

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Court Judge
Court Case No. 17-ALJ-15-0023-AP

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SC Court of Appeals

Appellate Case No. 2018-000112

Rodney Mollins, #210264, Appellant,

v.

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

RESPONDENT'S FINAL BRIEF

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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Was the Appellant permanently denied parole eligibility due to the Parole Board consideration of factors that will never change?
2. Was the Appellant's Due Process rights violated due to the parole hearing only having six members of the Parole Board present at his parole hearing?
3. Was the Appellant unconstitutionally denied parole when the Board failed to consider the fact that the Appellant was a juvenile at the time he committed his offense?

STATEMENT OF THE CASE

On September 4, 1992, the Appellant along with his three co-defendants drove up to the victims armed with handguns. Once they were out of the vehicle they held the victims at gunpoint and demanded items. They then fired shots killing one victim and wounding another. After an investigation by law enforcement, the Appellant and his three co-defendants were arrested and charged with the offenses of murder, assault and battery with intent to kill (ABIK), armed robbery, and criminal conspiracy.

On March 21, 1994, the Appellant appeared before the Honorable Julius Baggett for each offense. Upon the conclusion of this appearance the Appellant received a sentence of incarceration for the remainder of his natural life for the offense of murder, twenty-five years for armed robbery, twenty years for ABIK, and five years for criminal conspiracy.¹ At the time the Appellant 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 Board on February 6, 2013. Upon the conclusion of that hearing the Board decided to deny parole. Since this initial hearing the Appellant has appeared before the Board two additional times, each resulting in a denial of parole. His most recent appearance occurred on May 24, 2017. At the conclusion of that hearing the Board denied parole due to: 1) the nature and seriousness of the current offense; and, 2) a use of a deadly weapon in this or a previous offense. (R.p. 4).

Upon being informed of his denial of parole, the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within his appeal, the Appellant alleged that the Board used factors that would never change thereby denying his liberty interest. He also argued that he was

¹ The Appellant completed his sentence for armed robbery on June 24, 2007, for ABIK on August 21, 2004, and criminal conspiracy on October 21, 1995.

denied due process because there were only six members present at his hearing; and, the Board denied him a meaningful opportunity to participate in parole when they failed to consider the fact he was a juvenile at the time the crime was committed.

The Respondent argued that the facts of the case is part of the mandatory criteria which the Board must consider pursuant to South Carolina law, and Board policy criteria. The Respondent also argued that six members being present constitutes a quorum, thereby making the hearing lawful; and, the age of the Appellant at the time he committed the offense was considered by the Board prior to their decision.

After the submission of briefs by both parties, Administrative Law Court Judge S. Phillip Lenski issued an order affirming the decision of the Board. (R.p.1-p.6). Upon being notified of the decision of the ALC, the Appellant filed a notice of appeal before this Court. Within this appeal the Appellant argues that the ALC erred in affirming the decision of the Parole Board. He argues that he was wrongfully denied parole due to the Board using his prior offense as a reason for denial. Since these factors will never change, the Appellant's position is that he is essentially permanently being denied an opportunity to be released on parole. He further argues that only six members of the Board being present at his hearing denies him due process. It is also his belief that the Board failed to consider the fact he was a juvenile at the time he committed his offense, which is a denial of his constitutional rights.

The Respondent argues that the ALC was correct in affirming the decision of the Parole Board. The order of denial revealed that the mandatory criteria and risk assessment was considered. The Respondent will further argue that six members were present at the Appellant's hearing which constitutes a quorum. There was a vote count of 5 to 1 for denial, so A seventh member being

present would have made no difference. There exists no prejudice, so there exists no denial of due process. The Respondent's brief supporting these arguments follows.

ARGUMENTS

1. The Respondent followed the mandates proscribed by the South Carolina Supreme Court in the *Cooper* decision, so this decision should be affirmed.

It is the Respondent's position, that this denial of parole and the order delivered to the Appellant followed South Carolina law. The decision given to the Appellant informing him of his denial of parole was in writing, which included a finding of fact and conclusion of law separately stated.² The order of denial also applied the mandates 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 ALC was correct in deciding that pursuant to *Cooper*, if the Board has shown that it considered all of the mandatory criteria and the risk assessment tool they have limited ability to further review the Board's decision.

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 Parole Board orders should consist of, *Cooper* specifically states:

² 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 a findings of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350(2016).

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 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.

Since the *Cooper* decision, the General Assembly added an additional requirement that the Department create and consider a risk assessment prior to any parole decision.³ Since this mandatory element was added, each inmate prior to appearing before the Board must have a Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment completed. The results must be provided to the Parole Board prior to their decision. According to the final order this was also listed as one of the criteria considered prior to the final decision.

According to South Carolina law there is also mandatory criteria that must be created by the Department and must be considered prior to the final decision. (R.p.53). There are fifteen criteria created by the Department that encompasses the criteria found in South Carolina statutory law.⁴

According to South Carolina law the General Assembly required the Board to consider the statutory criteria found in Section 24-21-640; Department created criteria; and the risk and needs assessment prior to any parole decision.

³ 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 contribute 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).

⁴ 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. 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(2016).

It is clear by the order of denial the Board considered all of the mandatory criteria and placed their reasons for denial in writing. These reasons would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24-21-640 and its own criteria. *Cooper*, at 112 n.5. The order delivered to the Appellant clearly states that the criteria within the mandatory criteria found in the statute, mandatory policy, and risk assessment were considered prior to the denial of parole. According to the Supreme Court, if this is shown no further action by the ALC was necessary.⁵

Within his brief the Appellant argues that due to the Board considering the facts of his crime which will never change, essentially permanently denying him parole. This is not true; there are many people who were once convicted of murder that are currently on parole. That is due to the fact that the actual crime itself is only one factor of many the Board considers prior to making their final decision. 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 may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that, by his conduct he has merited a lessening 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 (2017)

It is clear in the above referenced statute the record of the prisoner before imprisonment must be taken into consideration. That is due to the fact the offense committed will reveal any possible future dangerousness. However, there are other factors the Board must consider. If the Board believes the mitigating evidence outweighs the offense he would be released on parole. The

⁵ 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).

Appellant cannot claim he is being permanently denied parole when he is receiving parole hearings biannually.

Due to the Board following the law pursuant to *Cooper*, this must be considered a routine denial of parole which gave the ALC limited ability to review. The ALC made the proper decision in affirming the decision made by the Parole Board. A decision that should be affirmed by this Court.

2. The Appellant was not denied due process due to the fact only six Board members were present at his hearing.

The Appellant argues that he was denied due process because only six members of the seven member Parole Board was present at his hearing.⁶ There was no denial of due process in the Appellant appearing before six members of the Parole Board. In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. *Barton v. S.C. Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 415, 745 S.E.2d, 110, 121 (2013), quoting, *Garris v. Governing Bd. of S.C. Reins. Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998). There were six of the seven members present so there was a quorum present, they were lawfully enough members present to conduct business.

The Appellant was never denied due process. He was allowed to appear before the board and present any mitigating evidence. He was also notified of his denial in writing where the findings of fact and conclusions of law was separately stated. The fact he only appeared before six of the seven member board did not deny him any due process rights.

⁶ The Board of Probation, Parole and Pardon Services is composed of seven members. The terms of office of the members are for six years. Each of the seven members must be appointed from each of the congressional districts. S.C. Code Ann. §24-21-10(B)(2012)

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. However, in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100 (1979) the Court decided that there exist a distinction between a person currently on parole and a person seeking parole.⁷ The Appellant was only entitled a hearing before an impartial Board where a quorum is present. He was allowed to present any mitigation evidence and was notified in writing, what was considered, and why his parole was denied. Since all of this was made available there was no denial of due process.

According to the final denial of parole order, he was denied by a final vote count of five for rejection and only one for parole. So the Appellant has revealed no prejudice in only have six members of the board being present. According to South Carolina law existing at the time he committed the offense, at least two-thirds of the members of the board must authorize and sign orders authorizing parole for a person convicted of a violent crime as defined in Section 16-1-60. S.C. Code Ann. §24-21-645(1986). The Appellant was convicted of murder which is a classified violent offense pursuant to Section 16-1-60 of the South Carolina Code of Laws.⁸ So pursuant to South Carolina law the Appellant needed at least five affirmative votes in order to be released on parole. So even if a seventh member was present and voted in his favor he would have still been denied parole. Since he cannot reveal any prejudice the decision of the board should be affirmed. To warrant reversal the Appellant must show both error of the ruling and resulting prejudice.

Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (S.C. App. 2002)

⁷ 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 the necessary restraints that inhere in a prison. *Greenholtz*, at 2015.

⁸ For purposes of definition under South Carolina law, a violent crime includes the offenses: murder (Section 16-3-10) S.C. Code Ann. §16-1-60(1986).

3. The Board did consider the Appellant's age at the time he committed the offense as part of the mandatory criteria.

The Appellant was seventeen years of age when he committed this offense. He argues that the Board failed to consider this fact prior to their final decision to deny parole. However, the circumstances surrounding the offense is always considered prior to making the final decision. The General Assembly created mandatory criteria that must be considered by the Board for each inmate appearing before them requesting to be released on parole. 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 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).

The record of the prisoner before, during, and after imprisonment must be considered. The General Assembly has also made it mandatory that the Board 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 created fifteen criteria that encompasses all of the statutory criteria listed above. The Appellant was given a copy of this criteria prior to his hearing. These criteria consist of the following:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;

3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal conduct;
9. The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse enrolling in academic and vocational education courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow him/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;
15. Other factors considered relevant in a particular case by the Board.

(R.p.53).

Within his order the ALC determined that the Board considering the age of the Appellant at the time the offense occurred has merit; however, he believed that this factor considered does not include this issue. The Board ruled for the Respondent due to the fact there exists no United States nor South Carolina court decisions that requires the Board to consider the age of the inmate when the crime has occurred. The Respondent argues that there does exist criteria requiring the Board to consider the age of the inmate. One of the above stated fifteen criteria states that the Board will consider is, "The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it." One of the circumstances surrounding the offense is the inmate's age at the time the offense was committed. A review must be done for juveniles to determine future dangerousness due to the immaturity of a juvenile could change through adulthood. This is also considered by the Board. Another is the fifteen criteria is, "The inmate's adjustment while in confinement including his/her progress in counseling; therapy, and other similar programs designed to encourage the inmate to improve himself/herself." So the age of the Appellant was considered prior to denial.

Within his brief the Appellant compared this case to the United Supreme Court case of *Miller v. Alabama*, 132 S.Ct. 2455 (2012); and the South Carolina Supreme Court case of *Aiken v. Byers*, 410 S.C. 534, 765 S.E.2d 572 (2014). These decisions were relating to minors being subjected to life sentences without the possibility of parole. This is not the situation regarding the Appellant in the present case. The Appellant does have an opportunity to be released if granted parole. In both *Aiken*, and *Miller*, the Court decided that a life sentence for a juvenile is only constitutional if that, before a life sentence is imposed, the offender received an individualized hearing where the mitigating hallmark features of youth are fully explored. *Aiken*, S.C. at 545,

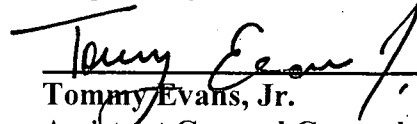
S.E.2d at 578. With these decisions a life sentence is constitutional as long as a hearing is held where the youth of the offender at the time the crime is committed is considered. This is what is given to the Appellant in this matter during his parole hearing. Since the Appellant in the present case has an opportunity to have his immaturity at the time of the offense considered before an impartial Parole Board with an opportunity of a possible release from incarceration, the *Miller* and *Aiken* decisions do not apply. The Appellant was not denied any Eighth Amendment rights in the denial of parole.

Since the Appellant has failed to produce any evidence that his age at the time of the offense was not considered, it must be presumed by this Court that it was. In the absence of any proof to the contrary, public officers are presumed to have properly discharged the duties of their offices and to have faithfully performed his duties with which they are charged. *S.C. Nat'l Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115-116, 127 S.E.2d 199, 202 (1962).

CONCLUSION

The Respondent respectfully request this Honorable Court uphold the decision of the ALC affirming the decision of the denial of parole.

Respectfully submitted,



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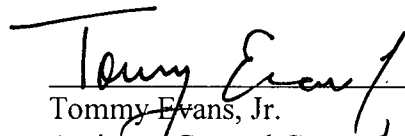
RODNEY MOLLINS, #210264.....APPELLANT

v.

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

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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Assistant General Counsel

April 30, 2018