



The Supreme Court of South Carolina

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March 12, 2020

The Honorable Jana E. Shealy
Clerk, South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton Street, Suite 224
Columbia SC 29201

REMITTITUR

Re: David Rose v. SC Department of Probation
Lower Court Case No. 2015ALJ150033AP
Appellate Case No. 2018-001641

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc:

Travis Dayhuff, Esquire

Matthew C. Buchanan, Esquire

Tommy Evans, Jr., Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

David Rose, Petitioner,

v.

South Carolina Department of Probation, Parole and
Pardon Services, Respondent.

Appellate Case No. 2018-001641

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Opinion No. 27940
Heard October 29, 2019 – Filed January 29, 2020

REVERSED AND REMANDED

Travis Dayhuff, of Nelson Mullins Riley & Scarborough,
LLP, of Columbia, for Petitioner.

General Counsel Matthew C. Buchanan and Assistant
General Counsel Tommy Evans Jr., both of Columbia,
for Respondent.

JUSTICE KITTREDGE: For years, the Department of Probation, Parole, and Pardon Services (DPPPS) improperly denied inmates parole based on an incorrect interpretation of the statute setting forth the number of votes required by the parole

board. Because DPPPS had a policy of destroying records of parole hearings, it was, to put it mildly, difficult to determine which inmates were wrongly denied parole. Nevertheless, in 2013, following our decision in *Barton v. South Carolina Department of Probation, Parole & Pardon Services*,¹ DPPPS undertook a process to attempt to identify which inmates were improperly denied parole.

Petitioner David Rose was one of the inmates who claimed he was improperly denied parole; in Rose's situation, the parole hearing occurred in 2001. As we will explain, the evidence manifestly establishes that Rose received the requisite number of votes in favor of parole in 2001, but he remains in jail to this day.

Rose persistently sought relief through the years, often in circuit court, where DPPPS contended that Rose must pursue relief through the administrative process rather than through the judicial process. Rose also sought administrative relief throughout the years, to no avail. In one of the numerous circuit court proceedings, counsel for DPPPS acknowledged as "credible" the evidence put forth by Rose as to the requisite number of favorable votes he received at the 2001 parole hearing. Circuit Judge Addy, to his commendable credit, recognized Rose's seemingly-meritorious claim was continually denied in all forums. Judge Addy directed DPPPS to conduct an investigation, at which point Rose again pursued his challenge in the administrative forum. At the agency level, DPPPS denied relief to Rose because the agency records did not establish the actual vote count from the 2001 hearing. As noted, DPPPS had destroyed the very records it claimed were necessary for Rose to prevail.

Following DPPPS's final agency decision, the administrative law court (ALC) granted Rose relief, finding the only evidence as to the parole board's 2001 vote demonstrated Rose was entitled to parole. The court of appeals reversed. We now reverse the court of appeals and find the ALC's decision was supported by substantial evidence.

I.

The parole board is comprised of seven members who vote on whether an inmate should receive parole. However, only a quorum—four of the seven members—need be present and vote at the hearings of those convicted of violent crimes. *See Garris v. Governing Bd. of S.C. Reins. Facility*, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) ("In the absence of any statutory or other controlling provision, the

¹ 404 S.C. 395, 745 S.E.2d 110 (2013).

common-law rule that a majority of the whole board is necessary to constitute a quorum applies.").

Prior to 1986, to receive parole, an inmate was required to obtain a simple majority vote in his favor. *See* S.C. Code Ann. § 24-21-645 (Supp. 1984). However, in conjunction with the passage of the Omnibus Criminal Justice Improvements Act of 1986, the General Assembly amended section 24-21-645(A) to prescribe "at least two-thirds of the members of the board [] authorize and sign orders authorizing parole for persons convicted of a violent crime." Act No. 462, 1986 S.C. Acts 2955, 2959, 2990–91; *see also* S.C. Code Ann. § 24-21-645(A) (Supp. 2019).

Between 1986 and 2013, DPPPS interpreted section 24-21-645 to require an inmate receive five votes in his favor out of seven possible parole board members' votes—at least two-thirds of the entire parole board—to receive parole, regardless of when the inmate was sentenced, even if it was prior to 1986 when the simple-majority vote requirement was in effect. DPPPS also did not relax the five-vote requirement in the event that less than a full parole board was present and voting on a particular inmate's fate.

However, in the 2013 *Barton* decision, this Court held DPPPS's adherence to the five-vote requirement was contrary to the statute. 404 S.C. at 415–17, 745 S.E.2d at 121–22. In particular, we found DPPPS's retroactive application of the two-thirds vote requirement violated the federal and state *Ex Post Facto* Clauses for those inmates sentenced prior to 1986 when the simple-majority vote requirement was the law. *Id.* at 403–14, 745 S.E.2d at 114–20. Additionally, we interpreted section 24-21-645 as only requiring inmates sentenced after 1986 to receive favorable votes from two-thirds of the parole board members actually present at the hearing. *Id.* at 414–19, 745 S.E.2d at 120–23 (noting that DPPPS's prior interpretation led to absurd results, for under that interpretation, it was possible for four members of the parole board (a quorum) to be present and unanimously vote to grant the inmate parole, but DPPPS nonetheless deny the inmate parole because he failed to receive five votes in his favor).

II.

In 1978, Rose was sentenced to prison. Ten years later, Rose was granted parole. While on parole, Rose did not commit any additional crimes. He moved to Florida, secured employment and supported his family. However, Rose eventually failed to report to his parole officer, and, thus, in 2000, his parole was revoked and he was returned to prison.

One year later, Rose sought parole again before six out of the seven parole board members. Immediately following the hearing, a DPPPS employee allegedly informed Rose, his cousin Carlos Bell, and Rose's counsel that Rose's request for parole had been denied because he had received only four votes in his favor out of the six members voting that day.²

Over the next twelve years, Rose repeatedly attempted to seek administrative and judicial relief, claiming he had received four out of six possible votes in favor of parole and therefore met the requirements of section 24-21-645. Each time, after being shunted from one forum to the next, Rose was told his case had to be dismissed on jurisdictional grounds because he had filed his claim in the wrong place.

Rose persevered, and following our decision in *Barton*, he filed yet another action in circuit court claiming DPPPS had unlawfully denied him parole because he had received the correct number of votes in his 2001 parole hearing. Once again, Rose was told he had filed in the wrong forum. However, in his order dismissing the case, Judge Addy ordered DPPPS to conduct an investigation into the 2001 vote count pursuant to *Barton*.

Larry Patton, an employee of DPPPS, conducted the investigation. Patton reviewed Rose's and Bell's sworn statements,³ both claiming to have been present when a DPPPS employee informed them Rose received four out of six votes in favor of parole. Patton also reviewed a hearing ledger which indicated Rose's 2001 petition for parole had been rejected but, importantly, did not indicate a vote count associated with the rejection. Because DPPPS had destroyed all of its other records prior to the *Barton* investigation, Patton was unable to review any other material related to the 2001 parole hearing aside from those two statements and the hearing ledger.

² As discussed, this was the period in which DPPPS required an inmate to receive five votes in his favor, regardless of how many parole board members were present and voting. Of course, four votes out of six is both a simple majority (under the pre-1986 version of section 24-21-645 that Rose was initially sentenced under) and a two-thirds majority (under the current version of section 24-21-645).

³ Bell submitted an affidavit, and Rose testified in a prior lawsuit against DPPPS.

Following Patton's investigation, DPPPS made a final agency decision that Rose was not entitled to receive parole under the *Barton* case because there was insufficient evidence of the 2001 vote count. Specifically, the final order stated, "Unfortunately, *we* have been unable to locate *any information* from your parole hearing as *records have been destroyed* given your hearing was almost fourteen years ago. Therefore, it is the Department's position that *without any other evidence of the vote count . . .* the Department cannot release you to parole." (Emphasis added.) Ironically, in the most recent circuit court proceeding, DPPPS had not only admitted there was other evidence of the vote count via the Bell affidavit submitted by Rose, counsel for the agency informed Judge Addy that the affidavit was "credible."

Rose appealed to the ALC. The ALC reversed DPPPS's decision, finding there was no evidence whatsoever in the agency record to support DPPPS's decision that Rose did not receive four out of six votes in favor of parole. Rather, the ALC determined the *only* evidence in the record indicated Rose did, in fact, receive four votes in favor of parole.

DPPPS appealed the ALC's decision, and the court of appeals reversed in an unpublished opinion. *Rose v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, Op. No. 2018-UP-087 (S.C. Ct. App. filed June 13, 2018). The court of appeals held, "[T]he ALC's determination that Rose received four votes in favor of parole is not supported by substantial evidence because, based on the record as a whole, reasonable minds would not find Bell's affidavit to be adequate evidence that Rose received four votes."

We granted Rose's petition for a writ of certiorari to review the court of appeals' decision.

III.

Rose argues the court of appeals erred in reversing the ALC because it applied an improper standard of review. Specifically, Rose claims the only evidence considered by DPPPS in its investigation of the vote count are Rose's and Bell's sworn statements. Given the fact that there is no evidence to the contrary, Rose contends the ALC's finding that Rose received four votes was supported by substantial evidence. We agree.

In an appeal to this Court from a final agency decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. *Barton*, 404

S.C. at 400, 745 S.E.2d at 113; *see also Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 417, 665 S.E.2d 231, 234 (Ct. App. 2008) (citing S.C. Code Ann. § 1-23-610(C) (Supp. 2007)).

This Court will only reverse the decision of an ALC if that 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 an abuse of discretion or clearly unwarranted exercise of discretion.

Barton, 404 S.C. at 401, 745 S.E.2d at 113 (quoting S.C. Code Ann. § 1-23-610(B) (Supp. 2012)). "The Court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact." *Id.* (internal alteration marks omitted) (quoting S.C. Code Ann. § 1-23-610(B)). "In determining whether the ALC's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Id.*

In this case, the ALC's decision was supported by substantial evidence. The only evidence considered by DPPPS was Rose's and Bell's sworn statements and a hearing ledger which said "rejected" with no further information. Of the evidence considered by DPPPS, only Rose's and Bell's sworn statements provided any evidence of the vote count, and both men indicated Rose had received sufficient votes to be granted parole. The position advanced in the sworn statements has remained constant in the years since the 2001 parole hearing. Moreover, DPPPS admitted in circuit court that Bell's statement was "credible." Beyond this, DPPPS admitted it incorrectly calculated the votes necessary to receive parole prior to the *Barton* case and, therefore, had routinely denied parole to otherwise eligible inmates between 1986 and 2013. Against this actual evidence, DPPPS apparently believes it may simply claim that because it does not have any evidence of the vote

count *in its own records*—which it destroyed prior to Patton's investigation, and which, by its own admission, would not have included the vote count anyway—it can nonetheless somehow claim it properly denied Rose parole in 2001.

Considering the record as a whole, we find the decision of the ALC is manifestly supported by substantial evidence. *See Sanders*, 379 S.C. at 417, 665 S.E.2d at 234 ("In determining whether the [ALC]'s decision was supported by substantial evidence, this court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALJ reached.").⁴

Because there is substantial evidence showing Rose received four out of six votes in his 2001 parole hearing, he has received both a simple-majority vote (required by the prior version of section 24-21-645) and a two-thirds majority vote of the parole board members present at the hearing (required by the current version of the statute). Thus, under either version of the statute, Rose received enough votes to be granted parole in 2001.⁵

⁴ DPPPS also argues the ALC improperly shifted the burden to DPPPS. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met." (quoting 73A C.J.S. *Public Administrative Law and Procedure* § 128 at 35 (1983))). We disagree. The fact that the ALC did not accept DPPPS's summary rejection of Rose's claim in no manner reflects burden shifting. Rose met his burden of proof by submitting his and Bell's sworn statements for DPPPS's review, which the ALC found credible.

⁵ DPPPS also claimed the ALC did not have the authority to grant the relief requested by Rose in that the ALC, by ruling in Rose's favor, effectively granted Rose parole. *See* S.C. Code Ann. § 24-21-640 (Supp. 2019) (delegating solely to the parole board the responsibility of determining if and when a prisoner meets the prerequisites for parole eligibility). The ALC rejected this argument, finding it did "not grant or deny [Rose] parole [itself], but rather require[d DPPPS] to carry out the result of a vote the [parole b]oard already made." We agree. *See Al-Shabazz v. State*, 338 S.C. 354, 376–77, 527 S.E.2d 742, 754 (2000) (finding the ALC has the authority to review non-collateral and administrative agency decisions); *see also Barton*, 404 S.C. at 400, 745 S.E.2d at 113 (upholding the ALC's authority to review DPPPS's decisions on the two-thirds requirement set forth in section 24-21-

Accordingly, because Rose has demonstrated that he was granted parole in 2001, yet remains in prison to this day, we reverse the decision of the court of appeals and remand to DPPPS to determine Rose's parole conditions.⁶

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

645); *cf. State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623 (1989) (finding the question of parole eligibility is separate from the court's authority to sentence an offender).

⁶ We note it is undisputed Rose has been a model prisoner, incurring no disciplinary infractions while imprisoned.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David Rose, #91858, Respondent,

v.

South Carolina Department of Probation, Parole and
Pardon Services, Appellant.

Appellate Case No. 2016-000225

Appeal From The Administrative Law Court
Deborah Brooks Durden, Administrative Law Judge

Unpublished Opinion No. 2018-UP-087
Heard October 3, 2017 – Filed February 21, 2018
Withdrawn, Substituted, and Refiled June 13, 2018

REVERSED

Matthew C. Buchanan and Tommy Evans, Jr., both of the
South Carolina Department of Probation, Parole and
Pardon Services, of Columbia, for Appellant.

Travis Dayhuff and Meredith Weinberg Sella, both of
Nelson Mullins Riley & Scarborough, LLP, of Columbia,
for Respondent.

PER CURIAM: The South Carolina Department of Probation, Parole and Pardon Services (the Department) appeals the administrative law court's (ALC's) order reversing the Department's denial of parole to David Rose, arguing the ALC (1) erred in finding Rose received sufficient votes in favor of granting parole, (2) lacked authority to reverse a decision by the parole board, and (3) erred by retroactively applying the supreme court's holding in *Barton v. South Carolina Department of Probation, Parole & Pardon Services*, 404 S.C. 395, 745 S.E.2d 110 (2013).¹ We reverse.

Rose pled guilty to kidnapping in 1978, and the circuit court sentenced him to life in prison.² After Rose had served just under ten years of his life sentence, the parole board granted him parole in 1987. Thereafter, Rose remained in South Carolina for one year before moving to Florida. Initially, Rose regularly reported to his Florida parole officer; however, he eventually stopped reporting. In 1991, Rose was placed on absconded status. On June 14, 2000, Rose was extradited to South Carolina and his parole was revoked.

On June 20, 2001, Rose again appeared before the parole board. In addition to his attorney, his sister, and his cousin, Carlos Bell, six board members were present at the hearing. After the hearing, the board denied Rose parole. According to Rose and Bell, an unidentified person (whom they allege to have been a parole examiner) exited the hearing room to report the parole board's decision and informed them that Rose received four votes in favor of parole. The Department subsequently mailed Rose notice of his rejection, stating that due to the nature and seriousness of the offense and his failure to successfully complete a community supervision program, the parole board denied his application for parole.

¹ In *Barton*, our supreme court found "retroactive application of section 24-21-645 constitutes an *ex post facto* violation, and inmates convicted of a violent crime must only convince two-thirds of the Parole Board members participating in their hearing" that they are entitled to parole. Thus, *Barton* should have been granted parole since four of the six board members participating in his hearing voted in favor of parole. 404 S.C. at 419, 745 S.E.2d at 123.

² Section 16-1-60 of the South Carolina Code (Supp. 2017) provides that, "for purposes of definition under South Carolina law, a violent crime" includes "kidnapping."

On February 13, 2015, the Department notified Rose it had conducted an investigation pursuant to *Barton* regarding whether Rose had received enough votes at his 2001 parole hearing to make him eligible for release.³ The Department stated it could not locate any records from the hearing, as they had been destroyed, and that it could not release Rose without evidence of the vote count, despite Bell's affidavit attesting that Rose received four votes.⁴

Subsequently, Rose appealed the Department's determination to the ALC. By order dated February 1, 2016, the ALC found the Department's determination that Rose lacked the necessary votes to be eligible for release was unsupported by substantial evidence. Because Rose offered Bell's affidavit in support of his contention that he received four votes at the 2001 hearing and because the ALC believed the Department failed to offer any contradictory evidence, the ALC found Rose received the necessary four votes in favor of parole and reversed the Department's decision.

The Bell affidavit, executed on October 25, 2014, attested that Rose received four votes in favor of parole at the 2001 hearing. According to Bell, only six board members were present during the hearing.⁵ Bell claimed a woman exited the hearing room and reported to Rose's attorney (who offered no affidavit or testimony) that Rose received four votes in favor of parole. Bell stated Rose's attorney informed Bell he would investigate whether the purported four votes were sufficient to grant Rose parole.

We find the ALC's determination that Rose received four votes in favor of parole is not supported by substantial evidence because, based on the record as a whole, reasonable minds would not find Bell's affidavit to be adequate evidence that Rose

³ The Department does not have any records for parole hearings prior to 2001; however, Rose obtained a copy of the recording of his parole hearing shortly after the hearing. Rose's attorneys in the current action had the recording transcribed. The transcript did not reflect a vote count but reported someone (most likely the chairman) stating, "David Lee Rose, rejected 1 and 5."

⁴ The hearing occurred fourteen years prior to the investigation.

⁵ Section 24-21-10(B) of the South Carolina Code (Supp. 2017) explains that the board "is composed of seven members."

received four votes. *See* S.C. Code Ann. § 1-23-610(B)(e) (Supp. 2017) ("The court of appeals . . . may reverse [an ALC] decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is . . . clearly erroneous in view of the *reliable*, probative, and substantial evidence on the whole record" (emphasis added)); *S.C. Dep't of Mental Retardation v. Glenn*, 291 S.C. 279, 281, 353 S.E.2d 284, 286 (1987) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); S.C. Code Ann. § 1-23-330 (2005) ("Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed."); Rule 801(c), SCRE ("Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules . . .").

In determining that Rose did not receive four votes, the Department essentially found Bell's affidavit not credible, and a reviewing court presumes this to be a correct finding unless unsupported by substantial evidence. *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 594, 654 S.E.2d 284, 287 (Ct. App. 2007) ("The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence."). Thus, the ALC erred in substituting its own judgment for that of the Department as to Bell's credibility and in assigning such significant weight to Bell's hearsay-laden affidavit. *See* S.C. Code Ann. § 1-23-380 (Supp. 2017) ("The [ALC] may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

Accordingly, the ALC's order reversing the Department's denial of parole is

REVERSED.⁶

WILLIAMS, THOMAS, and MCDONALD, JJ., concur.

⁶ Due to our reversal on other grounds, we need not address Rose's remaining issues. *See Berberich v. Jack*, 392 S.C. 278, 294, 709 S.E.2d 607, 616 (2011) (declining to address appellant's remaining issues when the court reversed and remanded on other grounds).