STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable H.W. Funderburk, Jr., Administrative Law Judge
Appellant Case No. 2019-002123

JAQUESE NEELY, #308317.....APPELLANT

v.

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

RESPONDENT'S FINAL BRIEF

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1. **Did the ALC err when it determined that the Appellant's prior conviction for possession with intent to distribute marijuana within proximity of a school a prior drug conviction which operated to make the Appellant ineligible for parole?**

STATEMENT OF THE CASE

On November 1, 2013, in York County the Appellant sold a quantity of crack cocaine. He sold another quantity of crack cocaine on January 22, 2014. For these offenses, he was indicted by the York County Grand Jury for two counts of distribution of crack cocaine. Because the Appellant had two prior drug convictions, the offenses were upgraded to distribution of crack cocaine third offense. On April 2, 2015, the Appellant pled guilty to both counts before the Honorable John C. Hayes to a negotiated sentence of ten years. (R.p. 57-p.62).

Two years later, the Respondent conducted a review of the Appellant's case to determine if he was eligible for parole. During this investigation, it was discovered that the Appellant had a March 23, 2005 conviction for possession with intent to distribute (PWID) marijuana within proximity of a school. (R.p.63-p.65). At the time the Appellant committed these offenses, South Carolina law did not allow an individual serving a sentence for distribution of crack third offense parole eligibility unless that individual's prior offenses were for possession of a controlled substance. Because of this prior conviction, the Respondent determined the Appellant was not eligible for parole. On March 21, 2017, the Respondent sent the Appellant a letter stating its findings. (R.p.56).

The Appellant appealed this determination of permanent ineligibility for parole to the Administrative Law Court.

The Honorable H.W. Funderburk, Jr. issued his order on December 3, 2019, affirming the Respondent's determination that he was ineligible for parole. (R.p.1-p.12).This appeal follows.

ARGUMENTS

1. **The Administrative Law Court did not err when it concluded that possession with intent to distribute marijuana within the proximity of a school zone was a separate drug offense that made his third or subsequent drug conviction ineligible for parole.**

A. PWID Marijuana within proximity of a school is a drug offense.

At issue in this case is whether a PWID marijuana within proximity of a school is a drug offense contemplated in S.C. Code Ann. §44-53-375 (B)(2018). At the time of the Appellant's 2005 conviction for PWID within proximity of a school, the state nolle prossed the related charge of possession with intent to distribute marijuana.

The Appellant argues that because his offense of PWID marijuana was nolle prossed the determination of the denial of parole eligibility was in error. The Appellant is currently serving a ten year sentence for two counts of distribution of crack cocaine third offense. Pursuant to South Carolina law, he can only be eligible for parole if all of his prior drug convictions were for possession of a controlled substance (commonly called simple possession). The South Carolina Code of Laws specifically states:

> 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, credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

S.C. Code §44-53-375(B) (emphasis added)

By the clear language of the statute, an inmate convicted of a third offense cannot be eligible for parole unless all of his prior drug offenses are for possession. 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, 468 S.E.2d 649 (1996). The Appellant's prior offense of PWID marijuana within a proximity of a school is quite clearly not merely an offense for simple possession.

The Appellant argues that his drug offense of PWID marijuana was nolle prossed, and the separate offense of PWID marijuana within proximity of a school is not a drug offense. The ALC correctly determined that this argument is without merit. Clearly, the proximity charge is a separate drug offense. The statute specifically states:

> It is a separate criminal offense for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute a controlled substance while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.

S.C. Code Ann. §44-53-445(A) (2010).

The Appellant argues that the phrase, "It is a separate criminal offense" somehow makes this only a criminal offense and not a drug offense. As the ALC determined, the elements of the offense requires the possession of marijuana, a controlled substance, with the intent to distribute in addition to the proximity element that makes it a separate and distinct offense. It is therefore a drug offense that, when considered in the language of §44-53-375(B), makes a person ineligible for parole.

B. Legislative intent and statutory revisions.

The Appellant argues that, at the time of his offense, the statute was contradictory regarding how prior marijuana convictions could be applied against a person's subsequent offenses, and therefore he should be considered parole eligible.

In his brief, the Appellant points out that the law regarding applying drug criminal history to enhance subsequent convictions was contradictory between June 2, 2010 and April 20, 2016 – which would have been the law at the time he committed his offense as well as when he pled guilty. The Respondent respectfully submits that this does not matter in the context of parole eligibility, and that the ALC was correct when it upheld the Respondent's decision.

The Appellant correctly points out that two provisions of the law were conflicting. S.C. Code Ann. §44-53-375(B) (Supp. 2010) stated, "(3) for a third or subsequent offense or if the offender has been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both." (Emphasis added).

However, §44-53-470 states that:

(A) An offense is considered a second or subsequent offense if:

> (3) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs; and
>
> (4) for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs.

S.C. Code. Ann. §44-53-470 (Supp. 2010) (emphasis added).

In §44-53-375, marijuana offenses could be used to enhance subsequent drug convictions, but §44-53-470 specifically excluded marijuana convictions. The Appellant then points out that

the General Assembly in 2016 amended §44-53-375(B)(3) to resolve the discrepancy by striking the language relating to the aggregate violations.

This way, he argues that the PWID marijuana within proximity of a school – being a marijuana offense – should not have been used to enhance his sentence.

While such an argument might be successful in attacking the validity of his conviction of a third or subsequent offense, this does not have any bearing upon his parole eligibility. As the ALC points out, the Appellant pled guilty to distribution of crack cocaine with a negotiated sentence. The legitimacy of that plea was not and could not be under review by the ALC. The only question before it was whether the Respondent correctly determined that the Appellant's prior record made him ineligible for parole.

The definition of "second or subsequent offense" as found in §44-53-470 only pertains to the sentencing enhancements of §44-53-370 and §44-53-375 when it defines the various penalties for first, second and third or subsequent offenses. The language in §44-53-375(B) considers the defendant's prior criminal history for parole eligibility, not for sentencing. It states, "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 the Appellant's case, he was convicted and sentenced pursuant to §44-53-375 for a third or subsequent offense. All of his prior offenses were clearly not possession of a controlled substance pursuant to §44-53-375(A) because of his PWID marijuana within proximity of a school conviction.

Courts 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 statue and the policy of the law. *Whitner v. State,* 328 S.C. 1, 16, 492 S.E.2d 777, 779 (1997). 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). It is clear by the reading of the statute the General Assembly only wished certain drug offenders be allowed parole eligibility.

The ALC's decision should therefore be upheld.

CONCLUSION

Based on the foregoing reasons, the Department submits that the ALC correctly concluded that the Appellant's prior conviction for PWID marijuana within proximity of a school was a drug offense and one which was properly considered to make the Appellant ineligible for parole. The Department would respectfully request this Court affirm the decision of the ALC.

Respectfully submitted,

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June 9, 2020

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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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General Counsel

June 9, 2020