

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
South Carolina Department of Probation, Parole and Pardon Services

S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2019-002102

Bernard Bagley, #175851,

Appellant,

v.

South Carolina Department of
Probation, Parole and Pardon Services,

Respondent.

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MAR 24 2020

SC Court of Appeals

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE BOARD PROPERLY FOLLOWED PROCEDURE GIVING DUE CONSIDERATION TO THE OBJECTIVE AND PREDICTIVE CRIMINOGENIC FACTORS OUTLINED IN §24-21-10(F)(1), §24-21-640, AND THE FIFTEEN FACTORS PUBLISHED IN ITS PAROLE FORM?
2. DID THE BOARD IMPROPERLY RELIED IN ANY MANNER ON FACTS AND CIRCUMSTANCES OF THE THREE IMMUTABLE OR FIXED CRITERIA EXCEPT DETERMINATION BASED ON OBJECTIVE FACTORS OR EVIDENCE THAT THE APPELLANT POSES A THREAT TO SOCIETY, THE VICTIM'S FAMILY, OR HIMSELF AS OUTLINED IN §24-21-10(f)(1), §24-21-640, AND THE FIFTEEN FACTORS PUBLISHED IN ITS PAROLE FORM?
3. DID THE BOARD TIMELY CONVENE THE APPELLANT'S PAROLE ELIGIBILITY REVIEW HEARING IN ACCORDANCE TO §24-21-645?
4. DID THE ALC HAVE JURISDICTION IN ACCORDANCE TO AL-SHABAZZ OF THE REMAINING TWENTY FIVE ISSUES AND ARGUMENTS OR THE ISSUES AND ARGUMENTS ARE IN THE SCOPE OF THE RICHLAND COUNTY CIRCUIT COURT JURISDICTION FOR REVIEW?
5. DID THE BOARD FIND THAT APPELLANT IS MORE LIKELY THAN NOT POSES A THREAT TO SOCIETY, THE VICTIM'S FAMILY, OR HIMSELF AS OUTLINED IN §24-21-10(f)(1), §24-21-640, AND THE FACTORS PUBLISHED IN ITS PAROLE FORM?
6. DID THE BOARD PROPERLY EMPLOYED PROCEDURE TO CONSIDER APPELLANT'S MITIGATING EVIDENCE OR CIRCUMSTANCES OUTLINED IN THE CRITERIA PUBLISHED IN ITS PAROLE FORM?

STATEMENT OF THE CASE

This matter is before the South Carolina Court of Appeals pursuant to the final order from the Administrative Law Court (ALC), dated January 3, 2020, in which the Appellant submitted a notice of appeal challenging the South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS) Board's procedure employed during his June 19, 2019, parole eligibility hearing review. The Appellant challenges the procedure employed on twenty-five (25) grounds that center around unlawful procedure, and arbitrary or capricious conduct by the Board in its decision-making process. The ALC states in its order that the grounds are outside the scope of the court's review, or were not raised to the Board, abandoned on appeal, or unsupported by relevant legal arguments and/or citations and, thus, are not preserved for review. In the ALC order, the ALC affirmed the Respondent's (SCDPPPS) determination and on the grounds inferred that it lacked subject matter jurisdiction to review the appeal due to a routine denial of parole. This appeal follows.

FACTS

On April 12, 1991, after a jury verdict guilty of murder, the Appellant was sentenced to a life prison for the death of his wife. At the time, South Carolina law granted parole eligibility to a person serving a life sentence for murder upon the service of twenty (20) years. The Appellant first appeared before the Board for a parole hearing on September 8, 2010. The Board denied the Appellant following that hearing, as well as on four subsequent occasions. On June 19, 2019, on this parole eligibility hearing, the Board Members each voted to deny the Appellant parole due to three immutable or fixed criteria factors, i.e. 1) the nature and seriousness of his current offense; 2) an indication of violence in his current or a previous offense; and 3) use of a deadly weapon in his current or a previous offense. Thereafter, the Appellant submitted additional information to the Board and requested for a reconsideration hearing to the Board through Parole Board Support Services Director, which it declined to review because the Respondent states that Appellant did not file a request for reconsideration. On July 18, 2019, the Appellant timely appealed the Board's decision to the ALC challenging the procedure employed by the Board, alleging specifically that the Board acted arbitrarily and

capriciously upon unlawful procedure in denying him parole. This appeal follows.

ARGUMENTS

1. THE BOARD DID NOT PROPERLY FOLLOWED PROCEDURE GIVING DUE CONSIDERATION TO THE OBJECTIVE AND PREDICTIVE CRIMINOGENIC FACTORS OUTLINED IN §24-21-10(f)(1), §24-21-640, AND THE FIFTEEN FACTORS PUBLISHED IN ITS PAROLE FORM.

Appellant asserts that the Respondent's SCDPPPS Criteria for Parole Consideration Form 1212, issued to him on 11/10/16, and his parole eligibility hearing was held on June 19, 2019, in which §24-21-10(f)(1) is not indicated on the form issued to him. Nevertheless, the procedure employed by the Board deprived Appellant of state-created liberty interest and triggered due process requirements, including entitlement to review by ALJ, because it does not constitute a routine denial of parole. SEE: Al-Shabazz, v. State, 527 S.E.2d 742 (2000), establishing an administrative review process for inmate appeals. Based on SCDC record, it appears that the Appellant is a good candidate for the privilege to parole. Appellant contends that the Board was arbitrary or capricious in its poor decision making process, based on subjective factors while not considering objective and predictive criminogenic factors or evidence. Cooper v. SCDPPPS, 661 S.E.2d 106 (2008), require revisit by the court because it falls short. The Cooper Court stated, the following:

"We emphasize that in the 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.

Under that scenario, the ALC can summarily dismiss the inmate's appeal." Cooper at [9], p.112.

Appellant further asserts that the Board is utilizing the foregoing arbitrarily and capriciously by just stating that it considered the factors when the Board employing a procedure denying him any realistic opportunity to a privilege to be parole. The process does not allow favorable parole decisions for lifers because the Board does not include in its decision that the Appellant have sufficient support and commitment from family and friends to remain successful after parole from SCDC.

The Board's procedure employed arbitrarily and capriciously permanently makes this Appellant ineligible for parole because the process determination does not include objective evidence and predictive criminogenic factors that causes the Board to conclude it is more likely than not that the Appellant poses a threat to society, the victim's family, or himself in accordance to §24-21-10(f)(1), and §24-21-640, of S.C. Code Ann.

The Appellant asserts that the order does not reflect that the Board findings that he poses a threat to society, the victim's family, or himself to substantiate the Board's conclusion, but it only reflects findings related to the commitment offense. SCDPPPS Criteria for Parole states, "that the Board deliberates upon reasonable probability that an inmate will or will not again violate the law which is not included in its findings of fact specific to the Appellant to substantiate the Board's conclusion. As such, Appellant contends that the Board has abused its discretion by concluding the three immutable factors alone as to preclude the privilege to parole. Appellant asserts special law or proposed law, SEE: Wallman v. Travis, 18 A.D.3d at 308, 794 N.Y.S.2d 381 (2005), and King v. New York State Div. of Parole, 83 N.Y.2d 788, 790, 610 N.Y.S.2d 954, 632 N.E.2d 1277 (1994).

2. THE BOARD DID IMPROPERLY RELIED IN ANY MANNER ON FACTS AND CIRCUMSTANCES OF THREE IMMUTABLE OR FIXED CRITERIA EXCEPT DETERMINATION BASED ON OBJECTIVE FACTORS OR EVIDENCE THAT THE APPELLANT POSES A THREAT TO SOCIETY, THE VICTIM'S FAMILY, OR HIMSELF AS OUTLINED IN §24-21-10(f)(1), 24-21-640, AND THE FIFTEEN FACTORS PUBLISHED IN ITS PAROLE FORM.

The Criteria for Parole Consideration form does not indicate §24-21-10(f)(1), as listed factor, in which the Board could not consider, but instead arbitrary state that it considered it. In addition, the Appellant contends that the Board improperly relied on facts and circumstances of the immutable or fixed criteria where the offense had been committed and sentence imposed in Richland County venue rather than Lancaster where the Board made its determination. The Board convened the hearing and rendered its decision June 19, 2019, in Lancaster County via teleconference. Appellant asserts that the proceeding 90-GS-40-5849, such as this should have provided venue where the Board made determination, i.e. Richland County. Also, where the material events otherwise took place, and where the principal office of Respondent is located. Appellant further contends that the process is unfair because the Board three immutable factors of his offense as the exclusive factor considered and sole basis for the Board's conclusion of Appellant's prior supervision history, prior disciplinary record, and prior criminal record for release, the conclusion is arbitrary and irrational. The Cooper ruling has allowed the Respondent abuse its discretion by just stating it followed proper procedure whereby the matrix of factors in §24-21-640, mandates the Board to determine whether the Appellant if released that in the future he will probably obey the law and lead a correct life. ALSO SEE: SCDPPPS Form 1212, that states "when deliberating upon the reasonable probability that an inmate will not again violate the law." Appellant asserts special provisions in general law, or special law pertaining to the matter.

Nevertheless, it's the Respondent's position that a denial continues the status quo, because the decision constitute a routine denial. However, due process of law requires the Board to express its reason in writing with a general statement; but the Board only enumerated its reason with the immutable factors in the order. Appellant contends that due process also requires that the reasons be rationally related to the published parole criteria, in which his notice of rejection does not express. Again, this case require certification of appeal to revisit Cooper because the process and procedure is unfair.

3. THE BOARD DID NOT TIMELY CONVENE THE APPELLANT'S PAROLE ELIGIBILITY REVIEW HEARING IN ACCORDANCE TO §24-21-645.

The Appellant asserts that he challenges the timelines of his parole hearings, because the Board has not held his parole eligibility hearing precisely every two years, thereby placing the dates of his hearings and next hearing some nine to ten months beyond the statutorily required, in violation of his constitutional rights and state-created liberty interest, since his initial parole eligibility hearing date September 8, 2010. Appellant's next parole eligibility hearing date is beyond June 19, 2021, in which he contends that the matter is not moot because he will not receive a hearing in 2020 as should be required from the date of his initial parole hearing eligibility date September 8, 2010. The Appellant asserts that a case is not moot if it could still cause him some related injury under §24-21-645. There has not been an adjudication of this issue, in which abrogates Appellant's right to timely parole eligibility, and infringes on a state-created liberty interest. SEE: Cooper v. SCDPPPS, 661 S.E.2d 106 (2008). Also SEE: §16-1-60, of S.C. Code of Laws 1976, and 14th Amendment U.S. Constitution.

4. THE ALC DO HAVE JURISDICTION IN ACCORDANCE TO AL-SHABAZZ OF THE REMAINING TWENTY FIVE ISSUES AND ARGUMENTS OR THE ISSUES AND ARGUMENTS ARE IN THE SCOPE OF THE RICHLAND COUNTY CIRCUIT COURT JURISDICTION FOR REVIEW.

It's Appellant's belief that the ALC has jurisdiction under Al-Shabazz v. State, 527 S.E.2d 742 (2000), and Furtick v. SCDPPPS, 576 S.E.2d 148 (2003). Appellant is challenging the fact that the Board is intentionally permanently determine to make him ineligible for parole. The Board failed to express its reason in writing with a general introductory statement, and reasons that are rationally related to the published criteria. In addition, it's the position of the Appellant, that there is no process within the criteria and §24-21-640, validating the risk consistent with evidence based practices that determine factors contributed to criminal risk factors as defines §24-21-5(2), S.C. Code Ann., as follows:

Characteristics and behaviors that, when addressed or changed, affect a person's risk for committing crimes. The characteristics may include, but not limited to, the following risk and criminogenic need factors; antisocial behavior patterns; criminal personality; antisocial attitudes, values, and beliefs; poor impulse control; criminal thinking; substance abuse; criminal associates; dysfunctional family or marital relationships; or low levels of employment or education.

Nevertheless, Appellant contends he is seeking judicial review of dismissal by the ALC of his additional issues from the parole procedures and abuse of discretion, in which if the ALC does not have jurisdiction he believes that the Richland County Circuit Court should have jurisdiction regarding the additional issues the ALC declined to accept. Appellant asserts that this Court move for certification of appeal directly to State Supreme Court because Cooper require revisit by the Court. Appellant contends that §17-17-10, et. seq., habeas corpus in the circuit court is required for additional issues not addressed.

5. THE BOARD DID NOT FIND THAT APPELLANT IS MORE LIKELY THAN NOT POSES A THREAT TO SOCIETY, THE VICTIM'S FAMILY, OR HIMSELF AS OUTLINED IN §24-21-10(f)(1), §24-21-640, AND THE FACTORS PUBLISHED IN ITS PAROLE FORM.

The Appellant proposes special provisions in general law, and he proposes special law pertaining to this issue on the basis that the notice of rejection only enumerate the Board's reasons with the immutable factors, whereby due process of law requires the Board to express its reason in writing with a general introductory statement, and due process also requires that the reasons be rationally related to the published parole criteria, and §24-21-5(2), S.C. Code Ann., a process validating the risk consistent with evidence based practices; and that will determine factors that has contributed to the behavior. South Carolina law defines criminal risk factors as:

Characteristics and behaviors that, when addressed or changed, affect a person's risk for committing crimes. The characteristics may include, but not limited to, the following risk and criminogenics need factors; antisocial behavior patterns; criminal personality; antisocial attitudes; values, and beliefs; poor impulse control; criminal thinking; substance abuse; criminal associates; dysfunctional family or marital relationships; or low levels of employment or education.

Appellant's notice of rejection does not indicate §24-21-5(2), criminal risk factors as defined above. Appellant asserts that Cooper require revisit and he respectfully request that this Court move for certification of appeal directly to the State Supreme Court because the Board is abusing its discretion with the following:

"We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in the instant case if it clearly states in its order denying parole that it considered the factors outlined in §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. Under that scenario, the ALC can summarily dismiss the inmate's appeal."

Cooper, at [9], p.112.

The Board is clearly abusing its discretion arbitrary or capricious with an unlawful or improper procedure with an insufficient notice of rejection and that it only weighed factors regarding the offense itself, along with its opinion that heinous nature of crime and holding Appellant at a higher standard alone was such to violate Appellant's substantial rights. While parole is not to be granted merely as a reward for Appellant's positive conduct or behavior, and rehabilitative achievements while incarcerated, these factors are to be considered as a privilege for parole. SEE: §24-21-640, matrix of factors within statute. The Board's guess work is an improper procedure employed to determine whether to or not to grant parole.

6. THE BOARD DID NOT PROPERLY EMPLOYED PROCEDURE TO CONSIDER APPELLANT'S MITIGATING EVIDENCE OR CIRCUMSTANCES OUTLINED IN THE CRITERIA PUBLISHED IN ITS PAROLE FORM.

Appellant asserts that Cooper require revisit especially for this issue because at the parole eligibility hearing the Appellant has no right or no way to present evidence on his/own behalf because the hearing is teleconference, and there is no procedure in place for the Board to receive documents or material evidence at the hearing, and no way for an inmate to present such at the hearing. As such, the Board is not able to consider such material during its determination or deliberation. SEE: SCDPPPS Criteria for Parole Consideration, form 1212, third ¶, that states, "At the hearing, the inmate has the right to present witnesses and evidence on his/her own behalf,...." SCDPPPS policy page 40, p. 8 (ROA), indicates the procedure for a reconsideration rehearing in which the Appellant requested in a timely manner, but the Respondent stated in its letter to the Appellant p. 2, (ROA), with no date, "You have not submitted a letter of reconsideration regarding your most recent hearing; therefore, the information submitted cannot be considered for you last parole hearing."

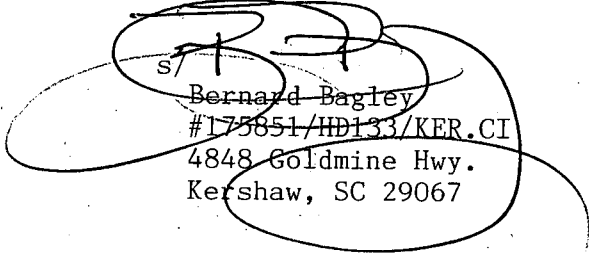
Appellant attempted to introduce his transcript of record pp. 397 through 414 as mitigating circumstance (ROA pp. 9-26), because the law has changed in the State of South Carolina the inferred malice of use of a deadly weapon where evidence is presented of a lesser included offense, i.e. voluntary manslaughter in his case, no longer good law in South Carolina. SEE: State v. Burdette, 832 S.E.2d 575 (2019), State v. Belcher, 685 S.E.2d 802 (2009). Evidence was presented in Appellant's case to reduce or mitigate his offense to a lesser included offense. Appellant do understand that the Board is in no position to retry his case, and he do accept responsibility for has actions, and has repented for atonment. Additionally, the Appellant is truly remorseful. The request for a rehearing was submitted to the Director of Parole Board Support Services, Nettie Jacobs. The proper procedure was not afforded to the Appellant regarding this matter.

Appellant understands that parole is a privilege and not a right, but in reality he is not being afforded a realistic opportunity during the procedure process to obtain parole. SEE: Appellate Case No. 2019-000934, Bagley v. SCDPPPS, and it's the Appellant belief that the Board has retaliated against him for exercising his state-created liberty interest to redress.

CONCLUSION

Based on the foregoing reasons the Appellant respectfully requests that the final decision of the ALC be reversed and remanded, and that this Court move for certification of this appeal directly to the State Supreme Court.

March 24, 2020


s/
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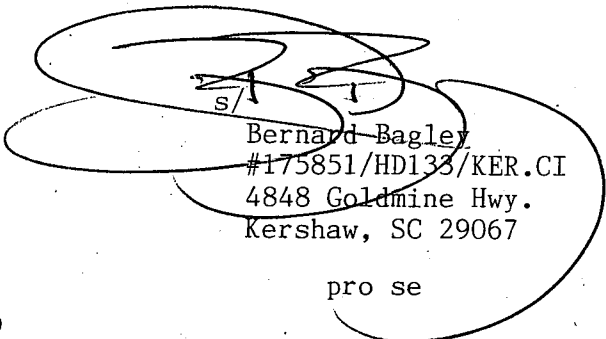
DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. ALC Final Order dated January 3, 2020 ~~2019~~
2. Notice of Rejection dated June 19, 2019
3. SCDPPPS Criteria Form 1212
4. Respondent's Letter with no date
5. SCDPPPS Policy Procedure p.40, Reconsideration for Rehearing
6. Transcript of Record, 90-GS-40-5849, pp.397-414, Charge/instruction
7. SCDPPPS Audio CD Disc of Proceedings June 19, 2019

I certify that this designation contains no matter which is irrelevant to this appeal.

March 24, 2020


s/
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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, and Designation of Matter to be Included in the Record on Appeal on the other counsel of record by depositing a copy of it in the U.S. Mail, postage prepaid, on March 24, 2020, addressed to Matthew C. Buchanan, General Counsel, SCDPPPS, P.O. Box 207, Columbia, SC 29202.

s/

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Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that his Final Brief complies with Rule 211(a),
SCACR.

March 24, 2020

s/

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