

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable Milton G. Kimpson, Administrative Law Judge
Docket Number 19-ALJ-15-0017-AP

Appellant Case No.: 2019-001935

JEROME MCDANIEL, #166436.....APPELLANT

v.

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

RESPONDENT'S INITIAL BRIEF

Matthew C. Buchanan
General Counsel

**South Carolina Department of Probation,
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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- 1. Did the Administrative Law Court err when it upheld the Parole Board's denial of the Appellant's parole by using the identical reasons for previous denials?**

STATEMENT OF THE CASE

Around midnight on August 1, 1992, the Appellant knocked on the door of the victim. The victim's sister approached the door and, tricked into thinking the Appellant was the victim's husband, opened the door. The Appellant punched her in the face and forced himself inside armed with a gun and knife. Once inside he demanded money, kidnapped the victim, and fled the premises. The Appellant forced the victim into a car and drove away. During the course of the kidnapping, he forced the victim to perform various sex acts. He then took her jewelry and left her in a junk yard. He was later arrested and charged with burglary in the first degree (burglary 1st), criminal sexual conduct in the first degree (CSC 1st), kidnapping, assault and battery of a high and aggravated nature (ABHAN), and strong armed robbery.

The Appellant was tried and convicted by jury; however, this conviction was later reversed on appeal. *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (1995). The Appellant was convicted a second time on October 17, 1997. After this conviction the Honorable Thomas G. Cooper sentenced him to a term of incarceration for the remainder of his natural life for burglary 1st; thirty years for kidnapping; thirty years for CSC 1st; ten years for ABHAN; and, ten years for strong armed robbery. The Court ordered all of these offenses to be served consecutively. At the time the Appellant committed these offenses, South Carolina law allowed an inmate parole eligibility after ten years.

The Appellant made his initial appearance before the Parole Board on April 27, 2004. At the conclusion of this appearance the Board denied parole for the Appellant. Since this initial denial the Appellant has appeared before the Parole Board an additional seven times, each resulting in a denial of parole. His most recent appearance occurred on February 27, 2019, where the Board denied parole due to: 1) the 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.

After being informed of this denial of parole the Appellant appealed to the Administrative Law Court (ALC). The Appellant alleged that he was unlawfully denied parole due to the identical reasons being given upon the conclusion of each parole hearing which did not allow him a realistic opportunity to participate in a parole hearing.

The ALC affirmed the decision of the Parole Board on October 25, 2019, determining its decision to be a routine denial of parole.

This appeal follows.

STANDARD OF REVIEW

The standard of appellate review during a review from the ALC is whether the administrative law judge's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(C) (Supp.2007). The Court of Appeals shall not substitute its judgment for that of the administrative law judge as to findings of fact, though the Court may reverse or modify decisions which are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. *Id.* In determining whether the ALJ's decision was supported by substantial evidence, the Court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALJ reached. *DuRant v. S.C. Dept. of Health and Environmental Control*, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct.App. 2004).

ARGUMENT

1. The Parole Board may reject an inmate for parole for the same reason that was listed in a prior rejection.

The Appellant claims that because the Parole Board denied his parole for the reasons listed in its notice of rejection (R. *) were from events in the past and unchangeable, the Board has effectively denied him parole eligibility. The ALC correctly dismissed that claim.

The ALC's jurisdiction to review a final decision of the Parole Board are found in three decisions, *Al-Shabbaz v. State*, 338 S.C. 334, 527 S.E.2d 724 (2000); *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services*, 352 S.C. 594, 576 S.E.2d 146 (2002); and *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008). In *Al-Shabbaz*, the South Carolina Supreme Court created a new avenue by which an inmate could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz*, at 376. In *Al-Shabbaz*, the Court recognized that, "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment imposed; and (2) when an inmate believes that prison officials have erroneously calculated his sentence; sentence-related credits or custody status." *Id.*, at 369.

The denial of parole eligibility was determined to be under the second *Al-Shabbaz* category in *Furtick*. A review by the ALC under the procedures set forth in *Al-Shabbaz* is appropriate to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick*, at 149. In *Furtick*, the Court determined that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.* In the present case, the Appellant argues that pursuant to *Furtick* he is being denied a realistic opportunity to participate in the parole

program. He makes this argument due to the fact identical reasons have been used upon the conclusion of multiple hearings. As the ALC properly held, the *Furtick* decision applies to the denial of parole eligibility. Despite his claims otherwise, the Appellant is eligible for parole and has had the opportunity to appear before the Board a total of eight times. Because of his denial at his most recent hearing, he will again be considered for parole in two years.¹ Since he is eligible for parole and had been allowed to appear before the Board numerous times, *Furtick* does not apply. Therefore, the decision that applies to the instant case is *Cooper*.

The Supreme Court in *Cooper* made a determination that allows the ALC to examine whether or not the mandatory criteria was considered by the Board prior to denial. Unlike *Furtick*, *Cooper* applies to individuals who are eligible for parole and have appeared before the Parole Board.

A final decision by an administrative body shall include a findings of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350 (2018): The ALC correctly determined the order of denial followed the law and the *Cooper* decision. Therefore, it concluded that as a routine denial of parole the ALC lacked the authority to review the appeal.

In *Cooper*, the Supreme Court decided that a finding of fact was included in the Parole Board's denial of parole; 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. The Supreme Court decided that if the Parole Board fails 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.

¹ S.C. Code Ann. § 24-21-645(D) "However, upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole..."

In *Cooper*, the Court established what a future Parole Board order should consist 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 the 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.

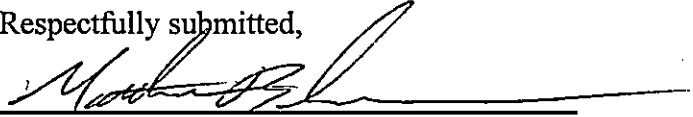
Since *Cooper*, the General Assembly added another condition that must be considered. The Department must create, and the Board must consider a risk assessment. See, S.C. Code Ann. §24-21-10(F)(2018). Since this mandatory element was added, each inmate must have a COMPAS risk assessment completed. The results will be provided and considered by the Board.

In the present case the order of denial conformed to the *Cooper* decision. The finding of fact was the reason provided for the denial of parole and the conclusion of law were the statutes, factors and risk assessment considered in making this determination. The order is clear the mandatory policy and department criteria as well as the risk assessment were considered prior to the denial of parole. The reasons for denial were reasonable and followed the mandatory criteria. The Appellant argues that identical reasons for denial are being used on multiple occasions, which makes him ineligible for parole in denial of due process. This is untrue; those reasons are sufficient to deny parole in the Board's discretion if the Board decision evinced consideration of section 24-21-640 and its own criteria. *Cooper*, at 112 fn.5. The Board has revealed that the mandatory criteria as well as the risk assessment were considered prior to the final decision; therefore, these reasons are valid regardless if they have been used in previous denials.

CONCLUSION

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

Respectfully submitted,



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July 16, 2020

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v.

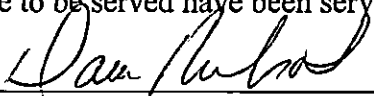
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter dated July 16, 2020, on Appellant this 21st day of July, 2020, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Jerome McDaniel, #166436
Ridgeland Correctional Institution
PO Box 2039
Ridgeland, S.C. 29936

I further certify that all parties required by Rule to be served have been served.



Dawn Nichols
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July 21, 2020

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

Re: Jerome McDaniel v SCDPPPS

Dear Ms. Kitchings:

Please find enclosed Respondent's Initial Brief and Designation of Matter dated July 16, 2020, along with proof of service in the above referenced case.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew C. Buchanan".

Matthew C. Buchanan
General Counsel

Enclosures

cc: Jerome McDaniel



State of South Carolina

Department of Probation, Parole, and Pardon Services

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