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SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Chuck McCullough, #311608,

Docket No. 20-ALJ-15-0020-AP

Appellant,

vs.

FINAL 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 a notice of appeal filed by Chuck McCullough (Appellant), an inmate in the custody of the South Carolina Department of Corrections. Following his most recent parole hearing on March 25, 2020, the South Carolina Department of Probation, Parole, and Pardon Services (Department or Respondent) notified the Appellant that the Parole Board (Board) had determined that his parole should be denied. The Appellant challenges the Department's decision on the grounds that it failed to reschedule his parole review hearing in the wake of a COVID-19 related emergency order preventing his family members from attending and serving as witnesses, failed to comply with Form 1212 by having inadequate information about his prior probation sentence, and violated his due process by adding another reason for the denial despite his clean institutional record.

After careful consideration of the briefs of the parties, the record, as well as the applicable law, the court finds no error in the Board's decision. Accordingly, the Department's decision is affirmed.

FILED

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BACKGROUND

According to the Department's recitation of background facts,¹ on March 17, 2011, the Appellant's estranged wife (Co-defendant) went to the Appellant's residence with their infant son.

¹ The Appellant presented a slightly different account of the facts surrounding his crimes. Most notably, the Appellant contends that the death of his child was not at all drug related, and that he and his estranged wife did not drive around but were on their way to the hospital when a relative called them to her house. Apart from those small but significant differences, the Department's account generally tracks with the Appellant's account.

At the time, the Appellant was running a methamphetamine lab out of the residence. The duo smoked meth together in the presence of their child and then fell asleep. The following morning, they awoke to find their son face down in his own vomit. Upon determining that he was deceased, the Appellant and Co-defendant panicked and called a relative, who told them to take the infant to the hospital. Rather than doing so, the Appellant and Co-defendant placed the deceased infant's body in a plastic tote and then placed the tote in a lock box. The duo put the lock box in the back of the Appellant's truck and drove around, eventually ending up at a relative's house. Thereafter, law enforcement showed up at the relative's house and conducted a lawful search of the vehicle, where the deceased infant's body and drugs were uncovered. The Appellant was subsequently indicted by a grand jury for possession with intent to distribute methamphetamine or cocaine base, third offense; and manufacturing methamphetamine, third offense. Later, the Appellant was also indicted for unauthorized removal of a dead body, exposing a child to methamphetamine, and unlawful conduct towards a child. On August 1, 2012, the Appellant entered an *Alford* plea and was sentenced to concurrent terms of thirty years for manufacturing methamphetamine, ten years each for possession of methamphetamine and unlawful conduct towards a child, five years for exposing a child to methamphetamine, and sixty days for unlawful removal of a dead body.

The Appellant has received four (4) parole hearings with the most recent taking place on March 25, 2020. Following his most recent hearing, the Board unanimously voted to reject the Appellant's request for parole based on the following reasons: 1) nature and seriousness of current offense; 2) criminal record indicates poor community adjustment; and 3) failure to successfully complete a community supervision program.

On March 31, 2020, the Appellant submitted a request for parole reconsideration and a new hearing on several grounds, including that his aunt and daughter were denied entry at Perry Correctional facility on the day of his hearing. He stated that his family members witnessed the crimes and would have provided testimony on his behalf. On April 9, 2020, the Department's General Counsel submitted a response letter to the Appellant's request for a new hearing stating that the closure of the correctional facility was an act of the Department of Corrections (SCDC), not the Respondent. The Department further stated that the visitor restriction affected all inmates equally, not just the Appellant, and that it was not prepared to invalidate an entire day's worth of hearings because of the prudent actions of the Department of Corrections in trying to prevent the spread of COVID-19.

Thereafter, on April 14, 2020, the Appellant filed a notice of appeal with this court. On appeal, the Appellant asserts that the Board: a) erred by not rescheduling his parole review hearing when the COVID-19 related Declaration of Emergency prevented his family members from attending and serving as witnesses; b) violated his due process by not complying with Form 1212 and by penalizing him for having completed probation; c) was not justified in finding additional reasons to reject the Appellant's request for parole since his last parole review hearing. In response, the Department argues that conducting the hearing as scheduled did not violate the Appellant's due process and that the Board properly considered the appropriate factors in accordance with *Cooper*.² The Department, therefore, argues that the Appellant's routine parole denial was not erroneous.

ISSUES ON APPEAL

Was the Appellant deprived of due process when his parole hearing went forward as scheduled even though his family members could not appear on his behalf at the hearing?

Did the Board properly consider the criteria set forth in *Cooper* in reaching its decision to deny the Appellant parole, thereby making it a routine denial of parole?

STANDARD OF REVIEW

The court's jurisdiction to review this matter is derived from the South Carolina Supreme Court decisions in *Al-Shabazz* and *Furtick*. See *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) (establishing an administrative review process for inmate appeals); see also *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003) (incorporating final decisions of the Department into that review process). As explained by the *Al-Shabazz* court, "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 Corrs.*, 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004).

Since parole is a privilege, not a right, the routine denial of parole does not constitute such a liberty interest. See *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 495-96, 661 S.E.2d 106, 109-10 (2008). If, however, the Board "deviates from or renders its decision without consideration of the appropriate [statutory] criteria, . . . it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Id.* at 499, 661

²~~*Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008).~~

S.E.2d at 111. Thus, this court may review the Board's decisions only for violations of statutory procedure or procedural due process, not the Board's substantive decision to deny an appellant parole.

In reviewing such matters, the court sits in its appellate capacity. *See id.* at 497, 661 S.E.2d at 110; *Al-Shabazz*, 338 S.C. at 377, 527 S.E.2d at 754. Under the Administrative Procedures Act, the court's review in appellate matters is confined to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2020). The court may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2020). Substantial rights of the appellant are prejudiced when the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

DISCUSSION

As stated *supra*, parole is not a right, but a privilege. *State v. Dingle*, 376 S.C. 643, 649, 659 S.E.2d 101, 104 (2008) (citing *Sullivan v. S.C. Dep't of Corrs.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 n.4 (2003)). The discretion to grant parole lies solely with the Board. *Id.* at 649, 659 S.E.2d at 104-05 (citing *State v. McKay*, 300 S.C. 113, 115, 386 S.E.2d 623, 623-24 (1989)). If, in denying parole, the Board follows proper procedure, then its decision will constitute a routine denial of parole and summary dismissal of the case would be appropriate. *See Cooper*, 377 S.C. at 500, 661 S.E.2d at 112; *see also Compton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 385 S.C. 476, 479, 685 S.E.2d 175, 177 (2009). The proper procedure for the Board to follow includes considering the factors outlined in Section 24-21-640 of the South Carolina Code, as well as those listed in the Department's parole form. *Cooper*, 377 S.C. at 500, 661 S.E.2d at 112; *Compton*, 385 S.C. at 479, 685 S.E.2d at 177; *see also* S.C. Code Ann. § 24-21-640 (Supp. 2020) (setting forth the statutory factors warranting parole). Additionally, the Board must utilize an actuarial risk and needs assessment tool, known as COMPAS, in making its parole determinations. *See* S.C. Code Ann. § 24-21-10(F) (Supp. 2020).

If the Board fails to follow proper procedure, giving due consideration to the specified factors, an appellant is denied his liberty interest in parole eligibility. *Cooper*, 377 S.C. at 499.

661 S.E.2d at 111. If, however, the Board adheres to procedure and considers all the requisite factors, the appellant's liberty interest is protected, and the Board has the discretion to deny parole based on any of the factors found in Section 24-21-640 or its own criteria. *See id.* at 499, 661 S.E.2d at 111-12.

Here, the Appellant argues that he was deprived of due process when the Department failed to reschedule his parole review hearing after his family members were prevented from attending his hearing to speak on his behalf as a result of COVID-19 related safety measures. However, the visitor restrictions were imposed at the behest of the Department of Corrections, not the Respondent, in a time of great uncertainty with the coronavirus pandemic. Furthermore, there is no indication in the record that the Appellant would have been prohibited from introducing relevant witness statements or testimony had SCDC's visitor restrictions not prevented their attendance. In any event, while the court is sympathetic to the Appellant's situation, it is not aware of, and the Appellant does not cite to, any authority creating a due process right in having a parole review hearing rescheduled if witnesses are prevented from attending through no fault of the Department.

Next, the Appellant argues that the Board erred by relying on inadequate information in finding that he failed to successfully complete a community supervision program and by adding, without cause, additional reasons since his last parole denial. The court commends the Appellant on his apparent sobriety and efforts to rehabilitate himself, however, the Board's substantive decision to deny him parole is outside of the limited scope of this court's review. *See Cooper*, 377 S.C. at 495-96, 661 S.E.2d at 109-10. This court may review the Board's decisions only to ensure that it has complied with the necessary procedures. *Id.* at 499, 661 S.E.2d at 111-12. In this case, the Board's order plainly reflects that it considered all the appropriate factors – including those set forth in Section 24-21-640, the Department's own criteria for parole consideration, and an actuarial risk and needs assessment – before making its decision to deny the Appellant parole. Thus, as a routine denial of parole, the court's ability to further review this matter is limited:

[T]he [] Board may avoid [reversal of its parole determinations] if it clearly states in its order denying parole that it considered the factors outlined in [S]ection 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. Under that scenario, the ALC can summarily dismiss the inmate's appeal.

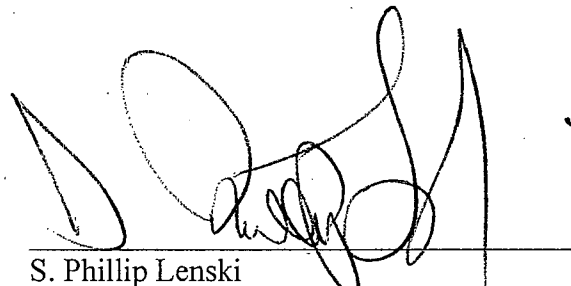
Cooper, 377 S.C. at 500, 661 S.E.2d at 112; *see Compton*, 385 S.C. at 479, 685 S.E.2d at 177. Consequently, because the Appellant has not shown a due process violation and the record reflects that the Board routinely denied the Appellant parole after complying with the necessary procedure and considering the appropriate factors, the court may not interfere with the Department's determination.

ORDER

THEREFORE, for the foregoing reasons, the Department's decision to deny the Appellant parole is hereby **AFFIRMED**.

AND IT IS SO ORDERED.

March 12, 2021
Columbia, South Carolina



S. Phillip Lenski
S.C. Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 12th day of March 2021
By: 
Staff Counsel

STATE OF SOUTH CAROLINA
Administrative Law Court
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LEGAL MAIL

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