

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III Administrative Law Judge JUL 06 2018
Case No.: 17-ALJ-15-0031

SC Court of Appeals

Appellant Case No.: 2018-000656

PERRY DEVEAUX, #109601.....APPELLANT

v.

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

INITIAL BRIEF OF RESPONDENT

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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Administrative Law Court erred in denying Appellant's claim that the South Carolina Department of Probation, Parole and Pardon Services, operating through its Parole Board, has violated the Eighth Amendment of the Federal Constitution, Article 1 §15 of the South Carolina State Constitution, and the South Carolina parole statute when it was has functionally converted Perry Deveaux's life sentence with parole eligibility after 10 years to a de facto life sentence by once again denying him parole after 25 years of such denials and when Mr. Deveaux has an exemplary institutional record.**

STATEMENT OF THE CASE

On November 28, 1975, a body was found in a wooded area in Mt. Pleasant South Carolina. It was determined that the victim died from stab wounds to the lower abdomen. During the investigation the authorities were informed that the Appellant was seen near the scene around the time the incident occurred. The Appellant was questioned by the police, and informed them that he went to Gold's Grocery Store to purchase a bottle of beer. The officers observed scratches from branches and vines consistent with the wooded area where the victim was murdered.

Officers went to Gold's Grocery and confirmed that the Appellant did purchase the bottle of beer. A bottle was found at the scene near the body of the victim. A confidential informant informed the authorities of the Appellant's involvement in this murder. Upon being advised of his *Miranda* rights the Appellant made a statement to police containing information only the killer would know. So on June 9, 1981 the Appellant was arrested and charged with the offense of murder.

On February 24, 1982, the Appellant appeared before the Honorable Richard E. Fields for the offense of murder. Upon the conclusion of this appearance, the Court sentenced the Appellant to a term of incarceration for the remainder of his natural life. At the time the Appellant committed this offense, South Carolina law allowed an inmate serving a life sentence for murder parole eligibility upon the service of ten years.

The Appellant made his initial appearance before the Parole Board on December 5, 1990. Upon the conclusion of this hearing the Board decided to deny parole. Since this initial denial the Appellant has appeared before the Board an additional twenty-one times, each resulting in a denial of parole. His last appearance occurred on October 18, 2017. At the conclusion of this hearing 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; 3) a use of a deadly weapon in this or a previous offense; and, 4) a failure to successfully complete a community supervision program.¹

Upon this denial the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argued that the Board violated the Eighth Amendment of the United States Constitution, and Article I §15 of the South Carolina Constitution. It is his position that since he was denied some twenty-one times, the Board has essentially given him a de facto life sentence without the possibility of parole.

The Respondent argued that the Appellant only provided mitigating evidence that was already considered by the Parole Board. The mitigating evidence presented are questions of fact which the ALC cannot determine. The Respondent also argued that they have shown that all of the mandatory criteria was applied prior to this decision.

The ALC case was assigned to the Honorable Ralph King Anderson, II Chief Administrative Law Court Judge. Upon the filing of briefs of both sides, Judge Anderson ruled that the Board considered all proper procedures prior to the denial of parole. The Board revealed that all of the proper criteria was followed as well as the risk assessment. The Appellant is in the exact same position as he was in when he was sentenced. The Appellant failed to reveal that the Board did not follow the statutory requirement. The Appellant also did not prove the Respondent violated any Constitutional prohibitions cited in his brief. So he affirmed the Board's decision.

The Appellant now brings this cause of action before the South Carolina Court of Appeals. Within this appeal the Appellant argues that the constant denial of parole violates the Eighth Amendment. The Respondent will reveal to this Court that, the Appellant was allowed to appear

¹ As stated before the lower court this reason was placed in error. There was no evidence that the Appellant failed to complete a community supervision program. However, there were other reasons for denial so there existed no prejudice.

before the Board and all of the mandatory criteria was considered. The Respondent will also argue that the Appellant revealed no substantial evidence that reveals his denial can be considered cruel and unusual punishment.

The Appellant argues that being constantly denied parole violates the eighth amendment. The Appellant is eligible for parole and he has appeared before the Board numerous times. The Board has the ability to deny parole, a decision that cannot be reversed by the Court. The Appellant also does not have the right to parole, just a hearing which is being provided. The brief of the Respondent supporting these arguments follows.

ARGUMENT

1. The Respondent followed the mandates proscribed by the South Carolina Supreme Court in the *Cooper* decision, so the denial of parole should be upheld.

The ALC's jurisdiction to review a final decision of the Parole Board is derived from the decisions of the South Carolina Supreme Court in *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000); *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002); and *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). In *Al-Shabbaz*, the South Carolina Supreme Court created a new avenue by which an inmate could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction or sentence. The Court held that an inmate could appeal those final agency decisions to the ALC and ultimately to 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 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 the appealable final decision arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The review by the ALC under the procedures set forth in *Al-Shabbaz*, is necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. In *Furtick* the Supreme Court ultimately determined that, “the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process.” *Id.* (Emphasis in original)

A final decision shall include a findings of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350(2017). It is the Respondent’s position that the order of denial followed the mandates found in the above referenced statute. In *Cooper*, the Supreme Court decided that a finding of fact was included; however, the court determined that the Parole Board neither, “offered an 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 court established what future Board orders should consist of, *Cooper* 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 in its parole form. If the Board complies with the 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 the case at bar, the order of denial did conform with the *Cooper* decision. The overall reasons provided as to why parole was denied were a findings of fact. The statutory and department criteria, as well as the risk assessment are considered the conclusions of law. The order and criteria delivered to the Appellant clearly revealed that all the relevant factors were considered prior to the denial of parole. The reasons given for denial were relevant, reasonable, and abided to the mandatory criteria.

In *Cooper*, the Court determined that the order of denial presented to the Appellant was unlawful. The Court decided that the order failed to present any conclusions of law. The Court ruled that for the Board to prove that proper procedures were followed it must not only state a findings of fact, but the statute, policy and risk assessment considered in reaching this conclusion. Within the present case the Respondent has proven that all of these mandatory criteria was considered prior to the final decision. The reasons for denial are considered questions of fact which can only be determined by the Board. The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(5)(2017). It is clear in the order of denial the Board considered all of the mandatory criteria and placed their reasons for denial in writing. This is all that must be revealed for the ALC to affirm the decision of the Parole Board. The decision by the ALC was proper and should not be subject to reversal. The order delivered to the Appellant was in writing and clearly stated that the criteria within the statute, and mandatory policy were considered prior to the denial of parole. According to the Supreme Court if this is shown no further action by the ALC is necessary.²

² The Parole Board 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, 685 S.E.2d 175 (2009).

2. The Appellant is not being given a de facto life sentence without the possibility of parole.

The Appellant argues that the continued denial of parole makes this essentially a sentence of life without the possibility of parole in violation of the Constitution. The Appellant argues that constant denial of parole violates the Eighth Amendment of the United States Constitution, and Article 1 §15 of the South Carolina Constitution. The Eighth Amendment specifically states, "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The South Carolina Constitution specifically states:

All persons shall be, before conviction bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving the weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.

S.C Const. art. I §15

The Appellant argues that the denial of parole on excessive opportunities is giving him a life without parole sentence which violates the Eighth Amendment. The South Carolina Supreme Court reviews three factors in assessing the proportionality of the sentence for Eighth Amendment purposes: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals; (3) sentences for the same crime in other jurisdictions. *State v. McKnight*, 352 S.C. 635, 576 S.E.2d 168 (2003).

The Appellant committed the offense of murder. At the time he committed this offense all individuals in South Carolina who committed the offense of murder were sentenced to life. The Appellant took another person's life. So being given a life sentence should not be considered harsh

considering the gravity of the offense he committed. This is the sentence given to other individuals who have committed murder not only in South Carolina but most other states.

At the time he committed this offense, South Carolina law only allowed a life sentence with the possibility of parole upon the service of ten years. So the Appellant was given a life sentence with the possibility of being released on parole upon the service of ten years incarceration. There exists no guarantee of being released on parole. He can actually serve the remainder of his life in prison. This is because there is no constitutional or inherent right of a convicted person to be conditionally released before expiration of a valid sentence. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979). By applying these factors, the lower court was correct in not accepting the Appellant's argument and affirming the decision of the Parole Board.

3. The Appellant has not provided any substantial evidence revealing that his parole was denied unlawfully.

Prior to being released on parole there are mandatory criteria that is applied to each inmate appearing before the Parole Board. The South Carolina Code of Laws specifically states:

The Board must carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner maybe 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 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(2017)

One of the criteria the Board must review is the record of the inmate prior to arrest. This must be done due to the fact the crime committed reveals his character, and potential dangerousness. The Appellant raised all of the mitigating evidence placed in his brief before the Parole Board. The

Board felt that the violence of the previous offense overrode his mitigating evidence, so they decided to deny parole. This denial was done lawfully as correctly determined by the lower court.

The ALC was correct in affirming the decision of the Parole Board because sufficient substantial evidence was not presented that reveals an unlawful denial of parole. Substantial evidence must exist before the ALC can make a determination about a cause of action against an agency. The findings of the 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). Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). The Appellant was denied parole due to the nature and seriousness of the offense of murder; the use of a knife in committing this offense; and, the amount of violence in the commission of this offense. Each reason is valid and is covered in the mandatory criteria. The lower court found it reasonable for the Board to deny parole due to these reasons. The evidence presented by the Appellant was insufficient as to provide substantial evidence to support his argument. The ALC made a lawful decision that should be upheld by this court.

The Appellant argues that he presented sufficient mitigating evidence to be granted parole, and to deny him parole is essentially changing the sentence to life without parole. The Board is the only entity that can grant parole. The Appellant is only allowed parole **eligibility**. There exists no guarantee to parole. This is because parole is a privilege not a right. *Sullivan v. S.C. Dept. of Corrections*, 355 S.C. 437, 586 S.E.2d 124 (2004). There are many persons currently on parole that were previously convicted of murder. Once the Board determines that the mitigating evidence overrides the crime committed, the Appellant could be granted parole. Only the Board can order

an inmate's release on parole. The ALC does not have the ability to reverse the decision of the Parole Board. The ability to grant parole only belongs to the Parole Board and the decision cannot be reversed by the courts. An Administrative Law Judge shall not hear an appeal from an inmate in custody of the Department of Corrections involving an appeal 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)(2017). 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 Pardons. *Brown v. State*, 306 S.C. 381, 412 S.E.2d 399 (1991). Section 24-21-640 of the South Carolina Code of Laws specifically provides for the Board to consider the complete record of the prisoner and delegates to the Board the responsibility of determining if and when a prisoner meets these prerequisites of parole eligibility. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1989). The law specifically states, "no such prisoner may be paroled until it appears to the **satisfaction of the Board.**" S.C. Code Ann. §24-21-640(2017)(Emphasis added). It is clear the General Assembly gave only the Board the authority to grant or deny parole. So this must be followed by the Court. 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, 91, S.E.2d 548 (1956). The General Assembly wished only the Parole Board to make the determination regarding parole. The Court does not have the authority to make this decision or reverse a prior decision of the Board regarding the denial of parole.

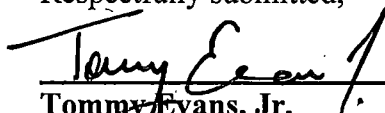
The Appellant provided mitigating evidence that this court cannot consider. The ALC was correct in reviewing the evidence and deciding that the policy was followed and the denial of parole was lawful. All of the mitigating evidence are questions of fact that cannot be decided by the ALC. The Appellant has not revealed any violation of the Constitution. The Respondent has the authority to deny parole upon the consideration of the mandatory criteria. There is no error of

law since it was revealed in the order of denial that a finding of fact and conclusion of law exist. Since no error of law was ever provided to the lower court, the ALC rightfully affirmed the decision of the Parole Board.

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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Columbia, South Carolina
July 3, 2018

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Appeal from the Administrative Law Court
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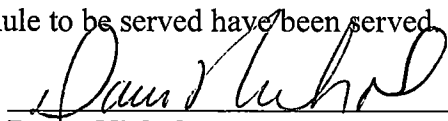
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter, on Appellant this 3rd day of July, 2018, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Elizabeth Franklin-Best, Esquire
900 Elmwood Ave, Suite 200
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I further certify that all parties required by Rule to be served have been served



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July 3, 2018

The Honorable Jenny Kitchings
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SC Court of Appeals

Re: Perry Deveaux v SCDPPPS

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter, along with proof of service in the above referenced case.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel
TE:dn

Enclosures

cc: Elizabeth Franklin-Best, Esquire

State of South Carolina

Department of Probation, Parole, and Pardon Services

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