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SC Court of Appeals

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Theodore Harrison, Jr., #155651,

Docket No. 20-ALJ-15-0004-AP

Appellant,

vs.

ORDER

South Carolina Department of Probation,
Parole and Pardon Services,

Respondent.

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal filed by Theodore Harrison (Appellant), an inmate incarcerated with the South Carolina Department of Corrections. By letter dated February 3, 2020, the South Carolina Department of Probation, Parole and Pardon Services (Department) notified Appellant that he was ineligible for parole. On February 13, 2020, Appellant filed a Notice of Appeal seeking this Court's review. Upon careful consideration of the matter, the Department's decision is affirmed.

BACKGROUND

In November 1990, Appellant was convicted of murder and was sentenced by the Honorable Don S. Rushing to life without eligibility of parole until the service of thirty (30) years. The Appellant had also been convicted of armed robbery in 1989. In 1996, the Department notified him that he would not be eligible for parole pursuant to S.C. Code Ann. § 24-21-640 which prohibits parole upon the conviction of two violent crimes. In November 2014, the South Carolina Supreme Court decided Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), a case in which 15 inmates who were sentenced to life without parole as juveniles petitioned for resentencing after the United States Supreme Court decision in Miller v. Alabama, 567 U.S. 460 (2012). The South Carolina Supreme Court sent all of the cases back to the circuit courts for "individualized hearings where the mitigating hallmark features of youth are fully explored." After motion by the Appellant, on July 14, 2016, the South Carolina Supreme Court ordered that the Honorable J. Mark Hayes, II, conduct a hearing for resentencing pursuant to Aiken v. Byars.

On June 14, 2018, Circuit Court Judge Mark Hayes issued a resentencing order after a two-day hearing. His order in part states:

FILED

September 9, 2020

SC ADMIN. LAW COURT

This Court's opinion is that Miller did make the mandatory LWOP aspect of this Defendant's prior sentences unconstitutional.

Nevertheless, after having performed the individualized review as required by Miller and Aiken v. Byars, this Court resentences this Defendant to the same sentences as announced by Judge Rushing in 1990. This Court realizes given the consecutive nature of these sentences, this Defendant will serve the remainder of his life in prison. Notwithstanding, this Court believes that the record before it establishes that these sentences properly and proportionally punish this Defendant for the crimes he has committed under a Miller analysis.

In December 2018, the Department told Appellant that he would be eligible for parole in 2020 because of the decision in Geer.¹ On February 3, 2020, the Department told Appellant that he would not be eligible for parole because of the two convictions for violent offenses. The letter stated that when he was told otherwise in December 2018, the Department was not aware of the order of Judge Hayes or that a Miller analysis had been conducted by Judge Hayes.

ISSUES ON APPEAL

1. Did the resentencing hearing of Judge Hayes in 2018 satisfy the requirements of Aiken v. Byars and of Geer v. South Carolina Department of Probation, Parole and Pardon Services?
2. Did Judge Hayes conclude that a sentence of life without parole for the Appellant who was a juvenile at the time of his crimes was not unconstitutional after an Aiken v. Byars analysis?

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the South Carolina Supreme Court decisions in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (establishing an administrative review process for inmate appeals), and Furtick v. South Carolina Department of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2003) (incorporating final decisions of the Department into that review process). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker v. S.C. Dep't. of Corr., 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). Because being granted parole is a privilege and not a right, the routine denial of parole does involve such a liberty interest, and thus is a matter properly before the Court for review. See James v. S.C. Dep't. of Prob. Parole & Pardon

¹ Geer v. South Carolina Department of Probation, Parole and Pardon Services, Op. No. 2018-UP-216 (S.C. Ct. App. filed May 23, 2018), certiorari denied November 9, 2018, is an unpublished opinion from the South Carolina Court of Appeals which affirmed the ruling of Chief Administrative Law Judge Ralph K. Anderson, III, in which the Court held there was "...no evidence showing that Geer's youth was taken into account before he was deprived of the possibility of parole." Id. at 3.

Servs., 376 S.C. 392, 395-96, 656 S.E.2d 399, 401-02 (Ct. App. 2008); see also Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003).

When reviewing a decision of the Department, the Court sits in an appellate capacity. See Furtick, at 599, 576 S.E.2d at 149; Al-Shabazz, at 377, 527 S.E.2d at 754. Under the appellate standard of the Administrative Procedures Act, the Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2019). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

DISCUSSION

The original order of Judge Rushing sentenced Appellant to life in prison without eligibility of parole for 30 years. Several years later, the Department notified Appellant that he would not be eligible for parole under the provisions of S.C. Code Ann. § 24-21-640. The pertinent part of that statute states, "[t]he board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60...." Appellant was convicted of armed robbery and subsequently for murder, both of which are violent crimes by statute.

In 2014, the South Carolina Supreme Court decided the case of Aiken v. Byars, following the directive of the United States Supreme Court in Miller v. Alabama, and stated that a life without parole sentence could not be imposed upon an individual who was a juvenile at the time his crime occurred without an individualized hearing where the mitigating hallmark features of youth are fully explored. Aiken, 410 S.C. at 545, 765 S.E.2d at 578. The Respondent was a juvenile at the time his crimes occurred. Judge Hayes conducted a lengthy hearing and issued a 43-page order in which the Appellant's youth at the time of his crimes was explored. This Court concludes that the in-depth hearing conducted by Judge Hayes was sufficient to meet the requirement of an "individualized hearing." There was no condition that it be conducted by the parole board and the South Carolina Supreme Court ordered Judge Hayes to conduct the hearing. Appellant argues in his brief that Geer states the parole board should conduct the hearing. However, Mr. Geer appealed the decision of the parole board to deny eligibility of parole without providing any hearing at all.

Mr. Geer did not have a hearing before a circuit court judge. Therefore, Geer is distinguishable from this case.

On appeal, Appellant contends that the language of the order of Judge Hayes stated that he should have parole eligibility. His arguments rests on the sentence of the order which reads, “[n]evertheless, after having performed the individualized review as required by Miller and Aiken v. Byars, this Court resentences this Defendant to the same sentences as announced by Judge Rushing in 1990.” Appellant argues that sentence was not life without parole because Judge Rushing specifically mentioned parole eligibility in 30 years. However, the case cited by the Respondent in its brief – Major v. South Carolina Department of Probation, Parole and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009) – states that it is the Department that is responsible for parole and when it is granted. The Court said previously, “in effectuating a sentencing court’s order, the Department has the sole authority to look to the statutes to determine whether a defendant is eligible for parole separate and apart from the court’s authority to sentence a defendant.” State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989). Based on these cases, it is the conclusion of this Court that the portion of Judge Rushing’s sentencing order which mentioned parole eligibility was not part of the sentence at all. Only the Department and its parole board have the authority to determine a person’s parole eligibility.

Nevertheless, what is important here is whether Judge Hayes meant to affirm that part of Judge Rushing’s order, meaning that life without parole was not a proper sentence after his hearing on the matter. Reviewing the order, it is clear that Judge Hayes did not find the features of youth of the Appellant to be mitigating. In Aiken, following Miller, the Court set out factors to be considered at the resentencing hearing. Below are pertinent parts of Judge Hayes’s order regarding -- the factors set out in Aiken, 410 S.C. at 544, 765 S.E.2d at 577, citing Miller, 132 S.Ct. at 2469.

- (1) the chronological age of the offender and the hallmark features of youth, including “immaturity, impetuosity, and failure to appreciate the risk and consequences;”

Judge Hayes - Even though his age at the time of the crime was 16 years and 9 months, the facts of the crimes for which he is being resentenced were not the result of the hallmark features of youth such as immaturity, impetuosity, and failure to appreciate the risks and consequences. These hallmark factors of youth are antonymous to what the facts of his crimes reflect. The facts of his crimes clearly demonstrate his actions were premeditated, intentional and reflect a callous disregard for human life.

- (2) the “family and home environment” that surrounded the offender;
Judge Hayes - Very little, if any[,] credible evidence was presented to suggest his family and home environment caused this Defendant to commit his crimes at age 16 years and 9 months or would have predicted his involvement in his crimes.
- (3) the circumstances of the homicide offense, including the extent of the offender[']s participation in the conduct and how familial and peer pressures may have affected him;
Judge Hayes – [t]he circumstances of his criminal offenses are horrific, chilling and terrifying (footnote omitted). This Defendant’s crimes were committed with another adolescent teenager. However, no evidence was presented to suggest this Defendant was under duress or coercion. These crimes were not committed while intoxicated; and no medical or psychological defect existed. This Defendant participated in these crimes with his Co-Defendant freely and voluntarily (footnote omitted).
- (4) the “incompetencies associated with youth – for example[,] [the offender’s inability to deal with police officers or prosecutors] including a plea agreement or [the offender[']s] incapacity to assist his own attorneys;”
Judge Hayes – [t]he incompetencies associated with youth did not result in his inability to deal with police and did not prevent him from assisting his attorneys. At the time of his original sentencing hearing, he had already cooperated with the New Jersey police and Richland County authorities and his attorney concerning his involvement with the August 1988 Richland County armed abduction and carjacking. Also, when initially questioned by law enforcement concerning the February 1988 Chester County crimes, he provided the factually false statement that substantially lessened his involvement in the crimes and placed substantial responsibility for the crimes on his Co-Defendant. Subsequently, he created statements substantially altering his involvement. During his plea hearing he provided sworn written and oral affirmation to the facts of the case to the Court (endnote omitted).
- (5) the possibility of rehabilitation.
Judge Hayes – [t]his Defendant has shown the possibility of rehabilitation. This Court commends his efforts of rehabilitation. Nevertheless, the possibility of rehabilitation under a Miller analysis alone does not present sufficient mitigation to alter this Court’s decision in light of the facts of the crimes when the deficits of his juvenility have not been sufficiently linked to his crimes.

While this Court does not wish to speculate on the reasons it believes Judge Hayes referred to Judge Rushing’s order regarding the sentence being the same, a reading of the order as a whole is clear that Judge Hayes explored the mitigating hallmark features of youth and found that there was nothing in Harrison’s youth that would mitigate his punishment of life without parole. Particularly convincing, aside from his language on the factors above, is when he says Miller made Appellant’s prior sentences unconstitutional. Then, the next sentence starts... “Nevertheless, ...”

After a very thorough review, it is the conclusion of this Court that Judge Hayes found that the life without parole sentence was not unconstitutional because he found no mitigating factors in Appellant's youth.

I do not find any ambiguity, but inasmuch as the Appellant has a different view, I do note that the South Carolina Supreme Court offered some guidance on this. The case of State v. Bordeaux, 410 S.C. 495, 765 S.E.2d 143 (2014) involved an unambiguous oral sentencing record which was followed by an ambiguous sentencing sheet. The Supreme Court held that what happened in the court hearing was enough to overcome the sentencing sheet. Likewise, the overwhelming discussion by Judge Hayes as to why the Appellant's youth should not mitigate the life without parole sentence was enough to overcome any question about the reference to Judge Rushing's sentence.

ORDER

IT IS THEREFORE ORDERED that the Final Decision of the South Carolina Department of Probation, Parole and Pardon Services is **AFFIRMED**.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

September 9, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

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FILED

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SC ADMIN. LAW COURT