THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge H.W. Funderburk, Jr.

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SC Court of Appeals

Case No. 2018-001293

Jakarta Deshon Young, #276572, ... Respondent,

v.

South Carolina Department of Corrections, ... Appellant.

FINAL BRIEF OF RESPONDENT

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Counter-Statement of Issue on Appeal

Did the Administrative Law Court properly reverse the Department of Corrections' calculation of Respondent's sentence for violation of S.C. Code Ann. § 44-53-370(e)(2) where Respondent is eligible for parole, extended work release, or supervised furlough?

Counter-Statement of the Case

This matter is before the Court on appeal from the Administrative Law Court's review of an inmate grievance filed by Respondent Jakarta Deon Young ("Young"). Young was sentenced on August 25, 2016 to seven (7) years for the offense of trafficking 10-28 grams of cocaine, 2nd offense, in violation of S.C. Code Ann. § 44-53-370(e)(2)(a)(2). (Sentence Sheet, R. 11-13.)

Young filed a Step 1 grievance on June 28, 2017 challenging the South Carolina Department of Corrections' ("the Department") sentencing calculation for this offense.[1] (Step 1 Grievance, R. 9.) Young contended that the offense of trafficking 10-28 grams of cocaine, 2nd offense, is not a "no parole" offense, and therefore he should not be required to serve 85% of his sentence. (*Id.*) Young asserted that because he was not sentenced to a mandatory term of imprisonment of twenty-five years, a mandatory minimum of twenty-five years, or a mandatory minimum term of imprisonment of less than twenty-five years nor more than thirty years, he was eligible for parole, extended work release, or supervised furlough under S.C. Code Ann. § 44-53-370. (*Id.*)

The Warden denied Young's Step 1 Grievance, finding that the offense of trafficking in cocaine under S.C. Code Ann. § 44-53-370(e)(2) requires a "no parole (85%) sentence." (*Id.*)

Young then filed a Step 2 Grievance, reasserting the same argument from his Step 1 Grievance. The Warden also denied the Step 2 Grievance. (Step 2 Grievance, R. 8.)

On September 21, 2017, Young filed a Notice of Appeal to the Administrative Law Court. Young requested that the ALJ appoint counsel, but that motion was denied. After a full round of

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[1] As the Administrative Law Judge ("ALJ") explained in his Order, Respondent referred to § 44-53-375(F) in his Step 1 Grievance, but cited only to § 44-53-370(e)(2) in his Step 2 Grievance, his Notice of Appeal to the Administrative Law Court ("ALC"), and in his merits briefing before the ALC. (*See* Order, R. 51.) Therefore, only § 44-53-370(e)(2) is at issue in this appeal.

merits briefing, the ALJ issued an Order on June 22, 2018 finding that the Department erred in calculating Young's sentence, and reversing and remanding. (Order, R. 51-55.) Specifically, the ALJ agreed with Young that the unenumerated paragraph following subpart (7) of § 44-53-370(e) supported that Young is eligible for parole, extended work release, or supervised furlough. (*Id.*) This appeal followed.[2]

Standard of Review

The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law. *Olson v. S.C. Dep't of Health and Envtl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 501 (Ct. App. 2008). According to statute, "[t]he review of the administrative law judge's order must be confined to the record." S.C. Code Ann. § 1-23-610(B). The reviewing court "may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact." *Id.* The appellate court may affirm the decision or remand the case for further proceedings. *Id.* However, the reviewing court may reverse or modify the decision ***only*** if the substantive rights of the petitioner have been prejudiced because the decision is:

> (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.

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[2] After filing its appeal, the Department subsequently moved to remand the matter back to the ALC to correct a purported "error of law." The Department also filed a motion for supersedeas with the ALC, which the ALJ granted. Young—still acting *pro se* at this juncture—filed a motion to appoint counsel. This Court issued an Order on October 25, 2018 appointing the Office of Appellate Defense to represent Young on appeal "[d]ue to the unique circumstances of this case." Young's counsel then filed a return in opposition to the motion to remand. The Court issued an Order denying the motion to remand on February 24, 2019.

S.C. Code Ann. § 1-23-610(B)(a)-(f).

Although Appellant cited the applicable general standard of review for all administrative law decisions, Appellant did not identify specifically how its substantive rights had been prejudiced. Nevertheless, it appears Appellant contends the ALJ's decision is either "in violation of constitutional or statutory provisions" or is "affected by other error of law" in light of the Appellant's argument that the ALJ "improperly ruled" and "was incorrect in its interpretation" of the relevant statutory provisions. As will be discussed in greater detail *infra*, the ALJ committed no error of law and correctly interpreted the controlling statute to determine Young is eligible for parole, extended work release, or supervised furlough.

Argument

I. The ALJ correctly determined that Young is eligible for parole, extended work release, or supervised furlough.

This case turns on the meaning of the unenumerated paragraph following subpart (7) of S.C. Code Ann. § 44-53-370(e) and its interplay with Young's sentence for violation of S.C. Code Ann. § 44-53-370(e)(2)(a)(2). Young was convicted of trafficking 10-28 grams of cocaine, 2nd offense, pursuant to § 44-53-370(e)(2)(a)(2). That section provides that a person who knowingly sells or manufactures between 10 and 28 grams or more of cocaine or a mixture of cocaine (or conspires to do so) must be punished "for a second offense, a term of imprisonment of not less than five years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars." *Id.*

This paragraph, however, must be read in conjunction with the unenumerated paragraph towards the end of subsection (e). That paragraph provides that:

> A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, 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. . . .

S.C. Code Ann. § 44-53-370(e) (emphasis added). The ALJ correctly found Respondent "was not convicted and sentenced to a mandatory term of imprisonment of twenty-five years, a mandatory minimum of twenty-five years, or a mandatory sentence between twenty-five and thirty years." (Order, R. 55). Appellant concedes that Respondent "did not receive a 'mandatory' or 'mandatory minimum' term of imprisonment of twenty-five to thirty years." (Br. of App. at 5.) Section 44-53-370(e) has been in place for several decades. The unenumerated paragraph was added by 1995 S.C. Act No. 7, Part I, § 17. That same year, the General Assembly also enacted the "85% no parole" provision in 1995. *See* 1995 S.C. Act No. 83, § 3.[3] The Code defines a "no parole" offense as a Class A, B, or C felony or an offense exempt from classification subject to a maximum term of imprisonment of 20 years. *See* S.C. Code Ann. § 24-13-100. The 85% provision states that generally for a "no parole" offense, the inmate is not eligible for early release, discharge, or community supervision "until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed." *See* S.C. Code Ann. § 24-13-150.

This Court examined the meaning of the unenumerated paragraph in *State v. Taub*, 336 S.C. 310, 315-16, 519 S.E.2d 797, 800-01 (Ct. App. 1999). Importantly, this Court held that it ***does not*** preclude a person convicted of trafficking second offense the potential for receiving

[3] The Department contends that the 85% no parole provision was "part of the January 1, 1996 enactments." Although the provision had an effective date of January 1, 1996, it was approved by the Governor and made into law on June 7, 1995. *See* 1995 S.C. Act No. 83, § 62. Thus, it was passed during the same legislative session as the unenumerated paragraph in § 44-53-370(e). Since these provisions were adopted during the same legislative session, they "are to be read together as one act, and are not to be construed as inconsistent, if they can fairly and reasonably be construed otherwise." *Locke v. Dill*, 131 S.C. 1, 126 S.E. 747, 748 (1925).

parole. *State v. Taub*, 336 S.C. 310, 315-16, 519 S.E.2d 797, 800-01 (Ct. App. 1999). This was despite the enactment of the 85% no parole provision. As the *Taub* court explained, by including this language the legislature assigned an "additional meaning" within subsection (e) to any sentence described as "mandatory" or as a "mandatory minimum." *Id.* The unenumerated paragraph explains that under such a "mandatory" provision, the person sentenced is not eligible for parole, extended work release, or supervised furlough. However, the first and second offense provisions for many offenses, including trafficking cocaine, did not include such language. Thus, the *Taub* court reasoned that: "a person sentenced as a first or second offender, though subjected to a required minimum term of imprisonment, ***is not precluded under the statute from receiving parole, extended work release, or supervised furlough***." *Id.* (emphasis added).

The General Assembly's decision to leave the language of (e) essentially unchanged following *Taub* must mean something.[4] As the Supreme Court has explained, "[t]he General Assembly is presumed to be aware of the common law . . . ." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997). Thus, "[t]here is a presumption 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***." *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) (emphasis added). Where the Legislature fails to alter a statute over a long period of time, "its inaction is evidence the Legislature agrees with th[e] Court's interpretation." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). "[S]tatutes in derogation of the common law are to be strictly construed," and "a statute restricting the common

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[4] The General Assembly has amended S.C. Code Ann. § 44-53-370(e) twice following the *Taub* decision, but has not altered the language of the unenumerated paragraph. *See* 2000 S.C. Act No. 355, § 8; 2002 S.C. Act No. 267, §§ 2, 3.

law will 'not be extended beyond the clear intent of the legislature.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (quoting *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)).

Therefore, under this principle, the General Assembly is presumed to have known about the *Taub* court's interpretation of the unenumerated paragraph, and the Court should continue to apply its interpretation.

Here, Young was sentenced to seven years. Therefore, the unenumerated paragraph does not bar him from receiving parole, extended work release, or supervised furlough, just as the ALJ correctly determined. Moreover, in light of *Taub*, he is eligible for each of these. Therefore, the Court should affirm the ALC's ruling.

II. At a minimum, the statute is ambiguous and should be construed in Young's favor since it is penal in nature.

As detailed above, *Taub* supports that the ALJ correctly found that Young is eligible for parole. However, even if *Taub* were inapplicable, the unenumerated paragraph is, at the very least, ambiguous and should be construed in Young's favor.

The statutory construction rules provide that if the "language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation." *State v. Dupree*, 354 S.C. 676, 693-94, 583 S.E.2d 437, 446-47 (Ct. App. 2003). However, where the language "gives rise to ***doubt*** or ***uncertainty*** as to legislative intent, the construing court ***may search for that intent beyond the borders of the act itself***." *Id.* (emphasis added). The statute must "receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers" and "be resolved in favor of a just, equitable, and beneficial operation of the law." *Id.* The statute must be "read in a sense that harmonizes with its

subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342-43, 713 S.E.2d 278, 283 (2011). Importantly, a penal statute is "***construed strictly against the State and in favor of the defendant.***" *Rainey v. State*, 307 S.C. 150, 151-52, 414 S.E.2d 131, 132 (1992) (emphasis added). Where there is "***any doubt***" about a statute's scope, the interpreting court is "***required***" to resolve it in the defendant's favor. *State v. Miles*, 421 S.C. 154, 164, 805 S.E.2d 204, 210 (Ct. App. 2017), *reh'g denied* (Oct. 19, 2017), *cert. denied* (Oct. 18, 2018) (emphasis added).

The South Carolina Supreme Court examined the unenumerated paragraph at the end of section 44-53-370(e) in *Kerr v. State*, 345 S.C. 183, 547 S.E.2d 494 (2001). Kerr was convicted of trafficking in cocaine in 1988. *Kerr*, 345 S.C. at 184, 547 S.E.2d at 495. Kerr was released on parole in 1993; however, he was arrested and reincarcerated in 1995 because the Parole Board "decided Kerr was parole ineligible under the trafficking statute." *Id.* at 185, 547 S.E.2d at 495. Kerr was sentenced to mandatory term of twenty-five years imprisonment. *Id.* at 187, 547 S.E.2d at 496. At the time, the unenumerated paragraph provided that a person sentenced under the subsection to a mandatory minimum term of twenty-five years imprisonment was not eligible for parole. *Id.* "Construing this penal statute strictly against the state," the Supreme Court held Kerr was parole eligible because "a 'mandatory term' of imprisonment is not the equivalent to a 'mandatory minimum term' of imprisonment." *Id.* at 188, 547 S.E.2d at 497.

The unenumerated paragraph is ambiguous because it only addresses a negative (providing that certain minimum sentences mean an offender is not eligible for parole). The implication is that the remainder of offenses would be parole eligible (as *Taub* found), but the statute is ultimately silent on this point. At a minimum, this renders the provision ambiguous. Because this is a penal statute, it should therefore be construed against the department and resolved in Defendant's favor.

Doing so would accord with the purpose of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which kept the unenumerated paragraph in § 44-53-370(e) in place. The legislative intent of that bill was expressly stated at the outset, providing that:

> It is the intent of the General Assembly to preserve public safety, reduce crime, and ***use correctional resources most effectively***. Currently, the South Carolina correctional system incarcerates people whose time in prison does not result in improved behavior and who often return to South Carolina communities and commit new crimes, or are returned to prison for violations of supervision requirements. It is, therefore, the purpose of this act to reduce recidivism, ***provide fair and effective sentencing options, employ evidence-based practices for smarter use of correctional funding***, and improve public safety.

2010 S.C. Act No. 273, § 1 (emphasis added). As this Court has reasoned, one of the 2010 Omnibus Act's objectives "is to conserve taxpayer dollars by allowing earlier release dates for inmates convicted of less serious offenses." *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 284-85, 781 S.E.2d 914, 918 (Ct. App. 2016). By affirming the ALC's finding that Young is parole eligible, the Court would accomplish the purpose of this provision.

Conclusion

For all these reasons, the Court should affirm the well-reasoned decision of the ALC.

Signature on Following Page

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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