

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from the Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge
Docket Number 20-ALJ-15-0020

Appellate Case No. 2021-000447

CHUCK MCCULLOUGH, #311608.....APPELLANT

v.

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

BRIEF OF RESPONDENT

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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Administrative Law Court correctly determined that Appellant's due process rights were not violated when his parole hearing went forward as scheduled even though family members could not appear on his behalf at the hearing?**
2. **Whether the Administrative Law Court correctly determined that the Board properly consider the criteria set forth in Cooper in reaching their decision to deny Appellant parole, thereby making this a routine denial of parole?**
3. **Whether this Court should address an issue raised for the first time on appeal where it was not raised and ruled on by the lower court?**

STATEMENT OF THE CASE

On March 17, 2011, Appellant's estranged wife (Co-Defendant) came to Appellant's residence in Spartanburg, SC with their infant son. At that time, Appellant ran a methamphetamine (meth) lab out of the residence. During the visit, Appellant and Co-Defendant discussed getting back together and smoked meth in the presence of their child. The duo fell asleep and the next morning they awoke to find their son face down in his own vomit. Upon checking on the infant, they realized he was deceased. Appellant and Co-Defendant panicked and called a relative who told them to take the infant to the hospital. However, rather than taking the infant to the hospital, Appellant and Co-Defendant put 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 Appellant's truck and drove around eventually ending up at a relative's residence. Law enforcement showed up at the relative's residence and a lawful search of the vehicle uncovered the deceased infant's body and drugs.

During the May 2011 term, the Spartanburg County Grand Jury indicted Appellant for possession with intent to distribute methamphetamine or cocaine base, third offense (2011-GS-42-2412); and manufacturing methamphetamine, third offense (2011-GS-42-2413). Appellant was subsequently indicted during the May 2012 term for unauthorized removal of a dead body (2012-GS-42-2465), exposing a child to methamphetamine (2012-GS-42-2466), and unlawful conduct towards a child (2012-GS-42-2467). On August 1, 2012, Appellant pleaded guilty as indicted under North Carolina v. Alford, 400 U.S. 25 (1970) before the Honorable J. Mark Hayes, II. Appellant 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.

At the time Appellant committed these offenses, South Carolina law allowed an individual to become eligible for parole upon the service of one-fourth of their sentence. Appellant has been before the Board four times with the most recent appearance occurring on March 25, 2020. At the conclusion of that hearing, the Board denied his request for parole for the following reasons: 1) the nature and seriousness of the current offense; 2) a criminal record indicates poor community adjustment; and 3) failure to successfully complete a community supervision program.

Upon being notified of the Board's decision, Appellant filed a notice of appeal before the Administrative Law Court (ALC). Appellant argued that he was unlawfully denied parole because his due process rights were violated because Respondent did not postpone his parole hearing, and the Board failed to properly consider the mandatory criteria prior to denying his request for parole. The ALC dismissed the appeal, affirming the decision of the Parole Board, on March 12, 2021.

Appellant has subsequently appealed the decision of the ALC, renewing his appeals and also alleging that the Respondent is biased against the Appellant. In reply, Respondent argues the ALC did not err when it determined Appellant's due process rights were not violated when his parole hearing took place as scheduled, and the Board's denial was a routine denial of parole. Respondent also argues that Appellant's third argument was not preserved for appeal and should not be considered by this Court. Respondent's brief supporting these arguments follows.

ARGUMENTS

- 1. Appellant's due process rights were not violated when his parole hearing went forward as scheduled even though family members could not appear on his behalf during the hearing.**

Appellant argues his due process rights were violated when his parole hearing was held as scheduled despite COVID-19 restrictions being implemented that prevented his family members

from appearing on his behalf at the hearing. Appellant argues he is entitled to a new hearing as his family members' presence at his hearing would have increased his chances to be awarded parole.

The Respondent submits, and the ALC agreed, that the COVID-19 restrictions that prevented Appellant's family members from attending his hearing were put into place by the South Carolina Department of Corrections (SCDC), not Respondent. Respondent cannot, and indeed should not, control the safety measures other state agencies put into place in response to COVID-19. Further, although Appellant claims to have been prejudiced by the absence of his family members, Appellant's due process rights were not violated as there is no statutory requirement mandating a parole hearing be rescheduled if Appellant's family members are unable to attend his hearing. The ALC correctly determined that there exists no law or other authority granting Appellant the right to have a parole hearing rescheduled if witnesses are unable to attend through no fault of the Board or the Respondent.

Therefore, this Court should affirm the ALC's denial of Appellant's request for a rehearing.

In his brief, Appellant relies in S.C. Code Ann. §1-23-380(5) to support his argument that his due process rights were violated when his hearing was not rescheduled to accommodate his family. Section 1-23-380(5) states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative 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 and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(5)(2008). Appellant's reliance on this code section is misplaced as no substantial rights were prejudiced by his parole hearing going forward without his family present. Section §24-21-50 states, "The board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law. No inmate has a right to confrontation at the hearing." This statute requires the Board to hear from individuals who appear at the hearing, not reschedule hearings to accommodate individuals the inmate would like to have present at his or her hearing.

Further, Appellant is entitled to annual parole hearings. Because the Respondent has no authority over the Department of Corrections, postponing hearings until Appellant's supporters are allowed back in to the institutions to appear on his behalf would amount to an unreasonable delay. Respondent cannot postpone his parole hearing indefinitely waiting for the restrictions SCDC has in place in response to COVID-19 to be lifted. Appellant's family will be unable to attend his parole hearings until SCDC determines it can safely allow visitors to enter their facility. Denying Appellant an opportunity to appear before the Board is of much greater consequence to Appellant than appearing before the Board without his family members.

Notwithstanding the above argument, Appellant has failed to show any substantive right to a rehearing for when supporters are unable to attend a hearing when they are prevented by no action of the Respondent. To rule otherwise would give inmates a nearly infinite number of rehearings whenever a desired family member is unable to attend for any number of reasons – work, illness, school, traffic, or mere inconvenience. As long as circumstances prevent a supporter

from attending, the inmate could demand another hearing. Therefore, this Court should affirm the decision of the ALC.

2. The Board properly considered the criteria set forth in Cooper in reaching their decision to deny Appellant parole, thereby making this a routine denial of parole.

Appellant argues the Administrative Law Court failed to rule on an allegation that the Board relied on inadequate information when it denied him parole.

However, Respondent respectfully submits that the ALC correctly applied the law when it determined that it had a limited scope to only review if the Board followed the necessary procedures. Cooper v. S.C. Dept. of Probation, Parole and Pardon Services, 377 S.C. 489, 661 S.E.2d 106 (2008). Therefore, the ALC correctly did not address Appellant's allegations, because it lacked the authority to do so.

In Cooper, the Board denied Cooper's parole based on the following three reasons: "1) the nature and seriousness of the current offense; 2) an indication of violence in this or previous offense; and 3) the use of a deadly weapon in this or a previous offense." Cooper, 377 S.C. at 499, 661 S.E.2d at 111. The Court found the Board, "failed to consider the requisite statutory criteria in rendering its decision" and "only considered the nature of Cooper's crime when it rejected his request based on three limited reasons." Id. at 500, 661 S.E.2d at 112. However, the Court went on to state:

We emphasize that in future parole review hearings the Parole Board may avoid the result in the instant case if it clearly states in its order denying parole that it considered the factors outlined in section 24-21-640 and the fifteen factors published in its parole form. If the Board complies with this procedure the decision will constitute a routine denial of parole and the ALC would have limited authority to review the decision to determine whether the Board followed proper procedure.

Id.

In the instant case, on March 25, 2020, the Board issued a rejection letter enumerating the following factors it carefully considered in arriving at their decision to deny Appellant parole: 1) the characteristics of your current offense(s), prior offenses(s), prior supervision history, prison disciplinary record, and/or criminal record, as described in the findings of facts below; 2) the factors published in Department Form 1212 (Criteria for Parole Consideration); 3) the factors outlined in Section 24-21-640 of the South Carolina Code of Laws; and 4) actuarial risk and needs assessment factors pursuant to Section 24-21-10(F)(1) of the South Carolina Code of Laws.

In the letter, the Board also identified its findings of fact that led to the rejection of Appellant's parole. Those findings were: 1) nature and seriousness of current offense, 2) criminal record that indicates poor community adjustment, and 3) failure to successfully complete a community supervision program. Appellant argues the Board failed to properly consider the criteria set forth in Department Form 1212, and the Board's findings inappropriately increased from his last parole denial. However, the Board's letter specifically states it considered the factors published in Department Form 1212. Further, the Board does not have to provide a rationale as to its reasons for denying Appellant parole nor explain why their reasons "increased" from his last denial. At no point does Cooper require the Board to explain its reasoning, and even if the Board did provide a detailed analysis of its decision-making process, §1-23-380(5) states, "The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code §1-23-380(5) (2008). It is clear by the letter of rejection that the Board considered all of the mandatory criteria as set forth in Cooper and placed their reasons for denial in writing. This is all that must be provided for this Court to affirm the decision of the Board. Since the Board's order clearly states a lawful reason for denial, the criteria within the statute, and

that mandatory policies were considered prior to the denial, no further action by the ALC was necessary.¹

The South Carolina Supreme Court in Cooper held, "... if [the Parole Board] 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... the decision will constitute a routine denial of parole and the ALC will have limited authority to review the decision to determine whether the Board followed proper procedure." Cooper, 377 S.C. at 500, 661 S.E.2d at 112. The ALC could not have substituted its judgment for that of the Board. When it determined that the Board properly considered all of the mandatory criteria in reaching its decision, the ALC could not overturn that decision for any reason. As the Court in Cooper emphasized, the ALC can only review Appellant's case to determine if the Board followed proper procedure. Id. Since Appellant has failed to establish the Board did not follow the proper procedure in denying his parole, this Court should affirm that the ALC properly dismissed the appeal.

3. This Court should not consider an issue raised on appeal here for the first time and not raised and ruled upon by the lower court.

Appellant raises for the first time the argument that the Respondent has been biased against him due to the fact that his son's death is unrelated to the drug charges for which he is being confined.²

¹ The Parole Board stated in its notice of rejection that it considered the statutory criteria and the criteria set forth in Department Form 1212, which is sufficient under Cooper. Compton v. S.C. Dept. of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E.2d 175 (2009).

² Appellant's argument does not match the statement of his third argument, that the alleged bias against him is related to his decision to appeal his denial. Because he has not argued this, Respondent will not reply to that stated argument except that he is similarly prohibited from raising a new issue on appeal when he could have raised it at the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Respondent submits that Appellant failed to raise this matter before the lower court, and therefore it is not preserved for review. “Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004).

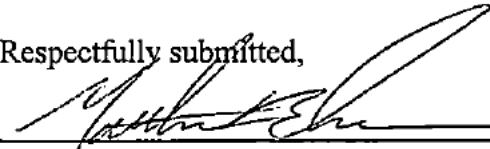
Because Appellant failed to raise the issue before the administrative law court, this Court should not address it. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder, 330 S.C. at 76, 497 S.E.2d at 733.

Furthermore, the Respondent would submit that there is no merit to Appellant’s allegation of bias based on the death of his child in proximity to the meth lab. The Board can consider the circumstances surrounding the offense. R. at * (Form 1212 Criteria for Parole Consideration). If this Court decides to consider the merits despite this being an argument raised for the first time on appeal, Respondent respectfully requests leave to fully brief its response.

CONCLUSION

Appellant’s due process was not violated when his parole hearing went forward as scheduled despite the SCDC COVID-19 restrictions that prevented his family from attending his hearing. Although Appellant claims he was prejudiced by his family’s inability to attend his hearing, the restrictions were put into place by SCDC due to a global emergency, not Respondent. Further, the Board’s decision complied with the Supreme Court’s holding in Cooper, thereby creating a routine denial of parole. Therefore, based on the foregoing reasons, this Court should affirm the ruling of the ALC.

Respectfully submitted,



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Columbia, South Carolina
June 29, 2021

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The Honorable S. Phillip Lenski, Administrative Law Judge
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v.

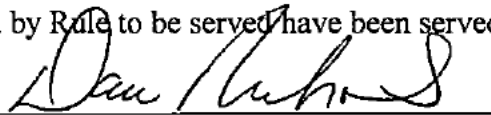
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant, hereby certify that I have served the within
Initial Brief of Respondent and Designation of Matter, on Appellant this 29th day of June, 2021,
by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Chuck McCullough, #311608
Livesay Correctional Institution
PO Box 580
Una, S.C. 29378

I further certify that all parties required by Rule to be served have been served.



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SC Court of Appeals

June 29, 2021

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: Chuck McCullough v. SCDPPPS
21-000447

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated June 29, 2021, along with proof of service in the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew C. Buchanan".

Matthew C. Buchanan
General Counsel

MCB:dn

Enclosures

cc: Chuck McCullough

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