

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

Darius Gould # 189007

Appellant.

v.

South Carolina Department of Corrections

Respondent

Appellate Case No. 2018-001903
APPELLANT'S BRIEF



Darius M. Gould
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11/16/2018
Date

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FACTS PROCEDURAL HISTORY

On May 25 2016 Petitioner was arrested for Trafficking in cocaine 28grams or more but less than 100grams 1st offense 44-53-370 (e)(2)(b)(1) , weapons possession 1st offense 16-23-0030; 16-23-0050 (A) distribution of cocaine base 1st offense 44-53-375(b)(1). Petitioner was sentenced on June 22, 2017 in General Sessions Court to seven 7 years for distribution of cocaine base seven 7 for Trafficking 1st offense, seven 7 years for possession of cocaine and five 5 years for weapons possession. All sentences to run concurrent. After being committed to the South Carolina Department of Corrections petitioner found out that his sentence for Trafficking in cocaine 1st offense 28 to 100grams 44-53-370 (e)(2)(b)(1) was a no parole offense under 24-13-100 and as a result petitioner's sentence was now a mandatory sentence under 24-13-150 and petitioner was now required to serve 85% of a mandatory seven 7 year sentence without receiving any good time credits or work credits. Petitioner was also informed that along with not being eligible for parole he would not be eligible for work release or furlough. Petitioner submitted an inmate request to classification on November 28, 2017, with the request returned on November 30, 2017, with negative results on request for help on being re-classified. Petitioner filed Step-One inmate grievance on December 22, 2017. It was returned on March

5, 2018 with negative results. Petitioner then submitted a Step-Two Grievance March 7, 2018, which was also returned affirming Department of Correction decision April 26, 2018. Petitioner then filed for an appeal on April 27, 2018, with the Administrative Law Court. Petitioner was assigned to Judge Lenski case number 18C0192, Docket # 18-ALJ-04-0192-AP. After both sides submitted briefs The Administrative Law Court "ALC" affirmed the final decision of the agency on September 17, 2018. Petitioner then filed Notice of Appeal to the Appeals Appellate Court on October 18, 2018.

Issue on Appeal

South Carolina Department of Corrections failure to construe controlling criminal statute S.C. Code Ann. 44-53-370 (e) (2) (b) (1) as a whole and their failure to construe S.C. Code Ann. 44-53-370 (e) statutory sentencing scheme for Trafficking as a whole is an error of law. South Carolina Department of Corrections also fails to apply later/recently amended general parole statutes is an error of law. These errors leads to erroneous applications of S.C. Code Ann. 24-13-100 and 24-13-150. These erroneous applications are in violation of statutory and constitutional provisions by erroneously enhancing S.C. Code Ann. 44-53-370 (e) (2) (b) (1) by requiring petitioner to serve 85% of his sentence through the "no-parole" classification. Also, the Department of Corrections implicitly repeals in parts S.C. Code Ann. 44-53-370(e) legislative sentencing scheme.

Did the Administrative Law Court "ALC" err in concluding that inmate must serve at least 85% of his sentence before he is eligible for early release, discharge or community supervision?

Standard of Review

Section 1-23-610 (B) of the South Carolina Code (Supp. 2018) sets forth the standard of review when the Appeals Court is setting in review of a decision by the "ALC" on an appeal from an administrative agency. Specifically section 1-23-610 (B) allows this court to reverse or modify the decision if the substantive rights of petitioner have been prejudiced because the findings conclusions or decision is in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or clearly unwarranted exercise of discretion. Here the sole issue on review involves a question of statutory interpretation, which is a question of law subject to de novo review. *Barton v. South Carolina Dept. of Probation, Parole and Pardon Services*, 404 S.C. 395, 414 745 S.E. 2d 110, 120 (2013).

Further, while the interpretation of a statute by the agency charged with its administration will be accorded the most respectful consideration an agency's interpretation affords no basis for the perpetuation of a patently erroneous application of the statute. *State v. Sweat*, 386 S.C. 339, 351, 688 S.E. 2d 569, 575-76 (2010) (quotation marks omitted)

Validity of Sentence

Petitioner concedes that sentence of seven (7) years for being convicted for S.C. Code Ann. 44-53-370(e)(2)(b)(1) is a valid sentence. Petitioner is not arguing validity of sentence, only the South Carolina Department of Corrections classification of sentence.

Argument

This court should reverse the Administrative Law Court's "ALC" decision because the South Carolina Department of Corrections does not have the general authority, statutory or constitutional authority to apply this classification to petitioner's first offense Trafficking 28g but less than 100g.

Petitioner contends that the eighty-five 85% percent requirement of section 24-13-150 does not apply to Appellant's first offense Trafficking 28g but less than 100g June 22, 2017 conviction because specific law contends that the only way that 44-53-370 (e) (2) (b) (1) can be classified as mandatory and ineligible for parole is if petitioner was to receive a twenty-five 25 year sentence. Petitioner also contends that based on amended provisions of the 2010 Act No. 237 ; 2010 Act No. 151 ; 2012 Act No. 255 and 2010 Act No. 273 legislature intended for certain Trafficking offense to be parole eligible when all parole statutes are construed to harmonize with one another.

§ 44-53-370 (e) (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in section 44-53-210 (b) (4), is guilty of a felony which is known as Trafficking in cocaine and upon conviction must be punished as follows if the quantity involved is :

(b) twenty-eight (28) grams or more but less than one hundred (100) grams :

(1) for a first offense a term of imprisonment of not less than seven years no more than twenty-five years no part of which may be suspended nor probation granted, and a fine of

fifty thousand dollars;

(3) for a third or subsequent offense a mandatory minimum term of imprisonment of not less than twenty-five years and not more than thirty years no part of which may be suspended nor probation granted and a fine of fifty thousand dollars.

44-53-370(e) Parole eligibility paragraph

A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years or a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release, as provided in section 24-13-610, or supervised furlough as provided in section 24-13-710

South Carolina Department of Corrections argues that this language does not apply to petitioner's sentence. The Department chooses to read the controlling criminal statute in isolation. Construing only parts (b)(1) of this specific statute. Then applying 24-13-100 "no-parole" classification to 44-53-370 (e) (2) (b) (1), implicitly repealing the specific nature of 44-53-370 (e) (2) (b) (1) and legislative statutory sentencing scheme for Trafficking. Therefore allowing the Department of Corrections to apply 24-13-150's eighty five (85%) percent to petitioner's sentence, making him ineligible for early release, discharge or community supervision.

We know that penal statutes are to be construed strictly. *Sparks v. Palmetto Hardwood Inc.* (2013) 406 S.C. 124, 750 S.E. 2d 61. The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons; however if the agency's interpretation conflicts with the statute's

plain language, it must be rejected. (emphasis added) Statutes of a specific nature are not to be considered as repealed in whole or in part by a later general statute unless there is a direct reference to the former statute or the intent of the legislature to do so is explicitly implied therein. (emphasis added.)

Strickland v. State, 276 S.C. 17, 19. 274 S.E. 2d 430, 432 (1981)

Where the terms of the statute are clear, The court must apply those terms according to their literal meaning. *Paschal v. State Electric Comm'n*, 317 S.C. 434, 436. 454 S.E. 2d 890, 892 (1995). An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of the statute.

Berkebile v. Outen, 311 S.C. 50, 426 S.E. 2d 760 (1993) Petitioner is sentenced to seven (7) years under the provisions of 44-53-370 (e) (2) (b) (1). The maxim of statutory construction that to express or include one thing implies the exclusion of another, or of the alternative should be used to accomplish legislative intent not defeat it. *State v. Leopard* (S.C. App 2002) 349 S.C. 467, 563 S.E. 2d 342.

The fact that the unenumerated paragraph only excludes twenty-five year sentences from being eligible for parole implies that all sentences under twenty-five years for the offense of Trafficking is considered parole eligible. The rule makes it clear that any time that a statute enumerates an exclusion from its operation that it implies that the statute should apply to all cases not excluded. *Hodges v. Rainey* 341 S.C. at 86, 533 S.E. 2d

582. In *Kerr v. State*, 345 S.C. 183, 547 S.E. 2d 494 (S.C. 2001) the court dealt with a similar situation whereas *Kerr's* parole was restored after the court construed that at the time his mandatory twenty-five year sentence was not included in the unenumerated paragraph, and that made *Kerr* parole eligible. Similar to *Kerr*, petitioner is sentenced to seven years and not one of the twenty-five nor more than thirty years that are mandatory in nature make him parole eligible.

South Carolina Department of Corrections is inconsistent with the Court's previous rulings in a number of similar situations. In the case of *State v. Taub*, 519 S.E. 2d 797 (S.C. App. 1999) the court was provided with the opportunity to construe the provisions of S.C. Code Ann. 44-53-370(e). In *Taub*, the court construed the statutory provisions to determine whether S.C. Code Ann. 24-21-410, a later enacted statutory provision allowed for the courts to suspend *Taub's* sentence and grant probation even though the provisions of S.C. Code Ann. 44-53-370(e) prevented the sentence from being suspended and having probation granted. In determination the court established that the provisions of S.C. Code Ann. 44-53-370(e) preventing the sentence from being suspended and having probation granted represented the more specific statute when it comes to *Taub's* sentence and determined that the later general statute giving the courts the authority to suspend the sentence in a criminal offense could not prevail over the more specific Trafficking statute.

Eventhough the issue in *Taub* was concerning whether the sentence could be suspended or not, the courts also addressed subsection (e) of S.C. Code Ann. 44-53-370 when it came to parole eligibility. The courts established that subsection (e) represented the more specific provision when it came to Trafficking offenses and also established that eventhough the provision excluded a mandatory minimum, mandatory or not less than a term of imprisonment of twenty-five years nor more than thirty years from being eligible for parole it does not exclude a first or second offense from being eligible for parole as it provides in the statutory scheme of sentencing for Trafficking offenses.

The Department of Corrections in its Reply Brief to the "ALC" contends that the more broader S.C. Code Ann. 24-13-100 and 24-13-150 require eighty-five percent (85%), "no-parole" terms for all 16-1-60 sentences for class A, B, C, felonies or those exempt from classification. We know this not to be true by virtue of the 2010 Omnibus Crime Reduction and Sentencing Reform Act. In interpreting statutes the court presumes that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.

Cowan v. Allstate Ins. Co. (S.C. App. 2002) 357 S.C. 625, 594 S.E. 2d 275.
Primary purpose of Court of Appeal in construing statute is to ascertain intent of legislature; in so doing, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand statutes operation. *State v. Green*, (S.C. App. 2002)

350 S.C. 580, 567 S.E. 2d 505. When a statute is penal in nature it must be construed strictly against the state and in favor of the defendant. *State v. Leopard* (S.C. App. 2002) 349 S.C. 467, 563 S.E. 2d 342. Criminal statutes are construed strictly against the state. *State v. Lawrence* (2002) 349 S.C. 129, 561 S.E. 2d 633. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used and that language must be construed in the light of the intended purpose of the statute. *State v. Leopard*, 349 S.C. 467, 467 S.E. 2d 563.

S.C. Code Ann. 24-21-645 At least two-thirds of the members of the board must authorize and sign order authorizing parole for persons convicted of a violent crime as defined in 16-1-60. Upon a negative determination of parole, prisoners in confinement for violent crime as defined in 16-1-60 must have their cases reviewed every two (2) years for the purpose of a determination of parole.

S.C. Code Ann. 24-21-640 the board must not grant parole nor is parole authorized to any prisoner convicted of a second or subsequent conviction following a separate sentencing for a prior conviction for a violent crime as defined in 16-1-60. S.C. Code Ann. 24-13-210(A) credits given inmates for good behavior for parolable offense is entitled to a deduction from the term of his sentence beginning with the day on which the service of his sentence commences to run, computed at the rate of twenty days for each month served. S.C. Code 24-13-230 (A) zero to one day for every two (2) days he is employed or enrolled. Max annual credits is limited to one-hundred

eighty days. S.C. Code Ann. 24-13-230 (B) no parole offenses is entitled to no reduction below minimum term of incarceration 85%.

S.C. Code Ann. 24-21-30 (B) 2004 Act No 263 § 13 The board may grant parole to an offender convicted of an offense which is not a violent crime as defined in section 16-1-60 or a no-parole offense as defined in section 24-13-100 by a unanimous vote of a three member panel or by a majority vote of the full board; (A) Pursuant to section 24-21-650 S.C. Code Ann. 24-13-150 Early release, discharge, and community supervision; limitations; forfeiture of credits

S.C. Code Ann. 24-13-125 Eligibility for work release; limitations; forfeiture of credits

S.C. Code Ann. 24-21-410 Power to suspend sentence and impose probation; exceptions

S.C. Code Ann. 44-53-375 (F) Sentences for violation of the provisions of subsection (C) or (E) may not be suspended and probation may not be granted. A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release as provided in section 24-13-610 or supervised furlough as provided in section 24-13-710. *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432 (2011) ("It is well-settled that statutes dealing with the same subject matter are in pari materi and must be construed together, if possible, to produce a single harmonious result.")

This means that 44-53-370 (e) is within the same subject-matter and

legislative sentencing scheme as 44-53-375 (c) and (e) -

South Carolina Department of Corrections chooses not to apply these amendments continuing to apply S.C. Code Ann. 24-13-100 as if it was mandatory and repealed all amendments that followed it. This is an error of law 1-23-610 (B) *State v. Tisdale*, (1996) 321 S.C. 153, 467 S.E.2d 270. The court's primary function in interpreting a statute is to ascertain the intent of the legislature. *State v. Baker*, 310 S.C. 510, 427 S.E.2d 670 (1993). A statute as a whole must receive a practical reasonable and fair interpretation consistent with the purpose, design and policy of the lawmaker. Words in a statute must be given their plain and ordinary meaning. *State v. Myers*, 313 S.C. 391, 438 S.E.2d 236 (1993) The court must avoid a statute so as to lead to an absurd result. *Stone v. State*, 313 S.C. 533, 443 S.E.2d 544 (1994) To the extent that the S.C. Code Ann. 24-21-410 and 56-5-2940 conflict, we hold § 56-5-2940, the later more specific statute implicitly repeals § 24-21-410 the older more general one. Where conflicting statutory provisions exist the most recent or last in order of arrangement prevails; (specific laws also prevail over general ones); statutes in apparent conflict should if reasonably possible be construed so as to allow both to stand and to give effect to each.

South Carolina Department of Corrections with its' final decision violates petitioner's liberty interest by enhancing sentences to a mandatory sentence and making him ineligible for parole and denying him good-time credits and work credits

These enhancements violates the petitioner's fourteenth amendment rights and South Carolina Constitutional Article One § 8.

Administrative Law Court erred in Affirming the Department of Corrections' decision stating petitioner was arguing sentence validity. Classification is a non-collateral matter.


Al Shabazz v. State, 338 S.C. 369, 527 S.E.2d 750 held:

An inmate may seek review of the Department's final decision in an administrative matter under the APA. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing and judicial review. It also will provide an orderly and consistent framework for solving such matters.

CONCLUSION

Based on these overwhelming facts on record and numerous errors of law the Department of Corrections have made in petitioner's classification; also the erroneous application of the general no-parole statute. The "ALC" decision to affirm the Department's classification of the petitioner should be reversed and petitioner should be reclassified.

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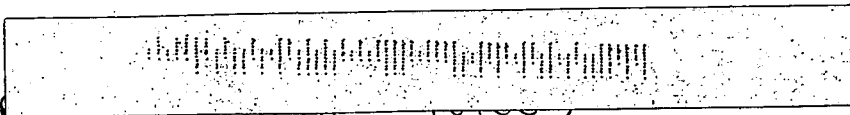
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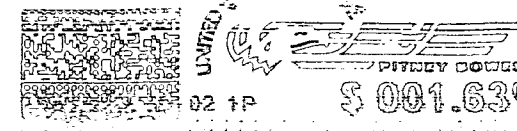


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