

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from the Administrative Law Court  
The Honorable H.W. Funderburk Jr., Administrative Law Judge  
Docket No.: 18-ALJ-15-0030-AP

---

Appellate Case No.: 2019-000532

---

CHARLES TYSON, #113360,.....APPELLANT

v.

**RECEIVED**

MAY 30 2019

SC Court of Appeals

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

---

**INITIAL BRIEF OF RESPONDENT**

---

**Tommy Evans, Jr.**  
**Assistant General Counsel**

**South Carolina Department of Probation,  
Parole and Pardon Services  
P.O. Box 50666  
Columbia, South Carolina 29250**

**ATTORNEY FOR RESPONDENT**

**TABLE OF CONTENTS**

Table of authorities.....ii

Statement of issue on appeal.....iii

Statement of the case.....1

    1. The argument of the Appellant was void due it not being initially raised for the first time  
    on appeal nor did the ALC have jurisdiction.....2

Conclusion.....7

**TABLE OF AUTHORITIES**

**CASES**

*Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000).....3

*Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).....3

*Ewing v. State Bd. of Medical Examiners of South Carolina*, 290 S.C. 89, 348 S.E.2d 361 (1986).5

*Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002).....3

*State v. Adams*, 354 S.C. 361, 580 S.E.2d 785 (2003).....5

*State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984).....6

**RULES**

Rule 203(2) SCACR.....5

**STATUTE**

S.C. Code Ann. §1-23-600(D)(2018).....5

**STATEMENT OF ISSUE ON APPEAL**

- 1. Did the ALC err when it ruled that the Appellant's issue one could not be raised on appeal because it constituted an attack on the jurisdiction of the trial court and is a matter for direct appeal and not for the Respondent nor the ALC?**

## STATEMENT OF THE CASE

On August 8, 1981, the Appellant entered the USA gas station in Florence South Carolina. Armed with a firearm he demanded money from the cashier. During the course of this robbery the Appellant shot the victim causing his death. He was later apprehended and charged with the offenses of murder and armed robbery. The solicitor's office decided to seek the death penalty. On September 19, 1992, a jury of his peers decided to spare the Appellant the death penalty; however, they did find him guilty of both offenses.

The Appellant appeared before the Honorable John Hamilton Smith who sentenced the Appellant to a term of incarceration for the remainder of his natural life for the offense of murder and, twenty-five years for armed robbery. At the time the Appellant committed these offenses South Carolina law allowed an inmate parole eligibility upon the service of twenty years.

The Appellant made his initial appearance before the Board on April 28, 1999.<sup>1</sup> At the conclusion of this hearing the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial denial the Appellant has appeared before the Board an additional sixteen times each resulting in a denial of parole.<sup>2</sup> His most recent appearance occurred on July 18, 2018. 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; 3) the use of a deadly weapon in this or a previous offense; and, 4) a criminal record that indicates poor community adjustment. The Appellant requested a rehearing which was denied on September 18, 2018.

When the Appellant was informed of this denial of parole he decided to file a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant alleged that

---

<sup>1</sup> Due to good time credits the Appellant became eligible for parole upon the service of seventeen years.

<sup>2</sup> The Appellant waived his appearance on May 5, 2004.

being sentenced on a Sunday makes this conviction unlawful. He also argued that the denial of parole violated ex post facto and due process.

The Respondent argued that the Appellant cannot argue that he was unlawfully convicted initially before the ALC. The ALC also has no jurisdiction over this conviction so this argument cannot be considered. The Respondent also argued that essentially the identical criteria being used now exist at the time he committed this offense, so there exist no violation of ex post facto.

Both sides submitted briefs and each were considered by the ALC. Upon reading these briefs the Honorable H.W. Funderburk, Jr. made his decision regarding this matter. On February 26, 2019, the ALC issued his order determining that the criteria considered by the Board did not constitute a violation of ex post facto. The ALC also decided not to consider that the Appellant's conviction was unlawful due to it occurring on a Sunday. The ALC determined that this argument was not originally raised before the Board; and, that they did not have jurisdiction to make a determination regarding this conviction.

The Appellant now submits this appeal arguing that the ALC erred in not considering the argument regarding the lawfulness of his Sunday conviction. The Respondent will argue that since the argument was not made before the Parole Board it was not preserved for appeal and the Board nor the ALC has jurisdiction to make a determination regarding the lawfulness of a conviction. The brief of the Respondent supporting these defenses follows.

### **ARGUMENT**

- 1. The argument of the Appellant was void due it not being initially raised for the first time on appeal, nor did the ALC have jurisdiction.**

Within his brief the Appellant argues that the ALC erred due to the fact they decided not to address his argument regarding it being unlawful for him to be convicted and sentenced on a Sunday. The Appellant believes that his conviction was unlawful which will deny the Board the

ability to consider him for parole. The ALC properly determined that since this argument was initially raised on appeal and not before the Board and there exist no subject matter jurisdiction. The ALC determined this argument waived, the Respondent agrees.

The ALC's sits in an appellate capacity regarding the decision of the Parole Board when it comes to the denial of parole eligibility or any failure of the board to consider the mandatory criteria. The jurisdiction of the ALC to review the decision of the Parole Board was established in the South Carolina Supreme Court cases of *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000), *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002), and *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). In *Al-Shabbaz*, the South Carolina Supreme Court created a new avenue by which an inmate could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-Shabbaz*, the Court recognized that, "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed; and (2) when an inmate believes prisoner officials have erroneously calculated his sentence; sentence-related credits or custody status." *Id.*, at 369.

The Court noted that the appealable final decision in *Furtick* arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The review by the ALC under the procedures set forth in *Al-Shabbaz*, is necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. The Court determined that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.*

In *Cooper*, the ALC was given the very narrow ability to review a denial of parole to determine if the Board applied the mandatory criteria prior to their final decision. If it is shown that the Board considered the mandatory criteria and risk assessment the final decision stands; and, the ALC would have no ability to rule on the outcome. If it is found that the Board in some way failed to apply the mandatory criteria, or risk assessment, they can order the case remanded for a new hearing.

The ALC had jurisdiction to hear this case and make a determination regarding if the Board followed the proper criteria prior to making the decision to deny parole. The ALC made the proper determination regarding the denial of parole. The ALC ruled that the Board did not violate *ex post facto* in the use of the current criteria. This is the proper decision which the Appellant does not argue against. The Appellant argues that the ALC was incorrect in not addressing his claim that his conviction was unlawful so the Board should not have jurisdiction. The ALC was correct in deciding not to address this claim, due to it not being preserved for appeal, nor having jurisdiction.

Within his brief the Appellant argues that the ALC erred in not addressing his argument that the board failed to have jurisdiction over his parole due to his conviction being unlawful. The Appellant argued that since his conviction was made on a Sunday it was improper and the Board should not have had any jurisdiction over his parole determination. Within his order the ALC decided that he was not going to address this issue. He decided that the Appellant failed to raise this issue before the Board nor included it in the grounds raised on appeal. The ALC also decided that this was an attack on the jurisdiction of the trial court which was a matter for direct appeal and cannot be considered by the Board nor the ALC in an administrative review of the denial of parole.

The Appellant was convicted for the offense of murder, at the time of his conviction South Carolina law allowed an individual convicted of murder parole eligibility upon the service of

twenty years. Once the Appellant had served the mandatory term he was allowed to appear before the Board. The Appellant was properly given an opportunity to appear before the Parole Board pursuant to South Carolina law. The ALC had no reason to remand the denial of parole back to the Board. This is the only remedy given to the ALC regarding the denial of parole. An administrative law judge shall not hear an appeal from an inmate in the custody of the Department of Corrections involving the loss of an appeal 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)(2018).

The Appellant never raised this argument before the Board so it was waived. *See, Ewing v. State Bd. of Medical Examiners of South Carolina*, 290 S.C. 89, 348 S.E.2d 361 (1986)(Physician who failed to raise issue of constitutional composition of Board of Medical Examiners at agency level or in lower court had waived that issue, for purposes of appeal in medical disciplinary action.) The Appellant had created a new argument that was initially raised before the ALC. An argument that was not initially raised nor decided by the Parole Board. The ALC was correct in not addressing this argument due to it being initially raised before the ALC and not before the Board. A defendant may not argue one ground below and another on appeal. *State v. Adams*, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (2003).

The ALC was also correct in deciding that they did not have jurisdiction over this matter. If the Appellant believes his conviction was done in error that matter must have been raised on appeal before the Supreme Court and, not before the ALC. After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation; a notice of appeal shall be served on all respondents within ten (10) days after the sentence is imposed. Rule 203 (2) SCACR. The Appellant did file a notice of appeal after his conviction. Within this appeal the Appellant raised as issues, 1) a failure of the court to allow him a speedy trial; 2) that the Court erred in admitting

items into evidence that were fruits of the statement given by the Appellant to the authorities; and, 3) he was entitled a voluntary manslaughter instruction to the jury. *See, State v. Tyson*, 283 S.C. 375, 323 S.E.2d 770 (1984). The Appellant had the opportunity to raise this argument lawfully after his conviction per the rules of the Appellant Court. He failed to do so, this argument cannot be raised before the Board nor the ALC. Once he failed to raise this argument before the South Carolina Supreme Court it was waived never to be raised later before any other Board or Court.

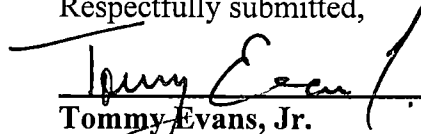
As stated earlier the ALC was only given the jurisdiction to make a determination as to whether the denial of parole was lawful, and followed the mandatory criteria. Any determination as to whether or not his conviction was lawful goes beyond the Administrative capacity of the ALC. Any decision of the ALC regarding the conviction of the Appellant would go beyond the separation of powers.

Since the Appellant failed to raise it earlier and it going beyond the jurisdiction of the ALC and the Board this issue was waived by the Appellant. The ALC was correct in not addressing this issue. The final decision of the ALC should be affirmed by this court.

**CONCLUSION**

Based on the foregoing reasons the Respondent respectfully requests the final decision of the ALC be affirmed.

Respectfully submitted,

  
\_\_\_\_\_  
**Tommy Evans, Jr.**  
**Assistant General Counsel**

South Carolina Department of Probation,  
Parole and Pardon Services  
P.O. Box 50666  
Columbia, South Carolina 29250  
(803) 734-9220

Columbia, South Carolina  
May 28, 2019

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court  
The Honorable H.W. Funderburk Jr., Administrative Law Judge  
Docket No.: 18-ALJ-15-0030-AP

**RECEIVED**  
MAY 30 2019  
SC Court of Appeals

Appellate Case No.: 2019-000532

CHARLES TYSON, #113360,.....APPELLANT

v.

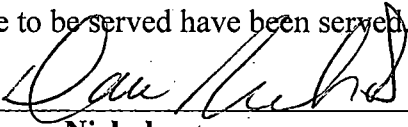
S.C. DEPARTMENT OF PROBATION, PAROLE AND  
PARDON SERVICES,.....RESPONDENT

**CERTIFICATE OF SERVICE**

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter dated May 28, 2019, on Appellant this 28<sup>th</sup> day of May, 2019, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Charles Tyson, #113360  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville, S.C. 29010

I further certify that all parties required by Rule to be served have been served.

  
\_\_\_\_\_  
**Dawn Nichols**  
**Executive Assistant**  
South Carolina Department of Probation,  
Parole, and Pardon Services  
P. O. Box 50666  
Columbia, South Carolina 29250

State of South Carolina  
Department of Probation, Parole and Pardon Services

HENRY McMASTER  
Governor



JERRY B. ADGER  
Director

2221 DEVINE STREET, SUITE 600  
POST OFFICE BOX 50666  
COLUMBIA, SOUTH CAROLINA 29250  
Telephone: (803) 734-9220  
Facsimile: (803) 734-9440  
[www.state.sc.us/ppp](http://www.state.sc.us/ppp)

May 28, 2019

Charles Tyson, #113360  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville, S.C. 29010

Dear Mr. Tyson:

Please find enclosed copies of the matter we designated for inclusion in the Record on Appeal.

Sincerely,

  
Tommy Evans, Jr.  
Assistant General Counsel

TE:dn

cc: The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals

**RECEIVED**

MAY 30 2019

SC Court of Appeals

State of South Carolina  
Department of Probation, Parole and Pardon Services

HENRY McMASTER  
Governor



JERRY B. ADGER  
Director

2221 DEVINE STREET, SUITE 600  
POST OFFICE BOX 50666  
COLUMBIA, SOUTH CAROLINA 29250  
Telephone: (803) 734-9220  
Facsimile: (803) 734-9440  
[www.dppps.sc.gov/](http://www.dppps.sc.gov/)

**RECEIVED**

MAY 30 2019

SC Court of Appeals

May 28, 2019

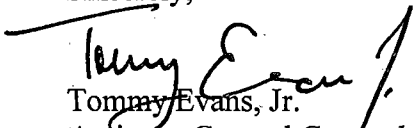
The Honorable Jenny Kitchings  
Clerk of the S.C. Court of Appeals  
P. O. Box 11629  
Columbia, South Carolina 29211

Re: Charles Tyson v. SCDPPPS  
Case No.: 2019-000532

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated May 28, 2019, along with proof of service in the above referenced case.

Sincerely,

  
Tommy Evans, Jr.  
Assistant General Counsel

TE:dn

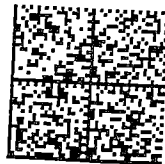
Enclosures

cc: Charles Tyson

State of South Carolina

Department of Probation, Parole, and Pardon Services

2221 DEVINE STREET, SUITE 600, POST OFFICE BOX 50666  
COLUMBIA, SOUTH CAROLINA 29250



U.S. POSTAGE >>> PITNEY BOWES



ZIP 29205 \$ 000.80<sup>0</sup>  
02 1W  
0001388679 MAY. 29. 2019

**RECEIVED**  
MAY 30 2019  
SC Court of Appeals

The Honorable Jenny Kitchings  
Clerk of the S.C. Court of Appeals  
P. O. Box 11629  
Columbia, South Carolina 29211