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SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Charles Tyson, #113360,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Probation,)
 Parole and Pardon Services)
)
 Respondent.)

Docket No. 18-ALJ-15-0030-AP

FINAL ORDER

FILED

FEB 26 2019

SC ADMIN. LAW COURT

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("ALC") pursuant to the appeal of Charles Tyson ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections. Following a conviction for murder and armed robbery in 1982, he was sentenced to life in prison for murder and twenty-five years for armed robbery. At the time of his conviction, an inmate who served a minimum of twenty (20) years could be eligible for parole. Appellant first applied for and was denied parole on April 28, 1999. The South Carolina Department of Probation, Parole and Pardon Services ("Department") Parole Board ("Board") denied his subsequent sixteen applications for parole, most recently on July 18, 2018. Appellant requested a rehearing, which was effectively denied by letter on September 18, 2018.¹

Appellant filed an appeal to the ALC on October 17, 2018.

ISSUES ON APPEAL

Appellant raised two grounds in his appeal. First, he argues that he was not provided a copy of

¹ Respondent does not actually deny the request but states that there is no rehearing process, therefore, it will take no action on the request. The Administrative Procedures Act ("APA"), S.C. Code Ann. § 1-23-380(1) (Supp. 2017) states as follows:

Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of an agency or, if a rehearing is requested, within thirty days after the decision is rendered. [Emphasis added.]

The Department is an agency subject to the APA. See *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). Therefore, the legislature allows a party before any agency subject to the APA to request a rehearing or reconsideration.

the Criteria for the Granting of Parole (Criteria for Parole Consideration) prior to his parole hearing. Second, he argues that the Criteria for Parole Consideration that he received on March 23, 2018, was not the criteria in effect when he was convicted in 1982 and that his parole should have been evaluated by the criteria which went into effect when the governor signed Act 100 on June 15, 1981.

Appellant adds a third issue (Argument I in the brief) in which he argues that his conviction was void because the jury rendered its verdict on September 19, 1982, a Sunday.

This ground was not raised in the case before the Board nor included in the grounds raised on appeal to the ALC. Moreover, as an attack on the jurisdiction of the trial court, it is a matter for direct appeal, and cannot be considered in the Department's parole hearing nor by the ALC in its administrative review of that proceeding.

The Record on Appeal contains a copy of the Criteria for Parole Consideration. Its receipt by Appellant is verified by his witnessed signature dated March 23, 2018, prior to his appearance before the Parole Board on July 18, 2018. Thus, his argument that he did not receive the criteria prior to his hearing can only be based on his contention that the criteria should have been the criteria in effect when he was convicted. Appellant claims that the Board violated the ex post facto clauses of the South Carolina Constitution, S.C. Const. art. I, 4, and the United States Constitution, U.S. Const. art I, § 10, by using criteria that was not the law in 1981 when his crime was committed.

In *Cooper v. S.C. Dep't of Prob., Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), the South Carolina Supreme Court rejected this argument and determined that S.C. Code Ann. § 24-21-640 had not been substantively amended since Cooper's conviction in 1984.² The Court stated as follows:

This section specifically authorizes the Board to establish written criteria for the granting of parole. Therefore, we find the Parole Board did not exceed its authority by creating the written criteria. Given the Parole Board was authorized to establish these criteria, we do not believe the Parole Board changed the law in violation of the Ex Post Facto clause.

² Both Appellant's and Cooper's convictions occurred between the 1981 and the 1986 amendments.

Id. at 502, 661 S.E.2d at 113-114 (citation omitted).

DISCUSSION

An individual has a right to ALC review of a final decision of the Board only when that decision affects a liberty interest for which due process is required. *See Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146, 149-50 (2003); *see also Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 586 S.E.2d 124, 127 (2003) (explaining the nature of the right to ALC review). In *Furtick*, the South Carolina Supreme Court held that although an inmate has a liberty interest in parole eligibility pursuant to S.C. Code Ann. § 24-21-620, the statute does not create a liberty interest in the granting of parole itself. *Id.* at 598, 576 S.E.2d at 149 n. 4. Therefore, the ALC may summarily dismiss claims arising from the Board's decision denying parole. The ALC will review claims that the Board failed to consider the appropriate criteria so as to be tantamount to an abrogation of parole eligibility. *Cooper v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008). Appellant makes a claim of an ex post facto violation. Since an ex post facto claim questions the procedure used by the Board, the ALC has jurisdiction. *Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 421, 665 S.E.2d 231, 236 (Ct. App. 2008).

When acting in an appellate capacity, the ALC must apply the criteria of S.C. Code Ann. § 1-23-380(5), which reads:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or

clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017).

The criteria used by the Parole Board did not violate ex post facto provisions.

Appellant argues that the criteria considered by the Board did not exist at the time he committed his crime and therefore the use of the current criteria violates constitutional ex post facto prohibitions. The current law setting forth parole criteria is nearly identical to the law in effect on August 1, 1981, the date of the murder and armed robbery for which Appellant is incarcerated.³

At the time Appellant committed his offense, S.C. Code Ann. § 24-21-640 identified the criteria that the Parole Board had to apply to an inmate seeking parole as follows:

The Board shall carefully consider the record of the prisoner before and after imprisonment, and no such prisoner shall be paroled until it shall appear 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 interests of society will not be impaired thereby; and that suitable employment has been secured for him. The Board shall establish written, specific criteria for the granting of parole and provisional parole. Such criteria shall reflect all of the aspects of this section.

S.C. Code Ann. § 24-21-640 (Supp. 1981).

The criteria also set out in the current §24-21-640, reads as follows:

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.

* * *

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 (Supp. 2017).

The South Carolina Supreme Court has stated that “[a]n ex post facto violation occurs when a change in the law retroactively alters the definition of a crime or increases the punishment for a

³ The statute was effective June 15, 1981.

crime.” *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (citations removed). The Court held that an ex post facto violation occurred when there was a change of parole eligibility review from annual to biannual. *Id.* at 264, 531 S.E.2d at 512. The Court reasoned that such a change “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Id.* at 261, 531 S.E.2d at 509 (quoting *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 509, 115 S.Ct. 1597, 1603 (1995)). If the change in law only produces a “speculative and attenuated possibility’ of increasing inmate’s punishment, then there is no ex post facto violation.” *Barton v. S.C. Dep’t of Prob., Parole and Pardon Servs.*, 404 S.C. 395, 403, 745 S.E.2d 110, 114 (2013) (citing *Jernigan* at 261, 531 S.E.2d at 509). Also, a change in the law does not violate the ex post facto clause if it only affects a mode of procedure and does not alter substantial personal rights. *State v. Huiett*, 305 S.C. 169, 172, 394 S.E.2d 486, 487 (1990).

In comparing the above statutes, the differences are limited to the word “shall” being replaced by the words “must” and “may”. This minor difference is procedural and is not a violation of ex post facto. There is nothing in the slight word change that would suggest a sufficient risk of increasing punishment. Therefore, there is no ex post facto violation as to the statute.

Next, Appellant argues that the use of the sixteen criteria found in Department Form 1212 is a violation of ex post facto. Appellant notes that the sixteen criteria were not in existence when he committed his offense. The sixteen criteria created by the Board are used to help guide the Board to make a decision on whether the prisoner should be granted parole. There is nothing that would clearly show that Appellant has been disadvantaged by the criteria listed in the form used by the Board. *See Huiett* at 171, 394 S.E.2d at 486. The use of the criteria is for evaluation and in no measure is used to increase the punishment of an inmate.

The addition of the sixteen criteria falls within the innocuous types of post-conviction changes in the law listed in *Morales*, which includes:

Changes to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Morales, at 508, 115 S. Ct. at 1603.

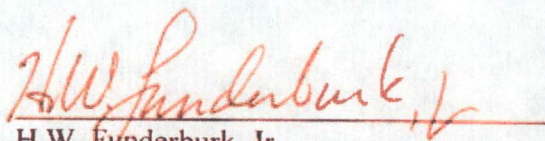
The United States Supreme Court further noted that these types of “changes might create some

speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for ex post facto purposes." *Id.* at 508-09, 115 S. Ct at 1603. As noted in *Morales* and *Jernigan*, the important determination to be made by the Court is whether there is a "sufficient risk of increasing the measure of punishment." *Jernigan* at 261, 531 S.E.2d at 509. Here, the use of the sixteen criteria could, at most, create a speculative risk of increasing punishment, and therefore, there is no violation of ex post facto.

In addition, and alternatively, the statutory criteria set forth in § 24-21-640 are virtually identical to the six criteria contained in § 55-612. The six criteria are: 1) the record of the prisoner, before, during and after imprisonment; 2) whether the prisoner has shown a disposition to reform; 3) whether in the future the prisoner will probably obey the law and lead a correct life; 4) whether the prisoner's conduct has merit a lessening of the rigors of imprisonment; 5) whether the interests of society will be impaired by the prisoner's parole; and 6) whether suitable employment has been secured for the prisoner. The sixteen criteria created by the Board under the direction of § 24-21-640 are questions that could be asked to discover whether the prisoner satisfies the original six statutory criteria. The sixteen criteria are subsumed by the six statutory criteria, and the Board has not created anything new. Accordingly, the Court concludes that Appellant has not been disadvantaged by the Board's creation or consideration of the sixteen criteria. *Cf. Cooper* (finding no ex post facto violation where the Board created fifteen criteria on parole form after the commission of inmate's crimes).

IT IS THEREFORE ORDERED that the Board's denial of Parole is **AFFIRMED**.
AND IT IS SO ORDERED.

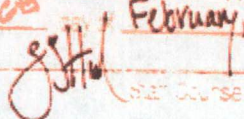
February 26, 2019
Columbia, South Carolina



H.W. Funderburk, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 2019 day of February, 2019


Clerk of Court

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