

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from the Administrative Law Court
The Honorable John D. McLeod, Administrative Law Court
Case No. 15-ALJ-0068-AP

SC Court of Appeals

Appellate Case No.: 15-ALJ-15-0068-AP

THOMAS THOMPSON #80681.....APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES,.....RESPONDENT

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- 1. Did the ALC err in deciding that the Respondent revealed they abided to the mandates proscribed by the Supreme Court in the *Cooper* decision, thereby, dismissing this appeal?**
- 2. Did the Board err in basing their decision on the Appellant's prior record?**
- 3. Did the Board deny the Appellant's rights to equal protection upon the denial of parole?**
- 4. Has the denial of parole essentially negated the sentencing authority of the Court upon the plea agreement made between the Appellant and the solicitor?**

STATEMENT OF THE CASE

On October 4, 1975, a motorist spotted a vehicle parked off a rural road in Cherokee County, South Carolina, he then notified the sheriff's department. After the deputies responded they observed a deceased person shot in the back of the head, and another person shot in the temple. The second man was alive, he was transported to the hospital in very critical condition. It was determined that both individuals were shot with the identical weapon. Upon the conclusion of their investigation it was discovered that the incident was the result of an attempted armed robbery, and the Appellant was the person who shot both victims. The Appellant along with his co-defendants Walter Gordon and Ben Holmes were arrested, and charged with murder and attempted armed robbery.

On December 11, 1975, the Appellant appeared before the Honorable Robert Hayes for the offense of murder. Upon the conclusion of this appearance the Appellant was sentenced to a period of incarceration for the remainder of his natural life.¹ At the time the Appellant committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of ten years.

On February 6, 1985, the Appellant made his initial appearance before the Parole Board. Upon conclusion of this hearing the Board decided to deny parole. Since this initial hearing the Appellant has appeared before the Board an additional sixteen times each resulting in a denial of parole. His last appearance occurred on October 21, 2015, 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; and, 3) the use of a deadly weapon in this or a previous offense. (R.p.1). Upon being notified of

¹ Co-Defendant Walter Gordon was convicted of accessory before the fact of murder and also given a life sentence; Benjamin Holmes was convicted of accessory after the fact of murder and sentenced to a ten year period of incarceration.

his denial of parole the Appellant filed a notice of appeal before the Administrative Law Court (ALC). The Appellant argued that his denial of parole was arbitrary and capricious; violated ex post facto, and equal protection. The Appellant also argued that the constant denial of parole negated the sentencing authority of the Court.

The Respondent argued that the denial of parole was lawful and followed the mandates proscribed by the Supreme Court in the *Cooper* opinion; that the decision was not in violation of equal protection; that there exist no violation of ex post facto in the denial of parole; and, the Parole Board is the only entity that decides parole, which never undermines the sentencing authority of the Court.

Upon having received briefs from both parties, the Honorable John D. McLeod, Administrative Law Court Judge issued his decision on this matter. On March 30, 2016, Judge McLeod issued an order deciding that the Board has shown that all of the mandatory criteria was followed before the denial of parole. That pursuant to *Cooper*, the ALC only have limited authority to review a decision of the Parole Board, and if it is shown that all of the criteria was considered the review authority of the ALC is completed. The ALC decided to dismiss this appeal. (R.p.3-p.4).

On April 14, 2016, the Appellant filed a notice of appeal before the South Carolina Court of Appeals. Within his initial brief the Appellant argues that the decision of the Parole Board should be considered arbitrary and capricious; that it violates ex post facto; denies him the right to equal protection; and, it negated the sentencing authority of the Courts. The Respondent argues that the ALC was correct in dismissing this appeal, due to the Board revealing they considered all of the mandatory criteria. Pursuant to the *Cooper* opinion if this is shown the ALC does not have any further action that can be made under the law. The Respondent further argues there exist no

violation of equal protection, nor ex post facto, and the denial of parole does not undermine the sentencing authority of the courts. The Respondent's brief supporting their arguments follows.

ARGUMENTS

1. The ALC was correct in deciding that the Board revealed they followed the mandates proscribed by the South Carolina Supreme Court in the *Cooper* decision.

Any final decision of an administrative agency in a contested case must be placed in writing and shall include a finding of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350 (Supp. 2015). The Respondent argues that the order informing the Appellant of his denial of parole followed the standards provided by the South Carolina Supreme Court in the case of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). The order revealed that the mandatory criteria, department policy, and risk assessment were considered, so this denial of parole does not violate South Carolina law. The ALC agreed and rightfully decided to dismiss this appeal.

In *Cooper*, the Supreme Court decided that the findings of fact were included; however, the Court determined that the Parole Board neither, "offered an explanation nor indicated that it had considered the statutory criteria of section 24-21-640 and the fifteen criteria listed on the parole form." *Id.*, at 500. The Supreme Court ruled in *Cooper* that if the Parole Board fails to consider and apply the statutory-related parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC. *Id.*, at 502.² The Supreme Court did establish what future Parole Board orders should consist of, in *Cooper* it specifically states:

We emphasize that in future parole review hearings the Parole Board may avoid the results in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-

² The Administrative Law Judge Division has jurisdiction to hear a defendant's appeal from a Department of Probation, Parole and Pardon Services decision that as a violent offender, defendant was not eligible for parole; the defendant had a liberty interest in gaining access to the parole board. *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2003).

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.

In the present case the ALC decided that the Board did conform with the *Cooper* decision. Their decision was correct, due to the fact the order of denial included a findings of fact and conclusion of law separately stated. The findings of fact were the reasons provided by the Board as to why parole was denied; and, the conclusions of law are the statutes and factors used to determine the denial of parole. The order was clear, the criteria within the statute, the mandatory policy, and risk assessment³ were considered prior to the denial of parole. The reasons given for the denial of parole were reasonable and followed the mandatory criteria. Since the Board is the sole authority to deny parole, and this authority is not appealable by the Courts; the denial of parole was properly affirmed. The ALC properly determined that this appeal should be subject to dismissal due to their very limited ability to review the procedure used by the Board in the denial of parole. The ALC does not have any authority to review and reverse a Parole Board final decision. An Administrative Law Judge shall not hear an appeal from an inmate in the custody of the Department of Corrections 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)(Supp. 2015).

In *Cooper*, the court determined that the order denying parole was unlawful due to it not presenting any conclusions of law. It was the opinion of the Supreme Court that in order for the Board to prove that proper procedures were followed, an order must not only state the findings of

³ The department must develop a plan that includes an establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors the 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)(Supp. 2015).

fact, but the statute and policy considered in reaching this conclusion. After this decision the Board immediately decided to change their orders to reveal that the criteria found in law and policy was considered prior to this determination. These new orders were used in the denial of every inmate including the Appellant ever since. The order delivered to the Appellant was clear, the criteria within the statute, mandatory policy, and risk assessment were considered prior to the denial of parole. According to the Supreme Court, if this shown no further review by the ALC is necessary.⁴ Therefore, the ALC was correct in dismissing this appeal. This decision should be affirmed by this Court.

The Appellant argued that the Board based their decision on incomplete information. The Board considered all the information made available. That includes information in the Appellant's favor, and in his detriment. If the Board had not received any information in the Appellant's favor, that is the fault of the Appellant and not the Board. It is always the Appellant's responsibility to provide all information that the Appellant wishes the Board consider in mitigation. All of the criteria considered was part of the record of the prisoner before, during, and after imprisonment. If the Appellant alleges that the Board made decisions with incorrect information, it was his obligation to reveal the information that was incorrect. The Appellant has the burden of proof that the Board made an incorrect decision due to their failure to follow the procedures found in law and policy. In administrative proceedings the general rule is that an Appellant for relief, or a privilege has the burden of proof and the burden of proof rest upon who files the claim with an administrative agency to establish that required conditions of eligibility have been met. Leventis v. South Carolina Department of Health and Environmental Control, 340 S.C. 118, 530 S.E.2d 643 (2000). The

⁴ The Parole Board clearly stated in its order of rejection that it considered 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 failed to reveal the information he alleges was not considered or incorrect, so this argument should not even be considered by this Court.

2. The Parole Board used criteria that existed at the time the Appellant committed this offense, thereby not violating ex post facto.

The Appellant argues that the Board unlawfully denies him to appear annually, thereby, applying a law that was created after his conviction in violation of ex post facto. The law existing at the time of the offense and not at the time of sentencing determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. *Elmore v. State*, 305 S.C. 456, 409 S.E.2d 397 (1991). At the time the Appellant committed this offense no law existed determining the amount of time an inmate must wait before reappearing before the Board. There only existed Department policy which stated that any inmate serving a sentence greater than thirty years must wait a twenty-four month period before reappearing. In the Court of Appeals case of *James v. S.C. Dept. of Probation, Parole, and Pardon Services*, 376 S.C. 392, 656 S.E.2d 399 (Ct. App. 2008), this Court decided,

Application of amended statute providing that consideration for parole eligibility for violent offenders would be biannually rather than annually did not violate prohibition against ex post facto laws; at time of inmate's crimes, there was no statute governing frequency of parole hearings, but Department of Probation, Parole and Pardon Services had policy calling for biannual review for persons serving sentences of 30 years or more, statute allowing for annual reviews was enacted several years after inmate's crimes were committed, and amended statute provided no greater limitation on parole eligibility that inmate was originally entitled to.

James, at 399.

A violation of an ex post facto law occurs when it retroactively alters the definition of crime or increases the punishment for a crime. *Jernigan v. State*, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000). The Department criteria never changed the law or any policy due to an absence of any law

that existed at the time the Appellant committed the offense. He is at the identical position as he was when he committed the offense, relating the amount of time he must wait before he is allowed to reappear before the Parole Board. The Department criteria never changed the amount of votes necessary to obtain parole, nor made it more difficult for the Appellant to be granted parole. It is not penal in nature, nor increases punishment; therefore, not a violation of ex post facto. For an ex post facto clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature. *State v. Huiett*, 302 S.C. 169, 394 S.E.2d 486 (1990).

3. The Appellant's denial of parole is not a violation of equal protection.

The Appellant argues that most persons sentenced during the time of his sentencing who received a sentence of fifteen years or more, has been granted parole. It is his position that the constant denial of parole violates equal protection. To establish an equal protection violation a party must show that similarly situated persons received disparate treatment. *TNS Mills, Inc. v. South Carolina Dept. of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (S.C. App. 1998). The identical criteria applied to the Appellant, was applied to each inmate going before the Board, and the Appellant has failed to offer any evidence that he was treated differently or a different criteria is being applied to him.

No two cases are completely identical, so two cases with the identical offense and identical sentences will still have different results. The Appellant has not shown that the Board has used different criteria when considering his case, or that he is required to receive a greater number of votes to be granted parole. This cannot be considered a violation of equal protection. The Appellant just alleges that other inmates have been granted parole for similar offenses and he has not. This is not sufficient to consider this to be a violation of equal protection. The Appellant raises factual arguments regarding the decision of the Parole Board. The decisions of the Board based on

questions of fact goes beyond the jurisdiction of the Court. 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 (Supp. 2015), see, *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

4. The continued denial of parole had not denied the sentencing authority of the Courts.

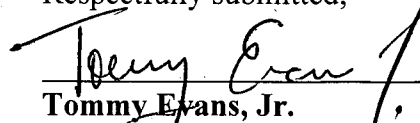
The Appellant argues that he was originally sentenced through a plea agreement, and the denial of parole goes against that sentence; therefore, negating the sentencing authority of the Courts. At the time the Appellant committed this offense the Courts only had one option regarding sentencing in a murder conviction. A person who is convicted of or pleads guilty of murder must be punished by death or imprisonment for life and is not eligible for parole until the service of ten years. S.C. Code Ann. §16-3-20(Supp. 1975). The only option available to the court was to sentence the Appellant to a lifetime period of incarceration with a ten year parole eligibility.

Parole determination is left solely up to the Parole Board. “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.**” S.C. Code Ann. §24-21-640 (Supp. 1976)(emphasis added) It has been largely held by the Courts that parole is a matter left strictly to the Parole Board, and the Court has no jurisdiction over this decision. 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 Pardon. *State v. Brown*, 306 S.C. 381, 412 S.E.2d 399 (1991); the question of parole eligibility is separate and independent from the court’s authority to sentence an offender. *State v. McKay*, 300 S.C. 113, 386 S.E.2d 623 (1989). The denial of parole has no bearing on the previous sentence nor did it deny the sentencing authority of the Court. Parole eligibility was a part of the sentence; however, it was never guaranteed. Parole was never available upon the decision of the Courts, it has always been totally up the Parole Board.

CONCLUSION

Based on the foregoing reasons the ALC correctly dismissed this appeal affirming the final decision of the Parole Board. The Respondent respectfully requests this Court to find there exist no wrongdoing, and affirm the final decision of the ALC dismissing this appeal.

Respectfully submitted,



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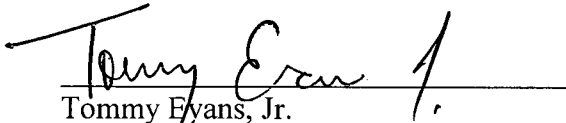
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SOUTH CAROLINA DEPARTMENT OF PROBATION,
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CERTIFICATE OF COUNSEL

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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November 29, 2016