

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAR 11 2021

Appeal from Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Judge

SC Court of Appeals

Appellate Case No. 2020-001121

GEORGE ADAMS, #181283.....APPELLANT

v.

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

FINAL BRIEF OF RESPONDENT

**Janell H. Gregory
Legal Counsel
SC Bar No. 103176**

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202**

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

Table of authorities.....ii

Statement of the issues on appeal.....1

Statement of the case.....2

Argument

 1. The lower court properly granted Respondent’s motion to dismiss and rejected Appellant’s subsequent motions because Respondent’s letter to Appellant in March 2020 did not trigger Appellant’s right to appeal and his subsequent motions were improper.4

 2. Respondent is not abusing its discretion or creating an ex post facto violation by denying Appellant biannual parole hearings because Appellant is a subsequent violent offender and is therefore ineligible for parole under South Carolina law.....6

Conclusion.....10

TABLE OF AUTHORITIES

CASES

Al-Shabbaz v. State, 338 S.C. 334, 527 S.E.2d 724 (2000).....5

Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2002).....5

Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (1997)5

Reidman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992)5

Sullivan v. State, 331 S.C. 479, 504 S.E.2d 110 (1998).....9

Phillips v. State, 331 S.C. 482, 504 S.E.2d 111 (1998).....9

STATUTES / COURT RULES

S.C. Code Ann. §24-21-640 (2018).....2, 8, 9, 10

S.C. Code Ann. § 16-1-60 (1986)2, 8, 9

S.C. Code Ann. § 16-11-311 (1976).....2

S.C. Code Ann. § 16-3-10 (1976)2

Rule 59, SCRALC.....6

Rule 62, SCRALC.....6

Rule 65, SCRALC.....3, 7, 8

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the lower court properly granted Respondent's motion to dismiss and rejected Appellant's subsequent motions because Respondent's letter to Appellant in March 2020 did not trigger Appellant's right to appeal and his subsequent motions were improper?

2. Whether Respondent is abusing its discretion or creating an ex post facto violation by denying Appellant biannual parole hearings because Appellant is a subsequent violent offender under South Carolina law and is therefore not entitled to parole hearings as he is ineligible for parole?

STATEMENT OF THE CASE

During the October 1992 term, the Richland County Grand Jury indicted Appellant for armed robbery (92-GS-40-11316) and murder (92-GS-40-11317). On June 20, 1994, Appellant proceeded to a jury trial before the Honorable L. Henry McKellar. The jury found Appellant guilty as indicted and Judge McKellar sentenced Appellant to life for murder and a consecutive twenty-five years for armed robbery.

At the time Appellant committed this offense, South Carolina law allowed a person serving a sentence for murder to become eligible for parole upon the service of twenty years. Prior to the arrival of his parole eligibility date, the Department conducted a mandatory investigation to determine if Appellant would be eligible for parole. During the course of this investigation, the Department discovered Appellant was convicted in September 1991 of the offense of first-degree burglary, which is classified as a violent offense.¹ Based on Appellant's prior conviction of a violent crime, the Department determined he is not eligible for parole pursuant to S.C. Code Ann. 24-21-640. (R.p.4).

On December 21, 2012, Appellant was informed that due to his prior conviction of a violent offense he is not eligible for parole. (R.p.4). At that time, Appellant was also informed the he can appeal the Department's decision to the Administrative Law Court (ALC). Appellant filed a notice of appeal on January 21, 2013. In his appeal, Appellant alleged the Department violated ex post facto clause by following the law on the date when he was sentenced and not the date when he committed the offense. Appellant also alleged that his denial of parole was in violation of due process.

¹ Under South Carolina law a violent crime includes the offenses of murder (Section 16-3-10) and, burglary in the first-degree (Section 16-11-311). S.C. Code Ann. §16-1-60 (Supp. 1986).

Upon reviewing briefs submitted by each party, the Honorable Ralph K. Anderson, III, acting in his capacity as chief administrative judge, issued an order affirming the Department's determination that Appellant was not eligible for parole. Upon receipt of Judge Anderson's order, Appellant filed a notice of appeal in the South Carolina Court of Appeals. After briefing, on October 19, 2016, the Court of Appeals affirmed this Court's decision in an unpublished opinion. Adams v. the Department of Probation, Parole, and Pardon Services, Op. No. 2016-UP-434 (S.C. Ct. App. filed October 19, 2016).

Nearly four years later, on February 25, 2020, Appellant sent a letter to the Department asserting that he should be parole eligible. On March 6, 2020, Matthew C. Buchanan, General Counsel for the Department, responded to Appellant's letter and enclosed a copy of the December 21, 2012, letter Appellant initially received from the Department informing him of the Department's final decision that he was not eligible for parole. (R.p.6). On March 18, 2020, Appellant filed a notice of appeal indicating his intention to appeal the letter sent to him on March 6, 2020. Appellant filed his brief on April 10, 2020. Respondent filed a motion to dismiss on July 10, 2020, arguing Appellant's appeal should be dismissed because the response Appellant received from Respondent did not trigger a right to appeal since it reiterated the final decision Respondent provided Appellant in 2012. The Honorable Shirley C. Robinson of the ALC was assigned Appellant's appeal. After reviewing Appellant's brief and Respondent's motion, Judge Robinson filed her order granting Respondent's motion to dismiss on July 29, 2020. (R.p.7-p.8).

Thereafter, Appellant filed a motion for reconsideration of his appeal and a motion requesting Judge Robinson recuse herself from presiding over his appeal. (R.p.10-p.13). On August 12, 2020, Judge Robinson addressed Appellant's motion for reconsideration in a letter citing SCRALC Rule 65, which expressly prohibits motions of reconsideration of a final decision

in the ALC. (Supp. R.p.21). On August 19, 2020, Judge Robinson sent a letter to Appellant explaining that his motion for recusal was not filed because he did not have a pending appeal before the ALC, and, further, Judge Robinson had no conflicts in presiding over Appellant's matter that would warrant her recusing herself from Appellant's matter. (R.p.19).

On August 6, 2020, Appellant filed his notice of appeal in the South Carolina Court of Appeals, which expressed his intent to appeal Judge Robinson's dismissal of his appeal in the ALC. In his brief, Appellant claims Respondent has abused its discretion in denying Appellant biannual parole hearings, that Respondent is violating the ex post facto clause by denying Appellant parole hearings, and that the lower court erred in refusing to file Appellant's motions for reconsideration and recusal. Respondent's brief follows.

ARGUMENT

1. The lower court properly granted Respondent's motion to dismiss and rejected Appellant's subsequent motions because Respondent's letter to Appellant in March 2020 did not trigger Appellant's right to appeal and his subsequent motions improper.

Appellant argues the ALC erred in granting Respondent's motion to dismiss his appeal, and rejecting his subsequent motions for reconsideration and recusal. Respondent submits the ALC properly granted Respondent's motion to dismiss because the letter Respondent sent to Appellant in March 2020 did not trigger any appellate rights for Appellant. As such, Appellant is barred by the doctrine of res judicata from filing an appeal on his claim that has already been litigated through the ALC and this Court. Further, the ALC properly declined to file Appellant's motion to reconsider because such a motion is not proper under South Carolina law in the ALC. Lastly, since the ALC properly dismissed Appellant's appeal, Appellant did not have a pending matter with the ALC to properly file a motion for recusal. Therefore, the ALC properly dismissed

Appellant's appeal and properly rejected Appellant's subsequent motions and this Court should affirm those actions by the ALC.

The ALC's jurisdiction to review a final decision of Respondent is derived from the South Carolina Supreme Court decision of Al-Shabbaz v. State, 338 S.C. 334, 527 S.E.2d 724 (2000), and Furtick v. S.C. Dept. of Probation, Parole and Pardon Services, 352 S.C. 594, 576 S.E.2d 146 (2002). 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 a final agency decision to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. Al-Shabbaz, 338 S.C. at 376, 527 S.E.2d at 754. In Al-Shabbaz, the Court recognized that, "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed; and (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence-related credits or custody status." Id. at 369, 527 S.E.2d at 750. The Court noted the appealable final decision in Furtick arises in the latter manner, where the inmate alleges that Respondent erroneously determined he was not eligible for parole.

Here, Respondent's final decision that Appellant was not eligible for parole was made in late 2012. Appellant appealed that decision to the ALC, which upheld Respondent's decision, and this Court later affirmed the ALC's decision in an unpublished opinion. Appellant is now attempting to relitigate the same claim for which he received appellate review of in 2012. "The doctrine of res judicata . . . bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between the parties." Pye v. Aycock, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (1997) (quoting Reidman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992)). Because

Appellant has already sought and received proper appellate review of Respondent's final decision from 2012, Appellant's appeal currently before this Court is barred by the doctrine of res judicata.

Despite Respondent's decision that Appellant is not eligible for parole being affirmed by the ALC and this Court, Appellant sent a letter in February 2020, approximately eight years later, asserting he should be parole eligible. Respondent replied to Appellant in March 2020 and Appellant filed an appeal based that response. However, Respondent's response to Appellant's letter was not a final decision from which Appellant would have the right to appeal. Respondent simply reiterated its final decision from 2012 in its response to Appellant's assertion that he should be parole eligible. Notably, Respondent enclosed a copy of the 2012 decision with its letter explaining that he was ineligible for parole. According to SCRALC Rule 59, a notice of appeal may only be filed from a "final decision." As Respondent has not issued a subsequent "final decision" that would have triggered Appellant's right to appeal, this appeal should be dismissed.

Further, Appellant's successive appeal is untimely. SCRALC Rule 59 states, in part,

The notice of appeal from the final decision to be heard by the Administrative Law Court shall be filed with the Court and a copy served on each party, including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken.

Appellant only has thirty days from receipt of Respondent's final decision to file an appeal. Despite Appellant's claim that he is appealing a final decision issued on March 6, 2020, the final decision here was actually issued in December 2012; Appellant's notice of appeal was filed on March 18, 2020, which is over seven years past the statutory filing period.

The ALC has the authority to dismiss an appeal pursuant to SCRALC Rule 62, which states, in part,

Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of

procedure for appeals, including failure to comply with any of the time limits . . . If the presiding judge determines that the appeal is frivolous . . . the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Here, Appellant's appeal was dismissed because he was seeking appellate review of a final decision from Respondent that was issued in 2012. At that time, Appellant properly sought – and received – appellate review of Respondent's decision, not only from the ALC, but from this Court as well. Appellant's appeal was based on his misunderstanding that Respondent's March 2020 letter was another “final decision” from which he had the right to appeal. Further, Appellant already received proper appellate review of Respondent's final decision in 2012 thereby making his appeal untimely and frivolous.

After the ALC dismissed Appellant's appeal, Appellant filed a motion for reconsideration on August 5, 2020. (R.p. 10-p.13). The ALC responded to Appellant explaining that the decision of the ALC is final and under Rule 65, SCRALC, motions for reconsideration will not be considered. (Supp. R. p.21). Thereafter, Appellant filed a motion for the Honorable Shirley C. Robinson to recuse herself from presiding over Appellant's appeal. (R.p.16-p.18). Judge Robinson responded and explained Appellant's motion for recusal was being returned to him because he did not have a pending matter before the ALC due to his appeal being dismissed on July 29, 2020. (R.p.19). Further, Appellant did not provide any justifiable grounds to substantiate his request for Judge Robinson to recuse herself from presiding over his matter.

Ultimately, the ALC properly dismissed Appellant's appeal from Respondent's March 2020 letter. In its order of dismissal, the ALC properly concluded Respondent's letter was not a final decision triggering Appellant's right to appeal because Respondent merely reiterated its final decision from 2012, from which Appellant did pursue and receive full appellate review. (R.p. 7-

p.8). Further, the ALC properly declined to file Appellant's motion for reconsideration because, under Rule 65, SCRALC, the ALC does not allow for such motions under their rules. Finally, the ALC also properly returned Appellant's motion for recusal because, at the time Appellant filed this motion, he had no pending matter before the ALC; further, he provided no justification or explanation for his motion to show Judge Robinson was unable to preside over his matter. As there was no error in dismissing Appellant's appeal and rejection of Appellant's subsequent motions, this Court should affirm the decision of the ALC.

2. Respondent is not abusing its discretion or creating an ex post facto violation by denying Appellant parole hearings because Appellant is a subsequent violent offender and is therefore ineligible for parole under South Carolina law.²

Despite the above arguments showing Appellant's appeal is barred, improper, and untimely, if this Court wishes to examine Appellant's argument that he should be entitled to parole eligibility, this Court will find Appellant was properly informed he is ineligible for parole because he is a subsequent violent offender.

Appellant argues Respondent is arbitrarily denying him parole hearings that he is entitled to after he completed twenty years of service. Appellant argues Respondent's determination that he is ineligible for parole constitutes an ex post facto violation. However, Appellant is a subsequent violent offender under South Carolina Law, which denies him parole eligibility. South Carolina law specifically states:

The [parole] board must not grant, 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.

S.C. Code Ann. §24-21-640(2018).

² This section will address argument 1 and 2 from Appellant's brief.

Respondent has properly informed Appellant that he is not eligible for parole under South Carolina law due to his previous violent crime conviction for first-degree burglary in 1991 and the ALC properly upheld Respondent's decision. As such, this Court should affirm the ruling of the ALC because Appellant is properly being denied parole hearings as he is a subsequent violent offender and not eligible for parole by statute.

An offender is a subsequent violent offender if the subsequent crime was committed after June 3, 1986, and classified as a violent offense at the time of its commission. Additionally, the subsequent violent offense cannot be part of one continuance course of conduct.³ Further, if the subsequent crime was committed between January 1, 1994, and January 12, 1995, the prior crime must have been classified as a violent offense at the time the subsequent crime was committed. With the exception of this window, there exists no ex post facto violation when an inmate is treated as a subsequent violent offender based on a prior conviction which was not defined as violent on the date the prior crime was committed. Sullivan v. State, 331 S.C. 479, 504 S.E.2d 110 (1998), Phillips v. State, 331 S.C. 482, 504 S.E.2d 111 (1998).

Here, Appellant's first violent offense, first-degree burglary, occurred in September 1991, and his subsequent violent offense of murder occurred in 1992, which is about five years after June 1986. Both of Appellant's offenses were classified as violent under S.C. Code Ann. §16-1-60 at the time they were committed. Appellant's two offenses were about a year apart, so they are clearly not part of one continuous course of conduct, and neither were committed between January 1994 and January 1995. As Appellant was convicted of two violent offenses that do not fall within any of the above referenced exceptions, Respondent properly classified Appellant as a subsequent

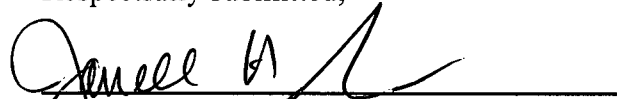
³ Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuance course of conduct, such multiple offenses must be treated for purposes of this section as one offense. S.C. Code Ann. §24-21-640 (1986).

violent offender under S.C. Code Ann. §24-21-640 and properly informed Appellant he is ineligible for parole. Further, Appellant's argument that Respondent's determination that he is ineligible for parole constituted an ex post facto violation is meritless because Appellant's offenses do not fall within any of the above exceptions, so his previous violent offense is properly evaluated under §24-21-640 as a subsequent violent offense, which, therefore, makes Appellant ineligible for parole. Since no error has occurred, Respondent respectfully request this Court to affirm the decision of the ALC.

CONCLUSION

The ALC was well within its authority to dismiss Appellant's improper appeal and reject Appellant's subsequent motions. Therefore, this Court should affirm the ALC's decision.

Respectfully submitted,



Janell H. Gregory
Legal Counsel

South Carolina Department of Probation,
Parole, and Pardon Services
P.O. Box 207
Columbia, South Carolina 29202
(803) 734-9220

Attorney for the Respondent

Columbia, South Carolina
March 2, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAR 11 2021
SC Court of Appeals

Appeal from Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2020-001121

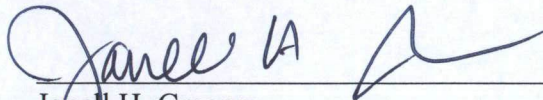
GEORGE ADAMS, #181283.....APPELLANT

v.

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

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.



Janell H. Gregory
Legal Counsel

March 2, 2021