

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-15-0032-AP

Appellate Case No.: 2019-000553

GREGORY MACKKEY, #136609.....APPELLANT

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v.

SC Court of Appeals

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- 1. Did the Parole Board deny the Appellant a substantial right to statutorily correct parole review and violate ex post facto clause in use of current version of parole statute instead of version of statute at the time of the offense?**

STATEMENT OF THE CASE

On March 21, 1986, the Appellant and several other people were at the residence of the victim to visit her boyfriend, the cousin of the Appellant. The Appellant returned later that night while the victim was home alone, he then sexually assaulted, choked, and suffocated the victim to death. When the boyfriend returned, he found the victim in the apartment deceased. He then immediately contacted the Rock Hill police department.

Though their investigation the authorities determined the Appellant as a prime suspect. He was then brought in for questioning. During a lawful interrogation he gave a full confession. After making this confession the Appellant was charged with the offenses of murder, grand larceny, criminal sexual conduct in the first degree, and a gun law violation.

On August 28, 1986, the Appellant appeared before the Honorable William Howell for the offense of murder. Upon the conclusion of this appearance the Appellant was sentenced to a term of incarceration for the remainder of his natural life. At the time he committed this offense South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

On August 23, 2006, the Appellant made his initial appearance before the Parole Board. Upon the conclusion of this hearing the Board decided to deny the Appellant an opportunity to be released on parole. Since this initial appearance, the Appellant has appeared before the Board an additional seven times each resulting in a denial of parole. His last appearance occurred on September 19, 2018. Parole was denied due to: 1) the nature and seriousness of the current offense; and, 2) an indication of violence in this or a previous offense. After receiving notification of his denial the Appellant decided to file a notice of appeal before the Administrative Law Court (ALC).

Within this appeal the Appellant argued that the Board violated ex post facto by not considering the criteria that existed at the time he committed the offense. The Appellant also argued that only six members were present making his denial unlawful. The Respondent argued that the Board followed the mandates proscribed by the South Carolina Supreme Court in the *Cooper* decision; and, there existed a quorum so the appearance of only six members did not violate South Carolina law.

On February 26, 2019, the Honorable H.W. Funderburk determined that a quorum of Board members were present and since the Appellant did not obtain the majority of yes votes required for parole, the denial of parole was proper. Due to the parole being properly denied the ALC decided to affirm the decision of the Parole Board.

Upon being informed of the ALC's decision to affirm the decision of the Parole Board the Appellant decided to file a notice of appeal before the Court of Appeals. Within this appeal the Appellant argues that since he was not heard by a full Board of seven members so the ALC erred in affirming the decision of the Parole Board.

The Respondent will argue that as long as there is a majority of members present that constitutes a quorum which allows the Board to hear a case and make a decision. Since there exist a quorum and the Appellant failed to gain a majority of yes votes he was lawfully denied parole. The decision of the ALC was lawful and should be upheld. The brief of the Respondent supporting their defenses follows.

1. The six member board constituted a quorum so the denial of parole was lawful.

The Appellant argues that being allowed to go before only six members of the Parole Board violates South Carolina law. Pursuant to South Carolina law the Parole Board is composed of seven members each of which are appointed from each of the seven congressional districts. S.C.

Code Ann. §24-21-10(B)(2018). However, all seven members does not have to be present to conduct business. As long as there is a quorum then a parole hearing can be heard and decided. In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. *James v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 564, 569, 660 S.E.2d 288, 291 (Ct. App. 2008).

The Appellant argues that the denial of parole was unlawful in violation of ex post facto. The Appellant believes that he was unlawfully denied parole after not receiving a majority of the vote. The Appellant believes that he was held to the standard that currently exist for violent offenders, thereby, needing a two-thirds vote rather than a simple majority to be granted parole. The Appellant committed this offense prior to June 3, 1986. Due to the *Barton* decision, all he must obtain is a simple majority to be awarded parole. He is required acquire four of the six votes to be awarded parole. The Appellant was only able to acquire three votes; therefore, he was lawfully denied parole.

The Appellant argues that he was only responsible for being awarded a majority of votes, so his denial was in violation of ex post facto. The Appellant is correct, he is only responsible for acquiring a majority votes which he failed to receive. At the time the Appellant committed this offense South Carolina law stated:

The Board may issue an order authorizing the parole which shall be signed either by a majority of its members or by all three members meeting as a parole panel or the case ninety days prior to the effective date of parole.

S.C. Code Ann. §24-21-645(1984)

As part of the Omnibus Criminal Justice Improvement Act 1986 additional language was added to state that “at least two-thirds of the members of the board must authorize and sign orders

authorizing parole for persons convicted of a violent crime as defined in Section 16-1-609.” S.C. Code Ann. §24-21-645 (2012). The Appellant is serving a life sentence for the classified violent crime of murder. The South Carolina Supreme Court decided in the case of *Barton v. S.C. Dept. of Probation, Parole and Pardon Service*, 404 S.C. 395, 745 S.E.2d 110 (2013), that requiring an inmate convicted prior to 1986 a two-thirds vote to be granted parole is a violation of ex post facto. The Appellant argues that due to *Barton* the Board violated the law by requiring a two-thirds vote for his release. At the conclusion of his hearing the vote was three for and three against so there was no majority. The Appellant never received the sufficient amount of votes to be granted parole. He was lawfully denied parole so he is not entitled to any relief.

In *Barton*, the Appellant Thalma Barton was serving a life sentence for the offense of murder. She appeared before the Board on January 8, 2012, with six members present, four voted in the affirmative to release Ms. Barton on parole. *Barton*, at 399. The existing laws required a two-thirds votes for all seven (7) members, so the Board determined Ms. Barton failed to receive the required number of votes to be released on parole. Upon receiving the order of denial Ms. Barton appealed. The South Carolina Supreme Court decided that since the law existing at the time of the offense allowed a majority, the denial of parole violated ex post facto.¹ Unlike the Appellant in *Barton*, the Appellant in the present case only received three affirmative votes not four which would have granted him parole. Due to the *Barton* decision all individuals who was convicted prior to June 3, 1986, for a violent offense needs only a majority of votes to be granted parole. The Appellant admits he only received three affirmative votes. This is not a majority, so he is not allowed to be released on parole. The Appellant failed to provide evidence revealing he received

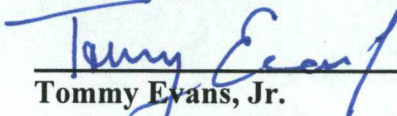
¹ The law existing at the time of the offense, and not at the time of sentencing determines whether an increase of punishment or reduction of benefits constitutes an ex post facto violation. *Elmore v. State*, 305 S.C. 456, 459, 409 S.E.2d 397, 399 (1991).

the four votes needed to be granted parole, so he failed to meet his burden. 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 test 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 decision of the ALC should be affirmed.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests that the final decision of the South Carolina Department of Probation, Parole and Pardon Services be affirmed.

Respectfully submitted,



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December 30, 2019

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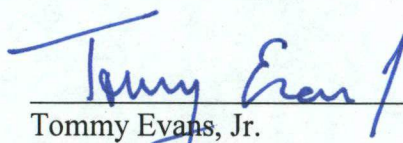
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S.C. DEPARTMENT OF PROBATION, PAROLE AND
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CERTIFICATE OF COUNSEL

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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December 30, 2019