

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge
Case No.: 18-ALJ-15-0008-AP

Appellant Case No. 2018-001557

THOMAS THOMPSON, #80681,.....APPELLANT

v.

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SC Court of Appeals

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

- 1. Has the Parole Board violated the Appellant's right to Equal Protection of the law by using its discretion to impose an extremely harsher punishment on him than other similarly situated persons?**

STATEMENT OF THE CASE

On October 4, 1975, a car was spotted on the side of the road near the Cherokee Creek Bridge in Cherokee County. The Sheriff's Department was called and upon responding they found two men inside the vehicle. One was deceased after suffering a gunshot wound in the back of the head. The other was shot in the temple, he was alive but in critical condition. It was later determined that both was shot with the same caliber gun. Upon further investigation the Appellant and co-defendants Walter Gordon and Ben Holmes were arrested. The victim who was shot in the temple survived however he did lose an eye due to this incident.

Due to plea negotiations between the Appellant and the solicitor's office the Appellant decided to plea to the offense of murder with all other charges to be dismissed. On December 11, 1975, the Appellant appeared before the Honorable Robert Hayes for this offense. Upon the conclusion of this plea the Appellant was given a term of incarceration for the remainder of his natural life. (R.p.21-p.23).

At the time the Appellant committed this offense an inmate serving a life sentence for murder was eligible for parole upon the service of ten years. The Appellant made his initial appearance before the Board on February 6, 1985. Upon the conclusion of this appearance the Board decided to deny parole. Since this initial appearance the Appellant has appeared before the Board an additional seventeen times each resulting in a denial of parole. His most recent appearance occurred on January 31, 2018, parole was denied due to: 1) the nature and seriousness of the current offense; 2) an indication of violence in this or a current offense; and, 3) the use of a deadly weapon in this or a previous offense. (R.p.1). Upon being informed of this decision the Appellant filed a notice of appeal before the Administrative Law Court (ALC).

Within this appeal the Appellant argued that he was being denied parole in violation of the Equal Protection Act. The Appellant argued that he was being treated differently as other inmates appearing before the Board with the identical offenses. (R.p.2-p.5). The Respondent argued that the Appellant failed to reveal to the ALC that he was being treated to a different standard than any other inmate appearing before the Board with the identical offense. The Respondent also argued that the decision of denial followed the mandates proscribed by the South Carolina Supreme Court in the *Cooper* decision. (R.p.6-p.15).

Upon receiving briefs by both parties supporting their arguments the Honorable Ralph King Anderson, III issued his decision on August 6, 2018. In this order Judge Anderson decided that the Appellant is in the identical position as he was when he committed the offense. The lower court also decided that the Appellant failed to reveal that the Board treated him any differently than any other inmate; and, the Appellant did not reveal that the Board failed to follow the statutory requirements in denying him parole. The ALC also decided that the Appellant did not reveal that the Board failed to follow the statutory requirements in denying him parole. Due to the Appellant's failure to support his argument regarding a violation of equal protection, the ALC decided to affirm the decision of the Parole Board. (R.p.16-p.19).

Upon receiving this decision the Appellant decided to file a notice of appeal before the South Carolina Court of Appeals. Within this appeal the Appellant argues that the ALC erred in affirming the decision of the Parole Board. He continues to believe that the Respondent violated equal protection in the denial of his parole. The Respondent will argue that the Appellant failed to reveal to the lower court any substantial evidence that he has been denied equal protection. The Respondent would further argue that the Appellant also failed to reveal that the Board failed to follow the mandatory criteria prior to their decision. Due to these reasons the Respondent will

argue that the decision of the ALC was proper and should be upheld by this honorable court. The brief of Respondent supporting this argument follows.

ARGUMENTS

1. The ALC was correct in determining that the Board did not violate equal protection in the denial of parole.

The Appellant alleges that the denial of parole violated equal protection clause of the United States Constitution which specifically states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

The Appellant alleged that he was being treated differently than other inmates appearing before the Board with identical convictions. He argues that the amount of time he has spent incarcerated is longer than most inmates so he is being denied equal protection. To establish an equal protection violation, a party must show that similarly situated person received disparate treatment. *TNS Mills, Inc. v. South Carolina Department of Revenue*, 331 S.C. 661, 503 S.E.2d 471 (S.C. App. 1998).

The Appellant failed to present any substantial evidence that revealed he was treated any differently than any other individual appearing before the Parole Board. Due to the Appellant's failure to provide any substantial evidence, the ALC was correct in affirming the decision of the Parole Board.¹ The findings of the administrative agency are presumed correct and will be set aside only if supported by substantial evidence. *Summersell v. South Carolina Department of Public Safety*, 334 S.C. 357, 513 S.E.2d 619 (1999).

¹ Substantial evidence is evidence which considering the record as a whole would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981).

The Appellant has been allowed to appear before the Board and present evidence in mitigation. The identical criteria and number of affirmative votes needed to be granted parole was applied on the Appellant as any other prisoner appearing with the identical conviction.

There are certain criteria that must be applied to each individual appearing before the Parole Board. These criteria can be found in South Carolina law which states:

The board must carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that, in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and, that suitable employment has been secured for him.

S.C. Code Ann. §24-21-640(1990).

There are Department created criteria that the Board must also consider.² The order of denial reveals that all of these criteria were considered prior to the final decision. The Appellant accuses the Board of violating equal protection upon his denial of parole. He argues that other individuals convicted of murder have been granted parole so he is being unlawfully withheld in prison longer than other similar individuals. Each case is different regarding what is presented and considered by the Parole Board. Many factors are considered to determine whether or not a person should be released on parole. Not only the above referenced criteria must be considered but law enforcement, the solicitor and the victim's family must receive notice of each hearing. The director must give thirty-day notice of any board hearing during which the board will consider parole for a prisoner to the following persons: (1) any victim of the crime who suffered damage to his person as a result thereof or if such victim is deceased, to members of his immediate family to the extent

² The Board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records. S.C. Code Ann. §24-21-640(1990).

practicable; (2) the solicitor who prosecuted the prisoner or his successor in the jurisdiction in which the crime was prosecuted; and, (3) the law enforcement agency that was responsible for the arrest of the prisoner concerned. S.C. Code Ann. §24-21-221 (1993). The opinion of law enforcement, the solicitor, and the victim's family must be considered prior to the final decision. This is just one of many reasons that can sway a decision of the Board to deny parole of one inmate while granting parole for another.

The Appellant argues that many people convicted of murder are granted parole. The one fact that one person was granted parole and another was not does not reveal a violation of equal protection. There are numerous factors that are considered prior to a final decision. Even if both individuals were convicted of the identical offense it remains the responsibility of the Parole Board to grant parole. Parole eligibility is not a matter within the jurisdiction of the trial court, but falls within the province of the Board of Probation, Parole and Pardon Services. *State v. Brown*, 306 S.C. 381, 412 S.E.2d 399 (1991). The Appellant never revealed that he had to receive a greater number or votes, nor that a different criteria was applied to him than other inmates. He even revealed within his brief before the ALC that he is not questioning the procedure used by the Parole Board. A fact raised by Judge Anderson within his decision which state: "Appellant specifically asserted that he was not disputing the procedure followed nor was he claiming the denial of parole was routine." ALC order p. 4 He argues that he is being unfairly punished which violates equal protection. It is the duty of the Appellant to provide substantial evidence revealing an unfairness, which he has failed to do. Since he is the party who brought the cause of action he has the burden of proof. Appellant for relief, or a privilege has the burden of proof and the burden of proof rest upon who files the claim with an administrative agency to establish that required conditions of eligibility have been met. *Leventis v. South Carolina Department of Health and Environmental*

Control, 340 S.C. 118, 530 S.E.2d 643 (2000). No evidence has been provided revealing that he has been treated any differently than any other inmate appearing before the Board with similar convictions. There exist no violation of equal protection. The ALC made the correct decision in affirming the decision of the Parole Board. Since there exist no error of law the decision of the ALC should be affirmed.

2. The Respondent revealed that they considered all of the mandatory criteria, and risk assessment; therefore, the decision of the ALC was correct.

A final decision shall include a finding of fact and conclusion of law separately stated. S.C. Code Ann. §1-23-350(2017) It is the Respondent's position that the order of denial followed the standards found in the above referenced statute. The order also followed the standards decided by the South Carolina Supreme Court in the case of *Cooper v. S.C. Dept. of Probation, Parole, and Pardon Services*, 377 S.C. 489, 661 S.E.2d 106 (2008).

In *Cooper*, the Supreme Court decided that a finding of fact was included; 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 failed 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.

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

Id.

Since *Cooper*, the General Assembly has added an additional requirement. The Department is now required to create and acknowledge a risk assessment. The Department must develop a plan that includes the establishment of a process for adopting a validated actuarial risk and needs assessment tool consistent with evidence-based practices and factors that contributed to criminal behavior, which the parole board shall use in making parole decisions including additional objective criteria that may be used in parole decisions. S.C. Code Ann. §24-21-10(F)(1)(2012). Since this mandatory element was added to Parole Board consideration, each inmate will have a COMPAS risk assessment completed prior to their hearing. These results are always considered prior to the final decision. This along with the mandatory statutory and Department criteria this is considered a conclusion of law. This consideration was included in the order of denial. The order of denial also lists the reasons for denial a findings of fact.

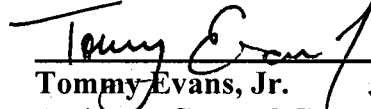
In *Cooper*, the Court determined that the order of denial was unlawful due to it not presenting any conclusion of law. It was the opinion of the Court that in order for the Board to prove proper procedure were followed, it must not only state a findings of fact, but also reveal that the statute, policy and risk assessment were considered prior to the final decision. The final order in the present case displayed that all of these required criteria were considered, once that is revealed no further review by the ALC is necessary.³ The ALC has properly ruled that the Board revealed that the mandatory criteria was followed. The Appellant has not brought any error of law that has been committed by the ALC. The decision of the lower court should be affirmed.

³ The Parole Board clearly stated in its notice of rejection that it considered the statutory criteria and the criteria set forth Form 1212 which is sufficient under *Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services*, 385 S.C. 476, 684 S.E.2d 175 (2009).

CONCLUSION

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

Respectfully submitted,



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