v. SCDPPPS**

Dear Ms. Kitchings:

Please find enclosed the original Respondent's Initial Brief and Designation of Matter along with a certificate of Service in the above captioned case.

Thank you for your assistance in this matter.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel

TE:dn
Enclosures

cc: Bernard Bagley, 175851

State of South Carolina

Department of Probation, Parole, and Pardon Services

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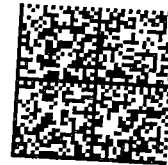
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