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S.C. SUPREME COURT

The State of South Carolina

In the Supreme Court

Appeal from the Administrative Law Court

The Honorable Deborah Brooks Durden, (ALJ)

Case No.: 2016-ALJ-15-0034-AP

Appellate Case No.: 2017-000603

Dennis Davis, #288558, Appellant,

V.

S.C. Dept. of Probation, Parole, and Pardon Services, Respondent.

Petition for Writ of Certiorari

Dennis Davis #288558
K.C.I. Mag-18A
4848 Goldmine Hwy.
Kershaw, S.C. 29067
Appellant

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In the Supreme Court

Appeal from the Administrative Law Court

The Honorable Deborah Brooks Durden, (ALJ)

Case No.: 2016-ALJ-15-0034-AP

Appellate Case No.: 2017-000663

Dennis Davis, #288558, Appellant,

V.

S.C. Dept. of Probation, Parole,
and Pardon Services, Respondent.

Certificate of Counsel

The undersigned certifies that this Petition For Writ of Certiorari Complies with Rule 242, SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

S/ Dennis Davis

Dennis Davis #288558

Petitioner

December 30th, 2018

Petitioner Certifies that the Petition For Rehearing was made and finally ruled on by the Court of Appeals On December 13, 2018.

Questions Presented

1. Did the Court of Appeals err in affirming the Lower Court's decision that Petitioner is not eligible for Parole?

2. Did the Court of Appeals err in saying Petitioner is a no-parole offender?

Statement of the Case

On May 21st, 2014, Petitioner entered a guilty Plea and was Sentenced by the York County Court of General Sessions by the Hon. Judge Edward G. Welmaker to a non-violent or Parole eligible 125 month Sentence for his plea of guilt. In 2010 the General Assembly Passed the Omnibus Crime Reduction and Sentencing reform Act of 2010, Which was passed to give inmates Convicted of less serious offenses at parole and earlier release dates. Repealing the 85% rule to the amended offenses in the 2010 act. After the respondent's further investigation they determined from their interpretation that the petitioner Wasn't eligible for parole. The SCDPPPS then violated the Seperation of Powers doctrine (S.C. Constitution Article I §8) and took away Petitioner's Parole eligibility on June 27, 2016! On Febuary 22, 2017 the Administrative Law Court issued an order affirming the decision of respondent saying Petitioner was a class C Felony or no parole offense because his prior's aren't for possession only which was Contrary to Petitioner's plea agreement and to the Legislative actions to amend 44-53-370(b)(2) and repeal the 85% rule for this offense and other's in the fore mentioned act of 2010. The Case was transferred to the Court of Appeals in which they affirmed the lower Courts decision also saying Petitioner is considered a no parole offense his prior's aren't for possession only on October 17, 2018. Petition for a rehearing was denied on December 13th, 2018. Petitioner now Petitions The South Carolina Supreme Court for Writ of Certiorari.

Argument

1. The Court of Appeals did err in affirming the Lower Court's decision that petitioner is not eligible for parole.

The Lower Court's erred in it's decision in affirming the SCDPPPS final decision, not only does it not coincide with the Legislative intent of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 but it also violates the Petitioner's Constitutional rights.

In 2010 S.C. Code Ann. §44-53-370(b)(2) was amended by the legislature to repeal any other provision of law that did not grant offenders earlier release date's for less serious offenses. The intent to repeal the 85% statutes and rules is shown in the amendments made to section §44-53-370(b)(2) which 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, 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." The only thing Petitioner isn't eligible for is a suspended sentence and probation granted! Following the effective date of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 amended seperate statutory provisions to indicate that, "Notwithstanding any other provision of law," a person convicted and sentenced pursuant to this item for a third or subsequent offense, is eligible for parole and other sentence reductions, However if you do not meet the (c) and (d) criteria the sentence must not be

suspended nor probation granted. The Legislatures use of the phrase "Notwithstanding any other provision of law in 44-53-370(b)(2) expresses it's intent to repeal section 24-13-100. The phrase Notwithstanding any other provision of law is very clear and unambiguous! Notwithstanding any other provision of law means inspite of any other provision of law this provision will always apply! The Lower Courts based their decision that I'm not eligible for Parole off of other provisions of law that no longer applies or has an effect after the effective date of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 to the Statutes amended in this Act. "Notwithstanding or inspite of" any other provision of Law repeals § 24-13-100, § 24-21-610, § 24-21-30, and § 24-13-150 or the 85% rule! Not only does it repeal these provisions or the 85% rule as stated by the Lower Court's for people whose prior's are for possession only, but it also repeals the 85% rule for a person convicted and sentenced pursuant to this item for a third or subsequent offense period! See Strickland V. State, 276 S.C. 17, 19, 274 S.E. 2d 430, 432 (1981) 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. The intent to repeal the 85% rule is explicitly implied in the phrase "Notwithstanding any other provision of law" and it's for all persons convicted and sentenced pursuant to this item for a third or subsequent offense. See also State V. Long, 363 S.C. 360, 364, 610 S.E. 2d 809, 811 (2008) (The Legislature is presumed to intend that it's statutes are to accomplish something.) The Lower Court's says that if your prior's aren't for Possession only, then your still to be considered a no parole offense. This cannot be true, the intent to repeal the 85% rule is not based on the prior's being for possession but is based or tied to the amended phrase "Notwithstanding or inspite

of any other provision of law" in 44-53-370(b)(2). It is implicit in both State and federal Constitutions that legislation may not be discriminatory but must give equal protection to all. Ellison V. Cass, 241 S.C. 96, 127 S.E.2d 206 (1962) See id at 351, 688 S.E.2d at 575 (Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.) This is what should have been done and must be done in this case. This interpretation that petitioner is not eligible for parole and is to be considered a no parole offense is absurd, illogical, and would defeat the plain legislative intention. The main objective of this Act was to conserve tax payers dollars by allowing earlier release dates for inmates convicted of less serious offenses. (There is nothing violent about marijuana.) Petitioner's prior offenses can only disqualify him from a suspended sentence and Probation being granted. Thus putting him into the in all other cases category of the law. See exhibit 1 from the Criminal law of South Carolina 6th Edition on pg. . These prior offenses however do not exclude Petitioner from Parole, Supervised furlough, Community Supervision, work release, work Credits, education Credits, and good Conduct Credits! Simply Petitioner's Distribution of marijuana 3rd is no longer Consid-ered a no parole offense. See State V. Sweat, 386 S.C. 339, 351, 688 S.E.2d 589, 573, 76 (2010) (Further while the interpretation of a statute by the agency charged with it's 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. § Statute §24-13-100 and the 85% rule no longer applies to petitioners offense and therefore is being applied in error. Just like Bolin, which is a Class A Felony and it is no longer considered a no parole offense, so is Petitioners Class C Felony no longer considered a no parole offense after the

passing of the Omnibus Crime Reduction and Sentencing Reform Act of 2010.

2. The Court of Appeals did infact err in saying Petitioner is a no parole offender.

Appellant was sentenced by the Courts to a non-violent 125 month sentence. By the SCDPPPS saying I'm not eligible for parole Changes my sentence and the Judgment and order of the sentencing Court. A non-violent offender by law is eligible for parole, good conduct Credits (20 days a month) education Credits, work Credits, furlough, etc., etc.. When petitioner was sentenced by the Courts, this is what the Hon. Judge Edward C. Welmaker sentenced Petitioner to 125 month non-violent for him pleading guilty. It reflects it in the Sentencing sheets which are clear and unambiguous. After 1/4 of the Sentence has been served an inmate (non-violent) is eligible for parole. When the Courts sentenced Petitioner the Courts sentenced him to a non-violent sentence which is a parole eligible sentence. If the Courts wished for me to ~~Not~~ have parole my plea would have not been accepted and I would have not been given a non-violent sentence. The Court's was aware that I was to be given a chance for good time, good Conduct Credits, Parole and the other Sentence reduction programs to a non-violent inmate. The SCDPPPS has violated the State and federal Constitutional rights of the Petitioner. When the SCDPPPS who is a part of the executive Branch of the government took my parole it violated the S.C. Constitution Article I §8 Seperation of Powers doctrine, Article I §3 and the 14th Amendment of the United States Constitution when they took my right to see the Parole board. The SCDPPPS usurped the power of the Judicial branch when they changed the Court's non-violent parole eligible sentence to a violent no parole sentence and it is unconstitutional. See Hamilton V. Freeman, 147 N.C. App. 195, 554 S.E. 2d. 856, (N.C.

App. 2001) (where the Department of Corrections independantly amends Judgments to reflect the DOC's interpretation of State Law, the DOC has usurped power of the Judiciary). Petitioner was sentenced to a parole eligible or non-violent sentence by the Courts and from The SCDPPPS further investigation they then determined I was not non-violent or parole eligible and amended the Courts Judgement usurp-ing the power of the Judiciary! Disrespecting the Honorable Judge Welmaker and his Judiciary authority. South Carolina Courts have willingly held that the executive branch cannot exercise powers reserved for the Judiciary branch. State V. Archie, 322 S.C. 135, 470 S.E.2d. 380 (1996) The exercise of a sentencing function by the SCDPPPS, an agency of the executive branch, violated the seperation of Powers Doctrine. In our sister state of North Carolina Hamilton V. Freeman, 147 N.C. App. 195, 554 S.E. 2d 856. There the Court held that the DOC was required to honor plea agreements and sentences imposed by the sentencing Court. (emphasis add-ed) The SCDPPPS took away Petitioner's parole from their interpretation off his sent--ence based on the fact he has 2 prior's was infact a Judiciary action. It was based off an erroneous interpretation of §44-53-370(e)(2) and the erroneous applicat-tion of §24-13-100 the parole was taken unlawfully and in error by the SCDPPPS. The United States Supreme Court established that the sentence imposed by the sentencing Judge is controling it's this sentence that constitutes the Court's Judgme-nt and authorizes the custody of a defendant. Hill V. United States ex. rel. Wampler, 298 U.S. 460, 56 S.CT. 760, 80 L.Ed. 1283 (1936). See also Green V. United States, 358 U.S. 326, 329, 79 S.CT 340, 3 L.Ed. 340 (1959) (quoting Wampler's assertion that the "only sentence known to the law is the sentence or Judgment entered upon the record of the Court!" Johnson V. Mabry, 602 F. 2d 167, 170 (8th Cir. 1979) The only Cognizable Sentence is the one imposed by the Judge.) Wampler thus's

provides clearly established Supreme Court precedent supporting Petitioner's Claim. Wampler articulates a broad holding, "The Judgment of the Court establishes a defendant's sentence and that sentence may not be increased by an administrators amendment." This is exactly what has been done by the SCDPPPS a member of the executive branch charged with administrative duties has increased my sentence. The established Petitioners non-violent or parole eligible sentence and that sentence may not be increased by the SCDPPPS (The administrators of parole) to a no-parole or Violent Sentence. This decision of the SCDPPPS is a violation of clearly established federal law and the United States and South Carolina Constitutions and a violation of ex. Post facto Laws.

Conclusion

Based on the forgoing facts of law that the petitioner is no longer a no parole offender, The SCDPPPS violated the Petitioners Constitutional rights, and the ALC decision is based on an erroneous Interpretation and application of law; Petitioner respectfully asks that this Court Cure this error and grant Petitioner a parole hearing to be held no later than 10 days after this Court's decision that Petitioner is infact parole eligible or non-violent and therefore should be recieving all the rights and sentence reductions of a non-violent or parole eligible offender. Petitioner respectfully asks that every parole hearing Petitioner should have had since 2016 be given in 30 day intervals after the first hearing if Petitioner is not granted parole. Also petitioner respectfully asks the Court give any other relief the Court's may see fit and fair

Respectfully Submitted

S/ Dennis Wade

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State of South Carolina

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June 27, 2016

Dennis Davis, #288558
Ridgeland Correctional Institution
PO Box 2039
Ridgeland, South Carolina 29936

Dear Mr. Davis:

On May 21, 2014, you were convicted of Distribution of Marijuana, third offense, in Indictment Numbers 13-GS-46-02970, 02971. Pursuant to South Carolina law a person convicted of this offense with two or more aggregate violation of the law relating to drugs is not eligible for parole.

A review of your prior record reveals prior drug convictions, therefore, your current offense is ineligible for parole pursuant to South Carolina law. You will not be considered for parole on this offense.

Sincerely

Matthew C. Buchanan
General Counsel

MCB:dn

(b) a currently accepted medical use in treatment in the United States; and

(c) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

§ 44-53-220 (2002).

Schedules IV and V drugs have the same elements as Schedule III drugs, but should have relatively less danger as compared to each other. Schedule V drugs should have the lowest potential for abuse and the least danger of dependence.

It is the duty of the State Department of Health and Environmental Control to notify the Legislature as to the schedule under which a drug will be classified. Under the Code, when a substance is "added, deleted, or rescheduled as a controlled substance under federal law or regulation" the Department will make the necessary changes to the schedule of drugs per its rule making powers. This action has the force of law "unless overturned by the General Assembly."

The term "narcotic drug," as defined by the statute, does not carry its usual meaning of a sleep-inducing substance. Narcotic includes any extraction of opium, coca leaves, and opiates. The definition includes all compounds containing these substances and derivatives thereof. All chemically identical substances are included in the definition. S.C. Code Ann. § 44-53-110 (Supp. 2012).

There is a significant difference between the statutory definition of a "counterfeit substance" and an "imitation controlled substance." *See* S.C. Code Ann. § 44-53-110 (Supp. 2012). The essential difference is that counterfeit substances are controlled substances that are labeled to appear to be the product of a legitimate drug manufacturer. Imitation substances are non-controlled substances packaged to appear to be a contraband substance. As previously stated, a contraband substance is one that is illegal for anyone to possess. Although it is illegal to *distribute* imitation substances under S.C. Code Ann. § 44-53-390(a)(6), it is not illegal to possess the imitation substance with the intent to distribute. *Murdock v. State*, 311 S.C. 16, 426 S.E.2d 740 (1992). Ordinarily, "fake" drugs are not counterfeit substances because drug companies do not manufacture contraband drugs and prosecution for "fake" drugs is limited to those cases in which the defendant has actually distributed or delivered the "fake" drug to another.

f. Punishments

The Legislature substantially changed the effects of many of the drug punishments in the Omnibus Crime Reduction and Sentencing Reform Act of 2010. Now many drug offense punishments that were not eligible for probation, parole or early release credits or other prison programs under the pre-2010 statutes are eligible for such treatments. The essences of the changes are:

(a) first, second and subsequent offense violations of all possession of drug crimes under §§ 44-53-370(c) and 44-53-475(A) are eligible for a suspended sentence and probation, as well as "parole, supervised furlough,

community supervision, work release, work credits, education credits, and good conduct credits." § 44-53-370(d)(1)-(4) & § 44-53-375(A) (Supp. 2012);

(b) first and second offense violations for sale and possession with intent to distribute drug crimes under §§ 44-53-370(a) and 44-53-375(B) are eligible for a suspended sentence and probation, as well as "parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." § 44-53-370(b)(1)-(4) & § 44-53-375(B) (Supp. 2012);

a. Even third offenders who sell or possess drugs with intent to distribute are eligible for these sentencing and punishment options if "all prior offenses were for possession of a controlled substance pursuant to subsections (c) and (d)...."

b. If any of the prior offenses were for manufacturing, selling or possessing with intent to distribute, or trafficking in drugs then a third offender who violates § 44-53-470(a) or § 44-53-475(B) is not eligible for a suspended sentence or probation. They would apparently still be eligible for parole and the other sentence reduction programs.

A chart is provided in subpart 4 of this section listing the maximum punishments applicable to possession for each schedule. Subpart 5 is a listing of more common drugs by generic name in the various schedules.

In addition to any fine imposed for a violation of a misdemeanor or felony drug offense, the trial court is to assess a $150 surcharge on the defendant and no portion of this surcharge may be "waived, reduced or suspended." S.C. Code § 14-1-213(A) (Supp. 2012). The former provisions of § 56-1-745 suspending a person's driving license for a conviction of a drug offense were removed in 2011 when the Legislature revoked this statute.

A "second or subsequent offense" is defined at § 44-53-470 (Supp. 2012), which was rewritten in 2005 and 2010. Under subsection (A), an offense is considered a second or subsequent offense if, "for any offense involving marijuana . . . the offender has been convicted within the previous five years of a first violation of a marijuana possession . . . ." § 44-53-470(A)(1). Likewise, an offense is considered a second or subsequent offense if, "for an offense involving a controlled substance other than marijuana . . . the offender has been convicted within the previous ten years of a first violation of a controlled substance offense . . . other than a marijuana offense . . . ." § 44-53-470(A)(3) (Supp. 2012). The time period (whether it be five or ten years) begins to run from the date of the sentencing on the prior offense or from the date of release from confinement if the prior sentence involved a prison sentence, "whichever is later." § 44-53-470(B) (Supp. 2012).

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Certificate of Service

I hereby Certify that I have served a copy of the forgoing Petition on Counsel for the Respondent by depositing a copy in the United States Mail Postage prepaid on the 2nd day of January, 2019.

addressed as follows:

Tommy Evans Jr.
SCDPPPS
P.O. Box 50666
2221 Devine St.
Columbia, S.C. 29250

s/ Dennis Davis

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