

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Milton G. Kimpson, Administrative Law Judge
Docket Number 19-ALJ-15-0015-AP

Appellant Case No.: 2019-001853

EMIAH ANDERSON, #173165.....APPELLANT

v.

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SC Court of Appeals

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

RESPONDENT'S FINAL BRIEF

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STATEMENTS OF ISSUES ON APPEAL

- 1. Whether the Board's decision to deny the Appellant's parole was made upon an unlawful procedure?**
- 2. Whether the Board's criteria for parole consideration violated the ex post facto of the United States and South Carolina Constitutions?**

STATEMENT OF THE CASE

On February 8, 1990, the Appellant called the police to report his home was broken into. Once an officer arrived he went into the residence to conduct an investigation. It was discovered that items were thrown around and that frozen food was removed from the freezer and thrown on the floor. The Appellant informed the officer that his son was supposed to stay home from school so he should still be inside the house. The officer search the remaining portion of the home and found his son deceased due to an apparent gunshot wound to the back of the head. After removing the Appellant away from the home a further search was conducted. The authorities found the Appellant's daughter in bed a victim of a sexual assault. The murder weapon was later located inside the home, and it was discovered that the Appellant was the individual who sexually assaulted his own daughter. He was arrested and charged with the offenses of murder and criminal sexual conduct in the second degree (CSC 2nd).

On November 28, 1990, the Appellant appeared before the Honorable Sidney Floyd for the offenses of murder and CSC 2nd. Upon the conclusion of this appearance the Appellant was sentenced to a period of incarceration for the remainder of his natural life for the offense of murder and twenty years for CSC 2nd.¹ At the time the Appellant committed these offenses South Carolina law allowed an individual serving a life sentence for murder parole eligibility upon the service of twenty years.

The Appellant made his initial appearance before the Board on May 12, 2010. Upon the completion 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 an additional four times each resulting in a denial of parole. His most recent appearance occurred on March 20, 2019, parole

¹ The Appellant completed his sentence for CSC 2nd on October 9, 2000.

was denied unanimously due to: 1) 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.16). Upon being notified of this denial of parole the Appellant filed a notice of appeal before the Administrative Law Court (ALC).

Within this notice of appeal the Appellant argued that the Board failed to give him a fair hearing by incorrectly evaluating his parole review claiming he had a prior offenses, and prison infractions. The Appellant also argued that the risk and needs assessment was unfair because the facts of his offense will never change and always be violent in nature.

The Respondent moved to dismiss due to the fact the Appellant failed to file his brief within the time allotted pursuant to the rules of the Administrative Law Court. (R.p.8-14). The lower court decided to deny the Respondent's motion to dismiss; however, the court decided to affirm the decision of the Respondent in the denial of the Appellant's parole. (R.p.1-p.6).

Upon receiving the lower court's decision the Appellant decided to file a notice of appeal before this court. Within this appeal the Appellant argues that the denial of parole was based on an unlawful procedure; and, in violation of ex post facto.

The Respondent will argue that the Board revealed that they considered the mandatory criteria as well as the risk assessment prior to making a final decision, thereby, not violating any lawful procedure. The Respondent further argues that the criteria is not punitive so it cannot be considered a violation of ex post facto. The brief of the Respondent supporting these arguments follows.

ARGUMENTS

- 1. The Respondent revealed that they considered all of the mandatory criteria so the decision of the Board followed lawful procedure.**

A final decision shall include a finding of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350 (2018). The Appellant argues that the Board failed to follow lawful procedure in the denial of his parole. The ALC ruled that the Board followed the mandates proscribed in the South Carolina Supreme Court decision of *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008), and the above referenced statute. So the ALC decided to affirm the decision of the parole board, a decision that should be upheld by this Court.

In *Cooper*, the Supreme Court decided that a finding of fact was included; however, the Court determined that the Parole Board neither, “offered an explanation nor indicated that it considered the statutory criteria of section 24-21-640, and the fifteen criteria listed on the parole form.” *Id.*, at 500.² The Supreme Court decided that if the Parole Board failed to consider and apply the statutory-related criteria, it has the effect of rendering an inmate parole ineligible, which warrants review by the ALC. *Id.*, at 502.

In *Cooper*, the Supreme Court established what a future Parole Board order shall exist of, *Cooper* specifically states:

We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 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.

² Due to the mandatory risk assessment there are now sixteen criteria listed on the parole form.

Since *Cooper*, the General Assembly has added an additional requirement. The Department is now required to create and acknowledge a risk assessment. The Department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contributed 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)(2018). Since this mandatory element was added each inmate are now subjected to a COMPAS risk assessment. Upon completion the results are always considered by the parole board. The consideration of the risk assessment along with the mandatory criteria reveals that lawful procedure was considered prior to the denial of parole. The ALC was correct in his decision to affirm the decision of the Parole Board.

The Appellant argues that if an inmate reveals they made some efforts to rehabilitate he deserves a meaningful opportunity to earn his freedom which is untrue. This is just one of the many criteria considered by the Board. The criteria that must be followed by the Board can be found in the South Carolina Code of laws which states:

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: that the prisoner has shown a disposition to reform; that, in the future he will probably obey the law and lead a correct life; that the interest of society will not be impaired thereby; and, that suitable employment has been secured for him.

S.C. Code Ann. §24-21-640 (2018)

The board is required to create their own criteria which must include the above referenced statutory criteria. Which they must consider inmate records during the Appellant's incarceration.³ One of the mandatory criteria listed within the board created criteria states, "The inmates efforts to solve his/her problems such as seeking treatment for substance abuse, enrolling in academic and vocational education courses, and in general using whatever resources the Department of corrections has made available to inmates to help with their problems." Within the order of denial the Board has revealed that these criteria was considered prior to the final decision. The Appellants rehabilitation efforts were considered prior to denial.

The above referenced criteria as well as the mandatory department criteria was considered. Though the Board is obligated to consider all of the rehabilitated efforts the Appellant have taken advantage of while incarcerated, this does not guarantee parole. Parole determination is solely left up to the Parole Board. The parole board has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant. *Cooper*, at 496. Once all of the mandatory criteria including the Appellant's prison record is considered, if the Board finds that the Appellant's parole should be denied that is a lawful determination, one that should not be subject to reversal.

The Appellant also argues that section 24-21-640 of the South Carolina Code of Laws has cause him a disadvantage. Within his brief he has failed to reveal how this statute has caused him any disadvantage. He just states that he is entitled to relief. The Appellant must show this court there was some prejudice along with an error of law before this court can award him a reversal. Before the Court of Appeals will reverse a judgment for an alleged error in the exclusion of

³ The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records. S.C. Code Ann. §24-21-640 (2018).

evidence the appellant must show prejudice. *Burroughs v. Worsham*, 352 S.C. 382, 391, 574 S.E.2d 215, 219 (2002).

Within his brief the Appellant also argues that he has a liberty interest in obtaining parole. There exist no liberty interest in being granted parole. This is due to the fact parole is a privilege and not a right. *Sullivan v. S.C. Dept. of Corrections*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 fn.4 (2004). Although this provision creates a liberty interest in parole eligibility, it does not create a liberty interest in parole. *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 598, 576 S.E.2d 146, 149 fn.4 (2003). The Appellant only has a liberty interest in appearing before the parole board. The Appellant has appeared biannually since becoming eligible in 2010 pursuant to South Carolina law.

2. Considering the criteria and risk assessment does not violate ex post facto.

The prohibition against ex post facto is set forth in Art. I §4 of the South Carolina Constitution, and Art. I §10 of the United States Constitution. The Appellant argues that some aspects of the mandatory criteria and risk assessment did not exist when he committed these offenses, so considering them violates ex post facto. It is true that the law existing at the time of the offense, and not at the time 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). However, in order for a law to be prohibited by the ex post facto clause, two elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446 (1987). Before this two part analysis can begin however, the statute in question must be found to be punitive in nature such that it inflicts punishment merely by requiring the conduct called for in the law. *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). Without it being punitive it does not fall

under ex post facto. The current statute that the Appellant claims violates ex post facto cannot be considered punishment; nor does it causes him any disadvantage. The consideration of these criteria cannot be considered a violation of ex post facto.

The Appellant claims that sections 24-21-640 and 24-21-10 violates ex post facto due to the fact portions of these laws did not exist when he committed these offenses. Though certain portions were not established until after he committed his crimes, these portions cannot be considered punitive so ex post facto does not apply.

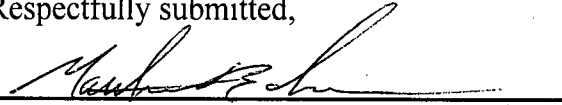
In section 24-21-640, the only portion that did not exist prior to the Appellant's commission of his crime is the establishment of the board criteria that must be considered prior to any final decision. Section 24-21-10 establishes that a risk assessment must be completed and the results considered by the parole board. Neither of these statues add to the Appellant's sentence, nor establishes any law making it more difficult for the Appellant to be granted parole. On the contrary, there exist elements of these new additions that could benefit the Appellant. The Appellant could get favorable results from his risk assessment, and there are parole board criteria that could become favorable to the Appellant. Each of these does not constitute punishment, nor is a deterrent to the Appellant; therefore, they cannot be considered a violation of ex post facto.

Due to these factors not being considered punitive the lower court was the correct in affirming the decision of the Parole Board. The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion or decision is affected by other error of law. S.C. Code Ann. §1-23-610 (2)(B)(d)(2018). Since the Appellant has not presented any error of law, the decision of the ALC should be affirmed.

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests the final decision of the Administrative Law Court be affirmed.

Respectfully submitted,



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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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March 4, 2020