

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Deborah Brooks Durden, Administrative Law Judge
Appellate Case No. 2020-001292

Theodore Harrison, Jr. #155651,

Appellant,

v.

South Carolina Department of Probation,
Parole, and Pardon Services,

Respondent.

APPELLANT'S REPLY BRIEF

December 7, 2020

Theodore Harrison, Jr.

SCDC# 155651

Perry C.I., Q4A 211

430 Oaklawn Road

Pelzer, S.C. 29669

Matthew C. Buchanan,

Esquire

General Counsel, SCDPPPS

P.O. Box 207

Columbia, S.C. 29202

TABLE OF CONTENTS

Table of Authorities..... 1

Reply..... 2

Conclusion..... 5

TABLE OF AUTHORITIES

State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988)..... 3
Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014)..... 2
State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1989)..... 3
State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (2002)..... 4
Duckson v. State, 355 S.C. 596, 586 S.E.2d 576 (2003)..... 4
State v. Dingle, 376 S.C. 643, 659 S.E.2d 101 (2008)..... 4
Cooper v. South Carolina Department of Probation, Parole
and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008)... 4
Major v. South Carolina Department of Probation, Parole
and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009)... 4
Geer v. South Carolina Department of Probation, Parole
and Pardon Services, Docket No.15-ALJ-15-0042-AP,
Unpublished Opinion (December 1, 2015)..... 2

STATUTES

S.C. Code Ann. §16-3-20(A)(1990)..... 2
S.C. Code Ann. §24-21-640..... 2

SECONDARY SOURCES

26 S.C. Jur. Probation, Parole & Pardon §16, September
2020 Update..... 4

REPLY

In Reply to the Respondent's Initial Brief, received by Appellant on December 3, 2020, Appellant submits that the Respondent based its final decision to again make Appellant parole ineligible on his parole eligible life sentence pursuant to S.C. Code §24-21-640 as a subsequent violent offender for crimes which Appellant committed as a juvenile, on the fact that Appellant received a Aiken v. Byars resentencing hearing before Judge Mark Hayes and the erroneous belief that Judge Hayes resented Appellant to life without parole; and the Administrative Law Court erroneously concluded that Appellant's Aiken v. Byars resentencing hearing before Judge Hayes satisfied the requirements articulated in Geer v. S.C. Dept. of Probation, Parole and Pardon Services, Docket No.15-ALJ-15-0042-AP, unpublished opinion (December 1, 2015), that before §24-21-640 can be applied turning his parole eligible life sentence into a sentence of life without parole for crimes committed as a juvenile, a hearing must be held taking Appellant's youth and its attendant characteristics and circumstances into account before making such a determination.

Appellant submits that the record is clear. On November 12, 1990 Honorable Judge Don S. Rushing, after finding a aggravating circumstance and no recommendation of death was made, sentenced Appellant pursuant to S.C. Code §16-3-20(A)(1990) to a term of life imprisonment without eligibility of parole until the service of thirty (30) years.

By Order dated June 14, 2018, Judge J.Mark Hayes II, after a two day resentencing hearing pursuant to Aiken v. Byars to decide if Appellant would receive a lesser sentence or the same sentence as originally imposed, Judge Hayes decided to resentence Appellant "to the same sentence as announced by Judge Rushing in 1990."

Judge Hayes could not impose a sentence of life without parole on Appellant, because this was not a sentencing option which §16-3-20(A) allowed in 1990. It was not a sentencing option available to Judge Rushing in 1990. Other than a lesser sentence,

the only other sentencing option available to Judge Hayes to impose on Appellant, was "the same sentence as announced by Judge Rushing in 1990." Had Judge Hayes imposed on Appellant a sentence of life without parole, that sentence would be an Ex Post Facto violation. State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988).

After being resentenced by Judge Hayes "to the same sentences as announced by Judge Rushing in 1990", Appellant again found himself in the exact same situation he was in when he received the first letter from the Respondent dated August 1, 1996 notifying him of his parole ineligibility. Sentenced to life with parole eligibility after the service of thirty (30) years imprisonment, and the Respondent changing his parole eligible life sentence into a life without parole sentence through the application of §24-21-640 to Appellant's 1990 sentences as a second or subsequent violent offender, for crimes which Appellant committed as a juvenile.

As to the resentencing hearing conducted by Judge Hayes, Appellant submits that the hearing satisfied the requirements of Aiken v. Byars to determine what sentence Appellant would receive: a lesser sentence or "the same sentence as announced by Judge Rushing in 1990." Appellant's resentencing hearing before Judge Hayes did not address or decide the issue of the Respondent's application of §24-21-640 to Appellant as a second or subsequent violent offender, changing his sentence of life with parole eligibility into a life without parole sentence for crimes committed as a juvenile. This was not the issue of Aiken v. Byars, and was not the issue for the sentencing court to decide.

The law in South Carolina is clear. S.C. Code §24-21-640 specifically provides for the Parole Board to consider the complete record of a prisoner and delegates to the Parole Board the responsibility of determining if and when a prisoner meets the prerequisites of parole eligibility separate and independent from the court's authority to sentence an offender. State v.

McKay, 300 S.C. 113, 386 S.E.2d 623 (1989); State v. Lee, 350 S.C. 125, 564 S.E.2d 372 (2002)("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."); Duckson v. State, 355 S.C. 596, 586 S.E.2d 576 (2003)("...the Board of Probation, Parole and Pardon Services determines both parole eligibility and revocations."); State v. Dingle, 376 S.C. 643, 659 S.E.2d 101 (2008)("...the parole board has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant."); Cooper v. South Carolina Department of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008)(a "court's final judgment in a criminal case is the pronouncement of the sentence. The parole board, however, has the sole authority to determine parole eligibility separate and apart from the court's authority to sentence a defendant."); Major v. South Carolina Department of Probation, Parole and Pardon Services, 384 S.C. 457, 682 S.E.2d 795 (2009)("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.").

Appellant submits that following this line of precedent, for purposes of parole eligibility under §24-21-640, the authority is statutorily vested in the Probation, Parole and Pardon Board, and not with the sentencing court. The legal authority in South Carolina clearly directs that any hearing which is to be conducted applying §24-21-640 to a convicted offender's sentence of life with parole eligibility, changing it into a sentence of life without parole as a second or subsequent violent offender for crimes which were committed as a juvenile, taking their youth and its attendant characteristics and circumstances into account, must be conducted by the Respondent's Parole Board, and not by the sentencing court. Major, "Our law; however, is well-established that a sentencing judge does not have the authority to determine parole eligibility through sentencing." See also, 26 S.C. Jur. Probation, Parole & Pardon §16, September

2020 Update, where the Chief Legal Counsel Carl N. Lundberg, Esq. and Legal Counsel Mark V. Desser, Esq. S.C. Department of Probation, Parole and Pardon Services stated "For purposes of parole eligibility under Section 24-21-640, the authority to determine whether multiple violent crimes have been committed pursuant to one continuous course of conduct is statutorily vested in the Parole Board."

The Court in Geer v. S.C. Dept. of Probation, Parole and Pardon Services, which was affirmed by this Court, found it was not the sentencing scheme of the court which made Geer's life sentence parole ineligible, but was the Respondent's application of §24-21-640, and because the Respondent made this application and determination without taking Geer's youth and its attendant characteristics and circumstances into account for crimes which Geer committed as a juvenile, the Respondent had subjected him to a sentence which violated the Eighth Amendment to the U.S. Constitution and Article 1§15 of the S.C. Constitution. To remedy this violation the Respondent now affords Geer a parole hearing every two (2) years.

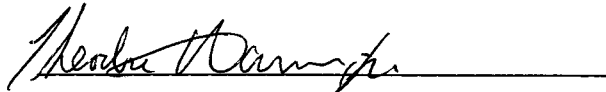
CONCLUSION

The Court should reverse and vacate the decision of the Administrative Law Court (ALC) affirming the final decision of the Respondent denying Appellant parole eligibility on his parole eligible life sentence as a second or subsequent violent offender under §24-21-640 for crimes which he committed as a juvenile without providing Appellant with a hearing taking his youth and its attendant characteristics and circumstances into account. The law in South Carolina is clear, the application of §24-21-640 is statutorily vested in the Parole Board, and any hearing taking the youth and its attendant characteristics and circumstances into account of a convicted offender as a second or subsequent violent offender serving a life with parole sentence for crimes committed as a juvenile, must be held by the Parole Board, and not by the sentencing court. The Respondent acknowledges that this issue was not addressed in Aiken v. Byars, was not addressed or ruled on by Judge Hayes at Appellant's resentencing hearing,

and even acknowledges the fact that the application of §24-21-640 is the sole authority of the Parole Board separate and apart from the sentencing court. The ALC decision affirming the Respondent's final decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, and is in violation of constitutional and statutory provisions. The Court should reverse and vacate that decision.

Respectfully submitted,

December 7, 2020



Theodore Harrison, Jr.

SCDC# 155651

Perry C.I., Q4A, 211

430 Oaklawn Road

Pelzer, S.C. 29669

Appellant

Other Counsel of Record:
Matthew C. Buchanan, Esquire
General Counsel, SCDPPPS
P.O. Box 207
Columbia, S.C. 29202