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SC Court of Appeals

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Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 11, 2021

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: State v. Cedrict Hopkins, Appellate Case No. 2018-002060
Oral argument on Wednesday, June 16, 2021 at 11:20 AM

Dear Ms. Kitchings:

The Court is scheduled to hold oral argument in the above case on Wednesday, June 16, 2021 at 11:20 AM. Please find enclosed the South Carolina Supreme Court decision of *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008) and the South Carolina Court of Appeals decision of *State v. Miles*, 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017). These decisions came to my attention after the initial briefs had been served and filed. Pursuant to Rule 208(b)(7), SCACR, I am respectfully advising this Court that the *Cooper* and *Miles* cases represent pertinent and significant authority for the issue presented in Appellant's brief. By copy of this letter, I am notifying opposing counsel of the submission of this supplemental authority.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Joanna K. Delany
Appellate Defender

JKD/hk

cc: Matthew C. Buchanan, Esquire (with enclosure)

Enclosures: as stated

377 S.C. 489
Supreme Court of South Carolina.

Kamathene COOPER, Respondent,
v.
SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, Appellant.

No. 26480.
|
Heard Jan. 8, 2008.
|
Decided May 5, 2008.

Synopsis
Background: Inmate sought judicial review of dismissal by administrative law judge (ALJ) of his appeal from denial of parole. The Circuit Court, Dorchester County; James C. Williams, Jr., J., reversed administrative determination, and Department of Probation, Parole, and Pardon Services appealed. The Court of Appeals moved for certification of appeal directly to state supreme court. Certification was granted.

Holdings: The Supreme Court, Beatty, J., held that:

procedure employed by parole board deprived inmate of state-created liberty interest and triggered due process requirements, including entitlement to review by ALJ, and

parole board's establishment and application of criteria for parole did not violate ex post facto clauses of state or federal constitutions.

Affirmed as modified.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****107** Teresa Knox, J. Benjamin Aplin and Tommy Evans, Jr., all of S.C. Department of Probation, Parole & Pardon Services, of Columbia, for Appellant.

Arthur C. McFarland, of Charleston, for Respondent.

Opinion

Justice BEATTY:

***492** In this case, the South Carolina Department of Probation, Parole, and Pardon Services (the Department) appeals the circuit court's reversal of the Administrative Law ****108** Court's (ALC) order. In its order, the ALC dismissed Kamathene Cooper's appeal from the denial of his request for parole on the ground that it lacked subject matter jurisdiction to review the appeal. We granted the Court of Appeals' motion for the appeal to be certified directly to this Court. We affirm as modified.

FACTUAL/PROCEDURAL HISTORY

On November 30, 1984, Cooper stabbed Rheupart Stewart with a knife and then beat him with a chair. Stewart died as a result of his injuries. Before leaving Stewart's residence, Cooper took Stewart's checkbook. That same day, Cooper forged Stewart's signature on one of the checks and used it to make a purchase at a local department store.

As a result of this incident, Cooper was arrested and a Florence County grand jury indicted him for murder, armed robbery, and forgery. Subsequently, a jury convicted Cooper of murder and forgery, but acquitted him of armed robbery. Cooper was sentenced to death. This Court reversed Cooper's conviction and remanded for a new trial. *State v. Cooper,* 291 S.C. 332, 353 S.E.2d 441 (1986), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991). Following this reversal, Cooper was convicted of murder and sentenced to incarceration for the remainder of his natural life and a consecutive seven-year term for forgery.

At the time of his conviction, South Carolina law permitted an inmate who was serving a life sentence to appear before the Parole Board upon the service of twenty years. S.C.Code Ann. § 16–3–20(A) (1985). On May 23, 2000, Cooper made his initial appearance before the Parole Board. On five more occasions, Cooper appeared before the Parole Board. Each time, the Parole Board rejected Cooper's request. On the last occasion, the Parole Board rejected Cooper's parole for the following reasons: (1) the nature and seriousness of the current offense; (2) an indication of violence in this or a ***493** previous offense; and (3) the use of a deadly weapon in this or a previous offense.

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Following the rejection of his parole and the denial of his motion for reconsideration, Cooper filed an appeal with the Administrative Law Court (ALC). In his appeal, Cooper "challenged the denial of parole by [the Parole Board] and asserted that the [Board] denied him a realistic opportunity to participate in the South Carolina Parole program and that such action by [the Board] was arbitrary, capricious, and in violation of the United States Constitution Article 14 Section I and South Carolina Constitution Article XII Section 2 and State statutes."

Chief Administrative Law Judge Marvin F. Kittrell, dismissed Cooper's appeal on the ground the ALC did not have jurisdiction to review an appeal from the denial of parole. Judge Kittrell found that Cooper's appeal did "not involve a determination by the Department that he is permanently ineligible for parole. Instead, Appellant is challenging the Board's decision not to grant him parole at his regularly scheduled parole hearing." In reaching this conclusion, Judge Kittrell primarily relied on this Court's decisions in *Al–Shabazz v. State,* 338 S.C. 354, 527 S.E.2d 742 (2000), *Furtick v. S.C. Department of Probation, Parole and Pardon Services,* 352 S.C. 594, 576 S.E.2d 146 (2003), and *Sullivan v. S.C. Department of Corrections,* 355 S.C. 437, 586 S.E.2d 124 (2003).

Cooper appealed Judge Kittrell's order to the circuit court. The parties appeared before Circuit Court Judge James C. Williams, Jr. Judge Williams issued an order in which he reversed Judge Kittrell's order and remanded the matter to the ALC to take testimony and render a decision. In reaching this decision, Judge Williams found the ALC had jurisdiction to review the Parole Board's final decision denying Cooper's parole because the Parole Board: (1) failed to apply the criteria for parole as required by the state parole statutes, specifically section 24–21–640, in violation of Cooper's liberty interest; (2) willfully denied Cooper the realistic opportunity to participate in the parole program in violation of his constitutional rights; and (3) violated the ex post facto clause of the South Carolina Constitution in denying Cooper the realistic ***494** opportunity to participate in the South Carolina parole program. Judge Williams denied the Department's motion for reconsideration. Subsequently, the ****109** Department appealed Judge Williams' order to the Court of Appeals. This Court granted the Court of Appeals' motion to certify the appeal.

DISCUSSION

I.

The Department asserts the ALC properly dismissed Cooper's administrative appeal for lack of jurisdiction. Specifically, the Department contends the denial of Cooper's request for parole did not constitute a protected liberty interest which required judicial review. Because the Parole Board's decision did not render Cooper ineligible for parole, the Department claims the ALC was without jurisdiction to review the appeal. [1]

In contrast, Cooper argues that he is not challenging the denial of parole, but rather, the procedure employed by the Parole Board in denying his request. He believes the Parole Board effectively rendered him ineligible for parole when it issued its decision based on three "immutable" or fixed criteria. Because the Parole Board did not consider all relevant factors [2] in making its decision, Cooper contends the Parole ***495** Board acted arbitrarily and capriciously and deprived him of a state-created liberty interest under section 24–21–640 of the South Carolina Code, which outlines criteria to be considered by the Parole Board. [3]

Given that neither party disputes the applicable law, this case essentially involves a determination of whether the Parole Board's decision amounted to a routine denial of parole ****110** or effectively rendered Cooper parole ineligible. If the former, then the ALC was without jurisdiction to review Cooper's appeal. Conversely, if Cooper was rendered ineligible for ***496** parole due to the procedure employed by the Parole Board, then he was deprived of a state-created liberty interest which triggered the due process requirements of judicial review.

Parole is a privilege, not a right. *Sullivan v. S.C. Dep't of Corr.,* 355 S.C. 437, 443 n. 4, 586 S.E.2d 124, 127 n. 4 (2003), *cert. denied,* 540 U.S. 1153, 124 S.Ct. 1155, 157 L.Ed.2d 1050 (2004). 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. *State v. McKay,* 300 S.C. 113, 115, 386 S.E.2d 623, 623–24 (1989).

This Court has the authority to interpret the parole statute. In interpreting statutes, we look to the plain meaning of the

statute and the intent of the Legislature. *Hinton v. S.C. Dep't of Prob., Parole, & Pardon Servs.,* 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct.App.2004). Because the statute is penal in nature, the Court must construe it strictly in favor of the defendant and against the State. *See Hair v. State,* 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (construing in favor of the defendant the different time frames for parole eligibility found in the general parole statute and in a statute regarding parole eligibility for burglary).

In the key case involving the jurisdiction of the ALC regarding review of inmate matters, this Court in *Al–Shabazz v. State* held:

> an inmate may seek review of [the] Department's final decision in an administrative matter under the APA. Placing review of these cases within the ambit of the APA will ensure that an inmate receives due process, which consists of notice, a hearing, and judicial review.

Al–Shabazz v. State, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000). The Court emphasized that its decision was not without limitation. Significantly, the Court noted that the requirements of procedural due process would be applicable when an inmate was deprived of a protected liberty interest under the Fourteenth Amendment in order to ensure that a "state-created right was not arbitrarily abrogated." *Id.* at 370, 527 S.E.2d at 750 (citing *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)).

***497** In cases post-dating *Al–Shabazz,* this Court has discussed in specific terms the subject matter jurisdiction of the ALJD, stating "the ALJD has subject matter jurisdiction to hear appeals from the final decision of [the Department] in a non-collateral or administrative matter. Subject matter jurisdiction refers to the ALJD's 'power to hear and determine cases of the general class to which the proceedings in question belong.' " *Slezak v. S.C. Dep't of Corr.,* 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004), *cert. denied,* 544 U.S. 1033, 125 S.Ct. 2266, 161 L.Ed.2d 1060 (2005) (quoting *Dove v. Gold Kist, Inc.,* 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994)). Further, "the ALC has subject matter jurisdiction over an inmate's appeal when the claim sufficiently 'implicates a state-created liberty interest.' " *Furtick v. S.C. Dep't of Corr.,* 374 S.C. 334, 339, 649 S.E.2d 35, 38 (2007) (quoting *Sullivan v. S.C. Dep't of Corr.,* 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003), *cert. denied,* 540 U.S. 1153, 124 S.Ct. 1155, 157 L.Ed.2d 1050 (2004)).

In terms of the ALC's jurisdiction to review parole decisions, this Court has analyzed the appealability ramifications of a decision by the Parole Board denying parole versus a determination that an inmate is not parole eligible. *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.,* 352 S.C. 594, 576 S.E.2d 146 (2003), *cert. denied,* 539 U.S. 932, 123 S.Ct. 2584, 156 L.Ed.2d 612 (2003). In *Furtick,* this Court extended the *Al–Shabazz* holding by finding "the *permanent* denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process," and, thus, review by the ALC. *Furtick,* 352 S.C. at 598, 576 S.E.2d at 149. "In reaching this conclusion, the Court emphasized the finality of the Department's decision, and distinguished the *final* determination of parole eligibility from the *temporary* granting or denial of parole to an eligible inmate." ****111** *Sullivan,* 355 S.C. at 443, 586 S.E.2d at 127. This Court has further elaborated on the holding in *Furtick,* stating:

> In simple terms, this means that an inmate has a right of review by the ALJD after a *final* decision that he is *ineligible* for parole, but that a parole-eligible inmate does not have the same right of review after a decision denying parole; the parole board is, however, required to review an inmate's case every twelve months after a negative parole ***498** determination. S.C.Code Ann. § 24–21–620 (Supp.2002). This distinction stems from the fact that parole is a privilege, not a right.

Sullivan, 355 S.C. at 443 n. 4, 586 S.E.2d at 124 n. 4; *see Steele v. Benjamin,* 362 S.C. 66, 72, 606 S.E.2d 499, 502 (Ct.App.2004) ("*Furtick* established that an inmate has a right to a ALJD review of an agency's final decision denying parole eligibility, but an inmate does not have a right to a review of a denial of parole. The distinction is that the review or consideration for parole is a right granted by statute whereas parole is only a privilege."). However, our Court of Appeals has noted that "[t]he use of the word *permanent* in *Sullivan*

and *Furtick* does not mean that there must be a permanent denial of parole eligibility before a sufficient liberty interest is involved. It is merely one of the ways that a sufficient liberty interest may be involved." *Steele,* 362 S.C. at 72, 606 S.E.2d at 502.

As a threshold matter, we find the fact that the Parole Board did not permanently deny Cooper parole is not dispositive and the ALC erred in summarily dismissing the appeal on this basis. To make a decision based solely on the outcome of the Parole Board's decision would be an oversimplification and merely involves a matter of semantics. As noted in *Steele,* a sufficient liberty interest may be implicated to trigger due process requirements even though the Parole Board's decision did not constitute a permanent denial of parole eligibility. *See Steele,* 362 S.C. at 72–73, 606 S.E.2d at 503 (holding inmate's complaint that the Department's application of biannual parole review to him constituted an ex post facto violation implicated a protected liberty interest which warranted judicial review under the APA); *Id.* at 71, 606 S.E.2d at 502 (stating "*Sullivan* seems to imply that a quantitative analysis of the liberty interest must be conducted" when determining whether the ALJD has subject matter jurisdiction over non-collateral matters).

Here, Cooper clearly was not permanently denied parole eligibility.[4] Moreover, Cooper is not appealing the denial of parole. Instead, he is challenging through his appeal ***499** the Parole Board's failure to utilize the procedure promulgated by the Legislature in section 24–21–640 of the South Carolina Code and the criteria established by the Parole Board pursuant to this statute. Thus, the question becomes whether Cooper's claim raises a sufficient state-created liberty interest to trigger due process requirements. If a Parole Board deviates from or renders its decision without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest.

Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.

In the instant case, the Parole Board denied Cooper's parole apparently without giving credence to section 24–21–640 or its own criteria. The Parole Board rejected Cooper's parole for three limited reasons: (1) the nature and seriousness of the current offense; (2) an indication of violence in this or a previous offense; and (3) the use of a deadly weapon in this or a previous offense.[5] Each of these reasons, as Cooper points out, "are fixed as of the date of the offense and can never ... be changed by the actions of ****112** [Cooper] while incarcerated." Parole is a privilege and Cooper has no right to be paroled; however, Cooper does have a right to require the Board to adhere to statutory requirements in rendering a decision. We find the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures. Therefore, we hold, Cooper's appeal was appropriate for disposition under the APA and should have been reviewed by the ALC.

We recognize the Department's concern that a decision affirming the circuit court and remanding to the ALC will create an overabundance of appeals from denials of parole. ***500** However, we believe this concern will be alleviated if the Parole Board issues orders that are sufficiently detailed for the ALC to conduct appellate review, limited to the Board's adherence to section 24–21–640, of decisions denying parole. Because the limited appeal of parole decisions is governed by the APA, the Parole Board and the ALC must comply with its provisions. Pursuant to the terms of the APA, a final decision in an agency adjudication of a contested case "shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C.Code Ann. § 1–23–350 (2005).[6]

Here, the Parole Board apparently only considered the nature of Cooper's crime when it rejected his request based on three limited reasons. Because the Parole Board neither offered an explanation nor indicated that it had considered the statutory criteria of section 24–21–640 and the fifteen criteria listed on the parole form, the order was defective. Therefore, we, as did the circuit court, can only conclude that the Parole Board's decision was arbitrary and capricious.

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. Under that scenario, the ALC can summarily dismiss the inmate's appeal. [7]

II.

The Department asserts the Parole Board did not violate the Ex Post Facto clause in denying Cooper parole. ***501** The Department contends the detailed factors on the parole form, used by the Parole Board, were based on the statutory criteria of section 24–21–640. In response, Cooper appears to challenge the authority of the Parole Board to create these detailed factors. Cooper contends that by creating these factors the Parole Board "effectively changed the standards for granting parole and retroactively applied it to [his] offenses which were committed before the establishment of these factors." In doing so, Cooper claims the Parole Board changed the law and, thus, violated the Ex Post Facto clause of the South Carolina Constitution. [8]

We agree with the Department's assertion for two reasons. First, Cooper acknowledges that section 24–21–640 has not been substantively amended since he was convicted. This section specifically authorizes the Board to establish written criteria for the granting of parole. Therefore, we find the Parole Board did not exceed its authority by creating the written criteria. Given the Parole ****113** Board was authorized to establish these criteria, we do not believe the Parole Board changed the law in violation of the Ex Post Facto clause. *See State v. Walls,* 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002) (recognizing that while both the United States and South Carolina Constitutions specifically prohibit ex post facto laws, two critical elements must be present for a law to fall within the prohibition: (1) the law must apply to events that occurred before its enactment; and (2) the offender of the law must be disadvantaged by the law); *see also Jernigan v. State,* 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (noting ex post facto violation occurs when a change in the law retroactively alters definition of crime or increases punishment for crime). Secondly, it is disingenuous for Cooper to contend the Parole Board exceeded its authority in adopting these written criteria when his primary complaint is that the Parole Board failed to consider any other factors than the three reasons given for the denial of his parole.

Although we disagree with the circuit court's finding that the Parole Board violated the Ex Post Facto clause, we agree ***502** with the court's ultimate conclusion that the Board failed to apply the statutory criteria of section 24–21–640 in denying Cooper's petition for parole. Therefore, we modify the circuit court's order with respect to this issue.

CONCLUSION

Based on the foregoing, we hold the ALC had jurisdiction to review Cooper's appeal. Because Cooper is not appealing the denial of parole, but rather, is challenging the method and procedure employed by the Parole Board in reaching its decision, Cooper's claim raises a sufficient liberty interest to trigger due process requirements of judicial review. If a Parole Board fails to consider and apply the statutorily-created parole criteria, it has the effect of rendering an inmate parole ineligible, which under *Furtick* warrants review by the ALC. In the instant case, the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of Cooper. Accordingly, we affirm as modified the circuit court's order reversing the ALC and remand the matter to the ALC for disposition in accordance with this opinion.

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

All Citations

377 S.C. 489, 661 S.E.2d 106

Footnotes

1 Because a decision on the jurisdictional question encompasses the first two issues raised by the Department, we have consolidated the analysis on these two issues in the interest of clarity and brevity.

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2 Cooper references a form given to an inmate by the Department which outlines the relevant criteria for parole consideration. This form lists the following non-inclusive criteria:

1. The risk the inmate poses to the community;
2. The nature and seriousness of the inmate's offense, the circumstances surrounding the offense, and the inmate's attitude toward it;
3. The inmate's prior criminal records and his/her adjustment under any previous programs or supervision;
4. The inmate's attitude toward his/her family, the victim, and authority in general;
5. The inmate's adjustment while in confinement, including his/her progress in counseling, therapy, and other similar programs designed to encourage the inmate to improve himself/herself;
6. The inmate's employment history, including his/her job training and skills and his/her stability in the work place;
7. The inmate's physical, mental and emotional health;
8. The inmate's understanding of the cause of his/her past criminal conduct;
9. The inmate's efforts to solve his/her problems, such as seeking treatment for substance abuse, enrolling in academic and vocational educational courses, and in general using whatever resources the Department of Corrections has made available to inmates to help with their problems;
10. The adequacy of the inmate's overall parole plan. This includes inmates living arrangements, where he/she will live and who he will live with; the character of those with whom the inmate plans to associate in both his/her working hours and his/her off-work hours; the inmate's plans for gainful employment;
11. The willingness of the community into which the inmate will be released to receive the inmate;
12. The willingness of the inmate's family to allow him/her to return to the family circle;
13. The attitudes of the sentencing judge, the solicitor, and local law enforcement officers respecting the inmate's parole;
14. The feelings of the victim's family, and any witnesses to the crime about the release of the inmate;
15. Other factors considered relevant in a particular case by the Board.

3 Section 24–21–640 provides in relevant part:

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. 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. The criteria must be made available to all prisoners at the time of their incarceration and the general public.

S.C.Code Ann. § 24–21–640 (2007).

4 During the course of this appeal, Cooper may have received another review by the Parole Board in June 2006 and June 2007.

5 These reasons would be sufficient to deny parole in the Board's discretion, if the Board's decision evinced consideration of section 24–21–640 and its own criteria.

6 We are cognizant of the unique status accorded parole and our precedent of limited appellate review notwithstanding the APA.

7 Notably, Cooper acknowledged at oral argument that the parties would not be before this Court had the Parole Board stated in its order that the section 24–21–640 had been considered as well as the other conditions outlined on the parole form.

8 The Constitutions of the United States and of South Carolina specifically prohibit the passage of ex post facto laws. U.S. Const. art. I, § 10; S.C. Const. art. I, § 4.

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421 S.C. 154
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Lance Leon MILES, Appellant.

Appellate Case No. 2015-000308
|
Opinion No. 5511
|
Heard June 7, 2017
|
Filed August 23, 2017
|
Rehearing Denied October 19, 2017
|
Certiorari Denied October 18, 2018

Synopsis
Background: Defendant was convicted in the Circuit Court, Lexington County, Thomas A. Russo, J., of trafficking in illegal drugs. Defendant appealed.

Holdings: The Court of Appeals, Hill, J., held that:

as a matter of first impression, statute criminalizing drug trafficking did not require the State to prove that defendant knew the precise identity of the drugs in his possession;

defendant was not entitled to a directed verdict; and

trial court's error, if any, in admitting statement obtained after manipulation of *Miranda* was harmless.

Affirmed.

****206** Appeal From Lexington County, Thomas A. Russo, Circuit Court Judge

Attorneys and Law Firms

Appellate Defender John Harrison Strom, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Megan Harrigan Jameson, Assistant Deputy Attorney General David A. Spencer, all of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

Opinion

HILL, J.:

***157** Lance L. Miles appeals his conviction for trafficking in illegal drugs in violation of section 44-53-370(e)(3) of the South Carolina Code (Supp. 2016). He argues the trial court erred by: (1) instructing the jury, in reply to a question they posed during deliberation, that the State did not have to prove Miles knew the drugs were oxycodone; (2) denying his directed verdict motion; and (3) admitting three statements he contends were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We affirm.

I.

While scanning parcels for illegal drugs at the Federal Express office in West Columbia, agents from the Lexington County Sheriff's Office became suspicious of a package. They arranged for a controlled delivery to the listed address, which was within an apartment complex. Surveilling the delivery, they observed the delivery person ring the doorbell and leave the package by the front door. A few moments later, an agent noticed Miles exit a nearby apartment and begin walking around the parking lot. The agent then saw a young female emerge from the delivery address. She looked at the box, got on her phone, quickly hung up and went back inside. Miles then got on his phone while walking towards the box. Miles picked up the box and started back to his apartment. Seeing the agents advancing to intercept him, he tried to ditch the box. The agents apprehended and handcuffed him.

Agent Edmonson immediately questioned Miles about the contents of the box. Miles claimed he did not know what was inside. Edmonson then asked if there were drugs inside the box; Miles responded there probably were, but he did not know what kind. At this point, Edmonson read Miles his *Miranda* rights and asked Miles again whether there were drugs in the box. Miles again responded the box could contain ***158** drugs, but he did not know what kind. Upon obtaining a search warrant and Miles' consent, the agents opened the box

and discovered three hundred pills that a chemist later testified contained a total of nine grams of oxycodone. Edmonson next asked Miles to write down everything he knew about the box and the drugs. Edmonson then reread Miles his *Miranda* rights, and Miles wrote a statement admitting he had been paid one hundred dollars to pick up the box, someone named "Mark" had called him to pick it up, and the "owner" was a "Stacks" from Tennessee.

****207** Edmonson then wrote out two questions. First, "Did you know drugs are in the parcel 'box'?" Miles wrote, "Yes." The second question and answer—related to Miles' admission that he had previously picked up packages for money—were redacted and not presented to the jury.

Miles was indicted for trafficking in illegal drugs, in violation of section 44-53-370(e)(3). He did not testify at his trial and moved unsuccessfully for directed verdict, arguing in part there was insufficient evidence he knew the box contained oxycodone. During the jury charge, the trial court gave the following instruction:

> Mr. Miles is charged with trafficking in illegal drugs and in this case we are referring to [o]xycodone. The State must prove beyond a reasonable doubt that the Defendant knowingly delivered, purchased, brought into this state, provided financial assistance or otherwise aided, abetted, attempted or conspired to sell, deliver, purchase, or bring into this state and was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive pos[session] of the [o]xycodone. Possession may be either ... actual or constructive.

The trial court charged that the State bore the burden of proving the amount of oxycodone was more than four grams. The trial court further instructed that the State had to prove criminal intent, which required a "conscious wrongdoing," and that intent may be inferred from the conduct of the parties and other circumstances. After deliberating for some time, the jury asked the following question: "Does the [S]tate have to prove that the defendant knowingly brought into the state ***159** four grams or more of [o]xycodone or just any amount of illegal drugs in order to consider this trafficking?"

The trial court, over Miles' objection, replied to the jury as follows:

> [T]he law in South Carolina is the State does not have to prove that the Defendant knew that the drugs in the package were [o]xycodone, just that he knew that the package contained illegal drugs. However, the State does have to prove beyond a reasonable doubt that the illegal drugs that were in the package w[ere] more than four grams of [o]xycodone.

The jury later returned with a verdict of guilty. Because Miles had at least two prior drug convictions, he was sentenced to the mandatory minimum term of twenty-five years, and ordered to pay a $100,000 fine.

II.

Miles' primary argument on appeal is the trial court's supplemental charge misinformed the jury that the State did not need to prove beyond a reasonable doubt that Miles knew the drug he possessed was oxycodone. We review jury instructions to determine whether they, as a whole, adequately communicate the law in light of the issues and evidence presented at trial. *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013).

Section 44-53-370(e)(3) provides in part:

> Any person who *knowingly* sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is *knowingly* in actual or constructive possession or who *knowingly* attempts to become in

> actual or constructive possession of: ... four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as "trafficking in illegal drugs"....

(emphases added).

Miles contends the term "knowingly" as used in subsection (e) applies to each element of the trafficking offense, including ***160** the specific type of drugs listed in (e)(3). The issue of whether trafficking requires proof that the defendant not only knowingly intended to "sell[ ], manufacture[ ], cultivate[ ] ..." or "posses[ ]" illegal drugs, but also had knowledge of the precise identity of the illegal drug being trafficked, has, surprisingly, never been addressed by our appellate courts.

****208** We are mindful that "statutory interpretation begins (and often ends) with the text of the statute in question. Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith v. Tiffany*, 419 S.C. 548, 555–56, 799 S.E.2d 479, 483 (2017) (citations omitted).

Courts grapple often with that tricky adverb "knowingly." In *United States v. Jones*, 471 F.3d 535, 538 (4th Cir. 2006), the court construed a federal statute that punished "[a] person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce ... with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." (quoting 18 U.S.C. § 2423(a) (2000 & Supp. 2003)). Rejecting the argument that the government was required to prove the defendant knew the person transported was a minor, Judge Wilkinson noted:

> [C]onstruction of the statute demonstrates that it does not require proof of the defendant's knowledge of the victim's minority. It is clear from the grammatical structure of § 2423(a) that the adverb "knowingly" modifies the verb "transports." Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil. We see nothing on the face of this statute to suggest that the modifying force of "knowingly" extends beyond the verb to other components of the offense.

Id. at 539.

The United States Supreme Court has not been so gun-shy about the adverb. [1] They ordinarily read a "statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." ***161** *Flores-Figueroa v. United States*, 556 U.S. 646, 652, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009). They have also found "the word 'knowingly' applies not just to the statute's verbs but also to the object of those verbs." *McFadden v. United States*, ––– U.S. ––––, 135 S.Ct. 2298, 2304, 192 L.Ed.2d 260 (2015).

But the Court has not gone so far as to hold that a criminal statute that opens with "knowingly" invariably requires each element be proven by that level of intent. It is commonplace that "different elements of the same offense can require different mental states." *Staples v. United States*, 511 U.S. 600, 609, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). Even in *Flores-Figueroa*, the Court acknowledged that "knowingly" does not always modify every element, particularly where the statutory sentences at issue "involve special contexts or ... background circumstances that call for such a reading." 556 U.S. at 652, 129 S.Ct. 1886. The Court emphasized that "the inquiry into a sentence's meaning is a contextual one." *Id.*; *see also Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 385 (2d Cir. 1986) ("Fundamental to any task of interpretation is the principle that text must yield to context.") (Friendly, J.).

Our duty is to determine legislative intent, and the text of the statute is often the best evidence of that intent. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Yet the text "must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011) (citation and internal quotations omitted).

We find that by using "knowingly" in subsection (e), the Legislature did not intend to require the State to prove a defendant knew the specific type of illegal drug he was trafficking. Section 44-53-370 is concerned with criminalizing numerous forms of conduct involving illegal drugs. Thus, subsection (c) decrees "[i]t shall be unlawful for any person knowingly or intentionally to possess a controlled substance," subject to certain exceptions not relevant here. S.C. Code Ann. § 44-53-370(c) (Supp. 2016). Our supreme court has held the language now codified in subsection (c) requires the State to prove beyond a reasonable doubt that the defendant ****209** knew he ***162** possessed a "controlled substance." *State v. Attardo*, 263 S.C. 546, 549, 211 S.E.2d 868, 869 (1975). Subsection (d) then sets forth the penalties for possession based on the type of controlled substance. S.C. Code Ann. § 44-53-370(d) (Supp. 2016).

This brings us to trafficking, subsection (e). Tellingly, our supreme court has explained "[i]t is the amount of [the controlled substance], rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession." *State v. Raffaldt,* 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995). While the court in *Raffaldt* was not confronted with the mental state required for a trafficking conviction, that issue was addressed in *State v. Taylor*, 323 S.C. 162, 166, 473 S.E.2d 817, 819 (Ct. App. 1996). In *Taylor*, the defendant was charged with trafficking more than ten grams of crank, in violation of section 44-53-375(C) of the South Carolina Code (Supp. 1995), which contains language nearly identical to section 44-53-370(e), including placement of the adverb "knowingly." Taylor argued the language required the trial court to charge the jury that "they could not find [her] guilty of trafficking in crank unless she knew there were ten grams or more." *Taylor*, 323 S.C. at 167, 473 S.E.2d at 819. Relying on *Raffaldt,* we disagreed. *Id.*

Raffaldt and *Taylor* illuminate the "special context" revealed by viewing section 44-53-370 as a whole. Because section 44-53-370(c) only requires knowledge that the substance is "controlled," and because *Raffaldt* and *Taylor* tell us the only difference between the elements of distribution and simple possession and the elements of trafficking is the amount of the controlled substance involved, there is no reason to suspect the Legislature meant to require knowledge of the specific type of controlled substance in trafficking prosecutions. Miles' interpretation depends upon isolating "knowingly" in subsection (e) and extending its modifying reach not only to "possession," but to the specific type of drugs listed. Magnifying individual words of a statute and insisting they be interpreted concretely can lead to strange results. One could, for example, myopically diagram subsection (e)(3) and conclude it criminalizes the possession of more than four grams of table salt, or even the conduct of the delivery person in this case. Further, were we to adopt Miles' version of subsection (e), the State would have to convince the jury ***163** beyond a reasonable doubt the defendant not only knew the drugs were oxycodone, but also knew that oxycodone is a "morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or ... any mixture containing any of these substances." We doubt the Legislature, in passing the drug trafficking laws, meant to create a scenario where a defendant is culpable only if armed with a proficiency in chemistry on par with a pharmacist or Walter White.[2] That is why considering the words in their surrounding environment is essential, especially here where the statute runs to nearly five-thousand words and represents the Legislature's will in the massive field of drug interdiction. Given this background, "[i]f ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 557, 63 S.Ct. 379, 87 L.Ed. 443 (1943) (Jackson, J., dissenting).[3]

When a statute can be read in its ordinary sense, courts have no right to engineer an extraordinary one. That the Legislature titled the offense defined by subsection (e)(3) as "trafficking in illegal drugs" affirms our conclusion that a defendant need not know the precise identity of the controlled substance to be guilty. *See Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) ("[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature."). This sense becomes inescapable when we consider subsection (e)(3)'s reference to sections 44-53-190 and 44-53-210 of the South Carolina Code (Supp. 2016), which set forth Schedules ****210** I and II governing classification of controlled substances. While we can interpret statutes by bringing in rules of grammar, logic, and other tools, we must be careful not to construe common sense out.

Courts in many other states share our conclusion that proving the defendant knew the specific type of drug is not required in trafficking and other controlled substance offenses. ***164** *See, e.g., State v. Stefani*, 142 Idaho 698, 132 P.3d 455, 461 (Idaho Ct. App. 2005); *People v. Bolden*, 62 Ill.App.3d 1009, 20 Ill.Dec. 79, 379 N.E.2d 912, 915 (1978); *Com.*

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v. Rodriguez, 415 Mass. 447, 614 N.E.2d 649, 653 (1993); *State v. Ali*, 775 N.W.2d 914, 919 (Minn. Ct. App. 2009); *State v. Edwards*, 257 N.J.Super. 1, 607 A.2d 1312, 1313 (App.Div.1992); *State v. Engen*, 164 Or.App. 591, 993 P.2d 161, 170 (1999); *State v. Sartin*, 200 Wis.2d 47, 546 N.W.2d 449, 455 (1996).

We cannot leave this issue without discussing the important canon of statutory construction that penal statutes are to be strictly construed. This rule of lenity applies when a criminal statute is ambiguous, and requires any doubt about a statute's scope be resolved in the defendant's favor. *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009). But the rule of lenity is not a device to create ambiguity, nor should a court invoke it before considering the words of the statute in context. *State v. Dawkins*, 352 S.C. 162, 166–67, 573 S.E.2d 783, 785 (2002); *State v. Firemen's Ins. Co. of Newark, N.J.*, 164 S.C. 313, 162 S.E. 334, 338 (1931) ("The rule that a penal statute must be strictly construed does not prevent the courts from calling to their aid all the other rules of construction and giving each its appropriate scope, and is not violated by giving the words of the statute a reasonable meaning according to the sense in which they were intended, and disregarding ... even the demands of exact grammatical propriety." (citation and internal quotations omitted)); *see also United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (court should rely on lenity only if, "[a]fter 'seiz[ing] every thing from which aid can be derived,' " it is "left with an ambiguous statute" (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805) (Marshall, C.J.))).

One of the foundations of the rule of lenity is the concept of fair notice—the idea that those trying to walk the straight and narrow are entitled to know where the line is drawn between innocent conduct and illegality. *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. ***165** To make the warning fair, so far as possible the line should be clear."). The line for conduct involving contraband is not merely clear but fluorescent. At least since *State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1916), we have required a defendant to know or be willfully ignorant that he was dealing with contraband drugs to satisfy criminal intent. This removes innocent activity, inadvertence or accident from the law's grasp. At any rate, we need not apply the rule of lenity here, as context has convinced us section 44-53-370(e)(3) does not require proof of knowledge of the specific identity of the controlled substance. *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (courts are required "to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct' ").

Another foundation of the rule of lenity is the separation of powers. Our Constitution commits the task of defining criminal offenses solely to the Legislative Branch. *Bass*, 404 U.S. at 347-48, 92 S.Ct. 515; *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820). If the Legislature believes our interpretation expands or is otherwise contrary to the scope it intended section 44-53-370(e)(3) and its harsh penalty scheme to have, it can amend the statute.

The trial judge's instructions—including his initial charge that criminal intent consists of "conscious wrongdoing"—conveyed the pertinent legal standards to the jury. He further correctly charged that the State still bore the burden of proving the drug quantity and identity.

****211** III.

Miles next argues he was entitled to a directed verdict because the State presented insufficient evidence that he knowingly trafficked oxycodone. As we have held, the State needed only to prove Miles knew the item was a controlled substance. Because there was evidence Miles possessed the box, the jury was free to infer he knew what was in it. As the assistant solicitor pointed out, the evidence was literally lying at Miles' feet. *See State v. Gore*, 318 S.C. 157, 163, 456 S.E.2d 419, 422 (Ct. App. 1995) ("Possession gives rise to an inference of the possessor's knowledge of the character of the substance."). Of course, Miles also admitted he knew the box ***166** contained drugs. Viewing the evidence in the light most favorable to the State, these circumstances go far beyond mere suspicion. There was ample direct and substantial circumstantial evidence from which Miles' guilt could be fairly and logically deduced. Rule 19, SCRCrimP; *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

IV.

Miles contends the series of three statements he gave to law enforcement should have been suppressed because the agents engaged in the "question-first" manipulation of *Miranda* forbidden by *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct.

2601, 159 L.Ed.2d 643 (2004), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). He asserts Agent Edmonson's immediate questioning of him upon arrest was a custodial interrogation triggering *Miranda*. At trial, the State conceded as much and agreed not to present evidence of Miles' first two statements. But, during a later bench conference, Miles agreed to their admissibility, which is unsurprising as this strategy allowed Miles to get his theory of the case—that he didn't know what kind of drugs were in the package—before the jury without having to take the stand. *See State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582 (2007) (stating an issue conceded at trial cannot be argued on appeal).

The issue of whether admission of Miles' third, written statement violated *Seibert* and *Navy* is unpreserved. Miles did not raise these cases or the "question-first" principle to the trial court. *See State v. Byers*, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("For an admissibility error to be preserved, the objection must include a specific ground 'if the specific ground was not apparent from the context.' " (quoting Rule 103(a)(1), SCRE)); *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." (citation omitted)).

Even if the issue was preserved, any error in admitting the redacted written statement was harmless. The statement was cumulative and could not have reasonably ***167** contributed to the verdict. It did not contradict Miles' earlier statements that he did not know the type of drugs in the box, and added he was paid one-hundred dollars to retrieve it. *See State v. Martucci*, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct. App. 2008) ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."). We cannot imagine the vague references to others involved packed any punch with the jury.

V.

The trial court did not err in its supplemental instruction to the jury that the State was only required to prove Miles knowingly trafficked in a controlled substance. There was sufficient evidence to carry the case to the jury, and even if the *Miranda* issue was preserved, we find no prejudice. Miles' conviction is therefore

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.

All Citations

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Footnotes

1 We suspect the bar for causing grammarians to recoil is low.

2 *Breaking Bad* (AMC 2008–13).

3 Our emphasis on context and structure bears on the threshold decision of whether the statute is ambiguous, and is not meant to dilute the rule of lenity, as we later discuss.

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