STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No.: 16-ALJ-15-0033-AP

Appellate Case No.: 2016-002499

QUENTIN HOLT, #268198.....APPELLANT

v.

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

FINAL 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 THE RESPONDENT

TABLE OF CONTENTS

Table of authorities.....ii

Statement of issues on appeal.....iii

Statement of the case.....1

Arguments

1. The ALC did not err in affirming the decision of the Respondent that the Appellant is not eligible for parole due to this prior drug conviction.....3

2. The *Bolin* decision never applied to the present case so the ALC was correct in not considering this in their decision.....8

3. There exist no ambiguity so the rule of lenity does not apply.....8

Conclusion.....11

TABLE OF AUTHORITIES

CASES

Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956).....7

Al-Shabbaz v. State, 338 S.C. 334, 527 S.E.2d 724 (2000).....3,4

Bolin v. S.C. Dept. of Corrections, 415 S.C. 276, 781 S.E.2d 914 (2015).....8

Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009).....8

Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2002).....3,4

Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992).....6

Mid State Auto Auction of Lexington Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690, 692 (1996)....10

Pachel v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995).....7

Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996).....6

Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997).....6

STATUTES

S.C. Code Ann.§1-23-380(5)(e-f)(Supp. 2015).....5
S.C. Code Ann. §1-23-610(Supp. 2015).....4
S.C. Code Ann. §24-13-100(Supp. 1995).....9
S.C. Code Ann. §24-13-150(Supp. 1995).....9
S.C. Code Ann. §44-53-375(B)(2)(Supp. 2015).....6
S.C. Code Ann. §44-53-375(B)(3)(Supp. 2015).....5,9

STATEMENT OF ISSUE ON APPEAL

1. **Whether the Appellant, with two prior convictions for drug related crimes, is eligible for parole after his conviction for possession with intent to distribute cocaine, third offense?**

STATEMENT OF THE CASE

The Appellant approached a confidential informant of the Georgetown County Organized Crime Bureau, and sold him .8 grams of a white rock like substance. The substance field tested positive for crack cocaine. It was later confirmed by the South Carolina Law Enforcement Division that this substance was in fact crack cocaine. On October 26, 2009, the Appellant was arrested and charged with the offense of distribution of methamphetamine or cocaine based first offense. A further investigation revealed that the Appellant was previously convicted on two separate occasions for drug offenses. Upon making this determination the Appellant's offense was upgraded to a third offense.

On September 22, 2010, the Appellant appeared before the Honorable Benjamin H. Culbertson for the offense of possession with intent to distribute cocaine base or meth third offense. (PWID Cocaine 3rd). Upon the conclusion of this appearance the Court sentenced the Appellant to a twenty-five year period of incarceration. (Amended R.p.21-p.27). At the time the Appellant committed this offense, South Carolina law did not allow a person serving a sentence for PWID cocaine 3rd parole eligibility. In 2010 the General Assembly passed the South Carolina Reduction of Recidivism Act, which went into effect in January of 2011. This law allowed persons convicted of a third drug offense parole eligibility only if their prior drug convictions were for possession. The Respondent conducted an investigation to determine if the Appellant was in fact eligible for parole. Upon the conclusion of this investigation the Respondent discovered that on July 24, 2000, the Appellant was convicted of PWID cocaine. (Amended R.p.11). Due to this previous conviction the Respondent determined that the Appellant is not eligible for parole. On June 20, 2016, the Appellant was informed that due to this prior drug conviction he is not eligible for parole. (Amended R.p.20).

Upon being informed of this denial, the Appellant's counsel contacted the Respondent requesting to resolve this matter in a way to possibly allow parole eligibility. (Amended R.p.12-p.13). The Respondent quickly responded informing him that pursuant to South Carolina law he is not eligible for parole. (Amended R.p.14). The Appellant's counsel once again contacted the Department expressing disagreement with the Department's decision, she again requested any possible resolution to this case that would give the Appellant parole eligibility. (Amended R.p.15-p.16). On July 25, 2016, another correspondence from the Respondent was delivered which informed the Appellant that the Department respectfully disagreed with their interpretation of the law. (Amended R.p.17). The Appellant then requested a final determination so they can file a notice of appeal before the Administrative Law Court. (ALC) The final decision was made available to the Appellant on August 1, 2016. (Amended R.p.19).

Upon receiving this final decision the Appellant filed a notice of appeal before the ALC. Within this appeal the Appellant argued that it was not the intention of the General Assembly for a person with a third drug offense be denied parole eligibility. The Appellant further argued that the denial of parole due to the "no parole" classification is unlawful pursuant to the *Bolin* decision. The Respondent argued that the Appellant was convicted of a third offense, and his prior offenses were greater than possession so per statute he is not eligible for parole. The Respondent also argued that the *Bolin* decision relates to a second drug offense, not a third as the present case, so *Bolin* does not apply.

Upon receiving briefs from both sides supporting their arguments, the Honorable Deborah Brooks Durden, Administrative Law Court Judge, issued her opinion on December 8, 2016. Within this opinion Judge Durden determined that South Carolina law does not allows an individual

serving a sentence for a third drug offense parole eligibility unless all prior drug offenses were for possession. She affirmed the decision of the Respondent. (Amended R.p.1-p.5).

The Appellant now brings this appeal before the South Carolina Court of Appeals. Within this appeal the Appellant argues that the ALC was incorrect in its determination. The Appellant alleges that he is currently being unlawfully denied parole eligibility. The Appellant further argues that there exists some ambiguity within the statute so he should be given the benefit due to the rule of lenity. The Respondent argues that the ALC was correct in its determination. The statute is clear: a person serving a third drug offense is not entitled parole unless all prior drug offenses were for possession. The Appellant has a prior possession with intent to distribute; therefore, he is not eligible for parole. The Respondent will also argue that the statute is clear regarding the intent of the General Assembly, there exists no ambiguity, so the rule of lenity does not apply. The initial brief of the Respondent supporting their argument follows.

ARGUMENTS

1. **The ALC did not err in affirming the decision of the Respondent that the Appellant is not eligible for parole due to his prior drug conviction.**

The ALC correctly determined that the Appellant was legally denied parole eligibility due to his prior drug convictions. In reviewing the record it is clear, the Appellant is serving a sentence for the offense of possession with intent to distribute cocaine third offense. The record also clearly reveals that the Appellant was previously convicted of the same offense. This does not reflect any error of law since the statute is clear that a person serving a third drug offense will not be eligible for parole unless all prior drug convictions were for possession. Since there exist no error in law this Court should affirm the decision of the ALC.

The Appellant has raised allegations that he was unlawfully denied parole eligibility. He filed a notice of appeal before the ALC pursuant to the South Carolina Supreme Court decisions

of *Al-Shabbaz v. State,* 338 S.C. 334, 527 S.E.2d 724 (2000), and *Furtick v. S.C. Dept. of Probation, Parole, and Pardon Services,* 352 S.C. 594, 576 S.E.2d 146 (2002). In *Al-Shabbaz,* the Court created a new avenue by which inmates could seek review of a final decision of a state agency in "non-collateral" matters related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act.[1] *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 prison officials have erroneously calculated his sentence; sentence-related credits or custody status." *Id.*, at 369.

In *Furtick*, the Court noted that appealable final decisions by the Board arises in the latter manner, where the inmate alleges that the Department erroneously determined he was not eligible for parole. The Court held that, in order to determine whether an inmate's claim against the Department is entitled to review by the ALC, it is first necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick,* 149. The Court decided that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.* These two cases gave the ALC jurisdiction over the decision of the Parole Board in the denial of the Appellant's parole eligibility.

In the determination of this case the ALC can only 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,

[1] For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right. S.C. Code Ann. §1-23-610 (Supp. 2015).

inferences, conclusions or decisions are, clearly erroneous in view of the reliable probative, and substantial evidence or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(5)(e-f)(Supp. 2015). The order of the ALC was clear the statute did not allow the Appellant parole eligibility. Since it is clear that the Appellant is not entitled parole eligibility the decision of the Department was correctly affirmed. The Appellant has no grounds to have this Court reverse the ALC's decision.

The Appellant argues that the ALC erred in affirming the decision of the Respondent that he is not eligible for parole. The Appellant is serving a sentence for a third drug offense, he will not become eligible for parole unless all of his prior drug offenses are for only possession. The South Carolina Code of Laws specifically state:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation granted 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.

S.C. Code Ann. §44-53-375(B)(3)(Supp. 2015)

Within his brief the Appellant argues that within the statue it states, "In all other cases, the sentence must not be suspended nor probation granted." The Appellant is of the belief this means that he is not entitled probation; however, is entitled to parole eligibility. The ALC determined that in reading the entire statute this is not the intent of the General Assembly, the Respondent agrees.

Within the statue it clearly states that an inmate convicted of a third drug offense is eligible for parole only if the prior offenses were for possession. If the legislature wished for inmates convicted of a third or greater drug offense be allowed parole regardless of their prior offenses that condition would not be in place. The legislature would have allowed all persons who have

committed a prior drug offense parole eligibility regardless of the prior amount of convictions or its seriousness. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Rowe v. Hyatt,* 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996).

In reading the entire statute it is clear the legislature wished all prisoners who were convicted of a first or second offense parole eligibility. There statute clearly states, "a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." S.C. Code Ann. §44-53-375(B)(2)(Supp. 2015). If the General Assembly wished all individuals who have committed prior offenses regardless of their severity parole eligibility the statute would have not been limited to third offenders who priors were only for possession. Statutes must be read as a whole and sections which are part of the same general statutory scheme must be constructed together and each given effect, if it can be done by any reasonable construction. *Higgins v. State,* 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992).

The legislature never intended all individuals sentenced to a drug offense under this statute parole eligibility. If the legislature wished an individual in the Appellant's position to receive parole eligibility the statute would have stated this. The Court should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State,* 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997). It is clear by the reading of the statute the General Assembly only wished certain drug offenders to be allowed parole eligibility. The Appellant does not fall within the parameters that allows parole eligibility. His parole eligibility was correctly denied, and this

decision was lawfully upheld. A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. *Abell v. Bell,* 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956).

Within the bulk of his brief the Appellant argues that for a third and subsequent drug offense the statute does not allow for probation but does allow parole. He makes this argument due to the last sentence of the statute, which states, "In all other cases, the sentence must not be suspended nor probation granted." That sentence does not mention parole eligibility just states that the sentence cannot be suspended nor probation granted. There is circumstances where the Court can sentence an individual to a suspended sentence with no supervision to follow. (ex. 10 years suspended to 5 years) The statute does not allow for this nor probation. However, it is clear by reading the entire statute no individual is also allowed parole for a third or subsequent offense unless his prior drug convictions are only for possession. That criteria would not have been included if the General Assembly wished all individuals regardless of the amount of prior drug offenses be allowed parole eligibility. If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no need to employ rule of statutory interpretation, and the court has no right to look for, or impose another meaning. *Pachel v. State Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995) The terms of the statute are clear, no individual with a third drug offense can be allowed to appear before the Parole Board unless all of their prior drug convictions are for possession. The Appellant has a prior offense of PWID cocaine, which denies him parole eligibility. Since it was applied properly the decision of the ALC was correct and should be affirmed.

2. The *Bolin* decision never applied to the present case so the ALC was correct in not considering this in their decision.

Within his brief the Appellant applies the South Carolina Court of Appeals decision of *Bolin v. S.C. Dept. of Corrections,* 415 S.C. 276, 781 S.E.2d 914 (2015). In *Bolin*, this Court decided:

> Defendant's convictions for second-offense conspiracy to manufacture methamphetamine were no longer no-parole offenses, for which defendant was required to serve 85% of the sentence before being eligible for parole, following effective date of Omnibus Crime Reduction and Sentencing Reform Act, even though the Act did not amend definition of the term "no parole offense" in statute describing types of offenses for which offender was not eligible for parole, where Act amended separate statutory provision to indicate that, "notwithstanding any other provision of law," a person conviction and sentenced as first or second offender pursuant to that subsection was not eligible for parole.

Bolin, at 276

The Court in *Bolin* made a second offense PWID or Distribution paroleable, and not an 85% offense. The Appellant is currently serving a sentence for PWID cocaine 3rd, *Bolin* does not apply. According to statute, an inmate is not parole eligible on a third offense unless their prior offenses are only possession. That does not apply to the present case; therefore, the ALC was correct in affirming the decision of the Parole Board.

3. There exists no ambiguity so the rule of lenity does not apply.

The Appellant argues that due to the ambiguity of the statute the decision of the ALC should have gone in his favor, under the rule of lenity. The rule of lenity requires that any law that is unclear regarding the intent of the General Assembly, or the punishment of the offender the law must side with the defendant. When a genuine ambiguity exist as a result of the proposed application of a penal statute to a given situation, the rule of lenity requires that the doubt must be

resolved in the defendant's favor. *Bryant v. State,* 384 S.C. 525, 683 S.E.2d 280 (2009) There exist no ambiguity within this statute. The General Assembly makes it clear that someone in the Appellant's position will not be allowed parole eligibility.

The Appellant is currently serving a sentence for PWID cocaine third offense. Within his prior offenses he was previously convicted of PWID cocaine so he is not eligible for parole. The statute clearly states, "a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation granted and is eligible for parole supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." S.C. Code Ann. §44-53-375(B)(3)(Supp. 2015). It is clear that not only a person serving a third or subsequent drug offense not allowed parole without priors only for possession, but that person is not entitled many other credits given to other inmates currently incarcerated. The reason for this is due to the fact a third offense is classified as an A-Felony which is considered a no parole offense.[2] Any one serving a no parole offense must serve at least 85% of their sentence and are not allowed any credits.[3] This is why the statute forbids any person serving a third or subsequent offense to receive parole or any other extra credits unless their prior drug offenses are only for possession. It is clear the intent of the General Assembly is to not allow an individual serving a third drug offense parole eligibility unless certain conditions are met. The Appellant failed to meet statutory requirements so he is not allowed parole eligibility. The decision

[2] For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more. S.C. Code Ann. §24-13-100(Supp. 1995).

[3] Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. S.C. Code Ann. §24-13-150(Supp. 1995)

of the Respondent and the ALC was correct and should be upheld. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington Inc., v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996).

The rule of lenity only applies if there exists some ambiguity in the statue. If it was not clear what was the intent of the legislature the decision would have to fall on the side of the Defendant, this is not the fact in the present case. There is no doubt the legislature wanted a person serving a third or subsequent offense only to be allowed have parole eligibility if that persons priors were only for possession. The statute is clear there is no ambiguity in how a person with a third offense can receive parole. The Appellant raises the last sentence in the statute, as to argue that this causes ambiguity. That is not the case, the last sentence does not allow split sentences or probation, the remainder of the statute clearly states that a person with a third offense is not allowed parole with a prior drug offense that is not possession. The statute should be read as a whole. *Id.* Since there exist no ambiguity within the statute the ALC was correct not applying rule of lenity. The statute is clear an inmate serving a sentence for a third or subsequent drug offense is only allowed parole eligibility if their prior drug offenses are only for possession. This is not the case with the Appellant, his parole eligibility was lawfully denied, and the ALC was correct in affirming the Respondent's decision.

CONCLUSION

Based on the foregoing reasons the ALC correctly affirmed the final decision of the Parole Board; therefore, the Respondent respectfully requests the final decision of the Administrative Law Court be upheld.

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
July 5, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Deborah Brooks Durden, Administrative Law Judge
Case No.: 16-ALJ-15-0033-AP

Appellate Case No.: 2016-002499

QUENTIN HOLT, #268198.....APPELLANT

v.

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

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.

Tommy Evans, Jr.
Assistant General Counsel

July 5, 2017