STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from the Administrative Law Court, Final Decision
From the Honorable Judge Phillip Lenski Docket No. 20-ALJ-15-0020

Appellate Case NO. 2021-000447

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SC Court of Appeals

CHUCK MCCULLOUGH, # 311608 . . . . Appellant

V.

SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, PARDON SERVICES . . . . RESPONDENT

Final Brief of Appellant

Chuck McCullough # 311608
Appellant

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STATEMENT OF ISSUE ON APPEAL

1. Did the ALC err in determing that Appellant's due process rights / Liberty intrest were not violated by SCDPPPS, when it failed to notify Appellant that due to Covid-19 restrictions parolees would not be able to have family / witnesses at their parole hearing and failed to have notification of corrective measures put into place for Appellant's supporters to attend, in which denied Appellant of his opportunity to present testimony to gain parole violating his 14th Amendment U.S.C.A.

2. Did the ALC fail to rule on the fact that SCDPPPS relied on inadequate information about Appellant's prior probation sentence? The inadequate information was a tool used by DPPPS to deny parole and deprived Appellant from obtaining Parole violating his liberty intrest and Due process rights under the 14th Amendment U.S.C.A.

3. Appellant alledges that SCDPPPS has been biased and vindictive toward him for exercising his right to appeal their final decisions abusing their decrection violating SCACR Rule 201.

STATEMENT OF THE CASE

On March 16, 2011: Appellant's wife co-defendant, Carissa McCullough, brought over their infant son, Noah McCullough, to spend time and talk about rebuilding their relationship. Carissa feed and burped their child and laid him down to rest.[1] SCDPPP claims meth was smoked around the child and that is not correct.[1] They woke up the next morning to find their child on its stomach and in vomit decesed. They panicked and called family because Carissa was not supposed to be at Chuck McCullagh's house. They headed to Spartanburg Regional when Amanda Padget (sister-n-law) called Carissa and directed for them to come to her house. at 123 Flatwood Rd. Law enforcement directed the call by three-way. The Appellant and wife were not just riding around.

They drove directly to Amanda's House where law enforcement arrived and took them into custody. No drugs were found after a search of the vehicle at the 123 Flatwood Rd address. The next day Law enforment ericited another search warrent for the vehicle at the impound lot when some meth was found. This was a tragic tragedy that the couple experianced and no one could be prepared for something like this and calling family they thought was the right thing to do. Appellants case hinges on the death of his child and the death had nothing to do with or was related to the drug charges.[2]

The Appellant was later indicted by Spartanburg County Grand Jury for the offenses of possession of Meth 3rd, enhanced Manufacture / Dist. Meth 3rd, unlawful neglect of a child, unlawful exposure of Child to Meth, Unauthorized removal of a dead body.

Footnotes

1. Autopsy + Toxicology report inconclusive and negitive for drugs or any caustic substances that you would expect to be found in the Child had it inhaled meth. Therefore no evidence meth was smoked around the child. see transcript Exhibit #3
2. The death of Appellants child is what SCDPPPS is holding against Appellant, some events Appellant does not recall them to be as DPPPS has put them.

On August 1, 2012 the Appellant appeared before the Honorable Judge Mark Hayes II, and plead under Alford v. N.C. At the Conclusion, the Court sentenced the Appellant to a term of incarceration for 10 years for Possession of Meth 3rd, 10 years for unlawful neglect of a Child, 5 years for unlawful exposure of a Child to meth and 30 years for Manufacture / Dist. Meth 3rd run concurrent.[3] Appellants Manufacture Meth conviction is enhanced from his possession of Meth convictions. Appellant's co-defendant was sentenced to 30 years suspended to 3 years time served and 3 years probation.

At the time the Appellant committed these offenses South Carolina Law allowed an individual to become eligible for parole upon the service of one-fourth of their sentence. The Appellant's initial appearance before the board occured on July 19, 2006 during his prior drug charge prison sentence. Appellant was released on probation on March 3, 2007 and completed SCDAC and probation in 2009, Spartanburg County, under Agent Faust.

Since Appellant's new convictions in 2012, the Appellant has appeared before the board 3 times which the Boards reasons for denial has changed each time. Appellant has went before the Board 1 more time since the begining of this appeal which he was also again denied parole.

Appellant filed a letter with DPPS Director on March 31, 2020 requesting a parole reconsideration and a New Hearing on several grounds including that his aunt and daughter were deny entry at Perry Correctional on the day of his hearing, and was denied

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Foot Note:

3. Appellant completed his sentence for Poss. Meth 3rd, unlawful neglect on June 4, 2016. Unlawful exposure to Meth on December 16, 2013, and will complete the sentence for Manufacture Meth 3rd on October 21, 2025.

Upon filing Notice of Appeal Appellant request the ALC to allow letters from his Aunt and Daughter to be included in the record on appeal to show the court that the family tried to contact DPPPS prior to his hearing. ALC dimissed his request.[4] Appellant recieved a letter from DPPPS dated April 9 2020 from their Counsel informing him that the closure of the correctional facility was an act of SCDC not the respondent. The Department further stated that the visitor restriction affected all inmates equally, not just the Appellant, and it was not prepared to invalidate an entires day's worth of hearing because of the prudent actions of SCDC . . .

Appellant gave an example that DPPPS did reschedule parole hearing. His fellow inmate William Smith #256495 parole hearing was set for March 13, 2020. It was rescheduled for June 2, 2020. No cases should have been heard after March 13, 2020 until corrective measures were put into place. That did not happen until middle of April 2020. when DPPPS started sending out Hearing protocols with the letter of Parole date.[5] Appellant did not recieve one until his most recent Parole in 2021, which is procedural due process.

This Appeal follows:

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. Dept of Prob. Parole and Pardon Servs. 352 S.C. 594, 576 S.E.2d 146 (2003) (incorporating final decisions of the Department

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Footnote:

4. Letters have been included as exhibits because they are relevent to the issue. Exhibit # 1
5. Hearing protocol letter. Exhibit # 2

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. Dept 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. Dept Prob, Parole & Pardon Services 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 S.E.2d at 11. Thus, this court may review the Boards decision 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. 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.

ISSUE 1

1. Did the ALC err in determing that Appellant's due process rights / Liberty intrest were not violated by SCDPPPS, when it failed to notify Appellant that due to Covid-19 restrictions parolees would not be able to have family / witnesses at their parole hearing and failed to have notification of corrective measures put into place for Appellant's supporters to attend, in which denied Appellant of his opportunity to present testimony to gain parole? Violating his 14th Amendment U.S.C.A.

Argument

The ALC ruled that there is no indication in the record that Appellant would have been prohibited from introducing relevant witness statements or testimony had SCDC's visitor restrictions not prevented their attendance.

Had Appellant's supporters been able to attend, then there would been no reason for a letter or statements because they would have been in person and would be able to speak for themselves. This is why it was so important for DPPPS to stop all hearings when the Governor Order the "decleration of emergency" on March 13, 2021. It is the duty of the director to oversee the department § 24-21-13 and a duty to Notify SCDC and Parolees of any conflict with parole hearings.

Due to the restriction on visitation because of COVID-19 Appellant's family was not allowed in to the facility. Appellant's family called and spoke with DPPPS to find out what they needed to do or bring prior to his hearing. DPPPS told them that someone would call them back within three days. DPPPS did not call back. Therefore, Appellants family came to Perry Correctional on March 25, 2020.

Appellant submitted letters from his family members to be included on the Record of appeal. (see EX. 1) DPPPS filed a motion to dismiss alledging that the documents were irrelevent to the issue. Appellant's motion for a complete record was denied. (see EX. 4) before the court had an opportunity to

to hear Appellants Motion to object[1] where he explained how the letters were relevent to his issue. It caused a signifiant hardship for him and his family that was not allowed to participate at his hearing, and was ("constitutionaly an inadequate procedual safeguard.") Love Lace v. Lee 472 F.3d 174, 202 (4th cir 2006) (see Ex.4-5)

It specifically states in the third paragraph of Form 1212 "Inmates do, however, enjoy certain rights in the parole process... At the hearing, the inmate has the inmate has the right to present witnesses and evidence on his/her own behalf... This mandates a liberty intrest, a procedural intrest of due process. The parole Board is ("required to adhere to statutory requirments in rendering decisions") and when 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, infriges on a state-created liberty intrest.")
See Cooper v. SC Dept of Prob., Parole + Pardon Services, 377 S.C. 489, 495-499, 661 S.E.2d. 106, 109-111 (2008)

The ALC also ruled that 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.

Appellant could not find any cases in regards to the current issue and doesn't know of another time in U.S. history where COVID-19, or any other sickness has shut down our state in the way it has. Appellant's case is probably the first case raised in the court where family or witnesses were prevented from attending parole hearings. The fact is that it happened to the Appellant. Appellant has shown an example from a fellow inmate where his parole date was March 13, 2020 and DPPPS resceduled his parole to June 2, 2020 where he was paroled. His name is William Smith #256495.

Footnote

1. Letters and Motions are listed on Designation of Matter to be included in the Record on Appeal.

Futhermore, there is noway that DPPPS properly considered all the criteria on Form 1212 especially Lines 10-15. DPPPS would have had to talk to Appellants family and job reference in order to assess the feelings, attitudes, and willingness for Appellants return to society. It is evident that DPPPS never spoke with Appellants family. This is evidence that DPPPS deviated from the proper procedures to determine the parole eligiblity of Appellant. and violated S.C. Code § 24-21-50 . . . . This statute requires the Board to hear from individuals who appear at the hearing. ("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 under law.")... it violates section a, f of S.C. code Section 1-23-380 (5)

A. in violation of constitutional or statutory provision

F. arbitarary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The purpose of parole is universally reccognized to be reformatory rather than punitive. It is intended as a means of rehabilitating the offender and restoring him to soceity as a law abiding and productive member of it. Under the structured supervision that parole sets up, the parolee has the opportunity to participate in any number of health and human services programs designed to help him acheive his reform. As an early release mechanism, parole serves to alienate the high cost to the state, and ultimately to the taxpayer, of keeping offenders in prison.

In sum, DPPPS's claim that in evaluating a prisoner for parole, the Board has replaced fair and meaningful review of the Policy factors in 1212 with consideration of only one factor, the offense for which the Appellant is incarcerated for, and replaced the exersice of discretion with automactic denial of Parole. Appellant has been denied due process and has failed to consider him for parole in a fair and meaningful way. in light of his perfect SCDC Record, ability to rehabilitate him self, and his family support. Parole should be granted.

ISSUE # 2

2. Did the ALC fail to rule on the fact that SCDPPPS relied on inadequate information about Appellant's prior probation sentence? The inadequate information was a tool used by DPPPS to deny parole and deprived Appellant from obtaining Parole violating his liberty interest and Due process rights under the 14th Amendment U.S.C.A.

ARUGMENT

In SCDPPP's Brief dated August 11, 2020 never addressed Issue Three on the fact the the Board used inaccurate information about appellant's prior probation sentence it was in the argument of Appellants Brief page 8. DPPPS did not Challenge the fact that Appellant did complete a supervised program (Probation in 2009). Therefore it [Board] failed to correctly and meaningfully consider the Statutory criteria set forth in Form 1212.

Futhermore, the ALC mentions that the Appellant argues that the Board erred by relying on inadequate information in finding that he failed to successfully complete a community supervision program... (see Final ORDER page 5.)
The ALC did not rule on the merits of this issue.

Appellant max-out a sentence for Poss. Meth and Grand larceny in 2007. March 3, 2007. He had to complete his 3 year probation sentence upon release. He completed SCDRC and his probation in 2009 in Spartanburg County under Agent FOUST. Appellant has wrote to DPPPS in hopes to get copys of all related documents, but DPPPS will not respond. Regardless, it is in the court system, and Probation, Parole's system. DPPPS has not denied the fact that Appellant completed a supervised Probation Sentence, NOR The ALC. Appellant's probation was on indictment # 2005 GS2301799, and probation was completed, Appellant plead to lesser included offense of Poss. Meth 1st.

The use of the allededly inaccurate information in making parole determination is capable of repetition but evading review. ("An appellate court can take jurisdiction, despite mootness, if the issue is capable of repetition but evading review.") Curtis v. State 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)

"An agency acts arbitrarily, and therefore unreasonably, when it entirely to consider an important aspect of the problem or offers an explanation for its decision that runs counter to the evidence before it." Ad Hoc Shrimp Trade Action Committee v. U.S. 70 F.Supp 3d 1328, or ("is so implausible that it could not be ascribed to difference in view or product of agency expertise") Sierra Club v. United States Dept. of Interior 899 F.3d 260

Appellant completed a supervised program. He had a little hardship, but he completed the probation given. DPPPS has denied him that credit and therefore arbitrarily used false information to deny him parole. Not taking into consideration the fact that Appellant has been displinary free 10 years, has gotten his GED, completed substance abuse classes willfully. He has a perfect work record, Been a role model inmate, and has family support which DPPPS has never talk to. DPPPS has given him no credit for his accomplishments much less, a Second Chance.

The Board did not support their findings in their brief about Appellant's prior supervised program, and is unclear what the board relied upon for their belief he failed to complete a program. DPPPS is "deliberately indifferent" towards his constitutional rights and willfully, maliciously violated Appellants State created due process right to be considered parole eligible and his rights to equal protection of the law."

In regards, Appellant should be granted parole on accurate information. It is axiomatic that due process ("is flexible and calls for such procedural protections as the particular situation demands.") Morrisey v. Brewer, 408 U.S. at 481, 92 S.Ct. at 2600 L.E.2d. 484 (1972).

ISSUE # 3

3. Appellant alledges that SCDPPPS has been biased and vindictive toward him for exercising his right to appeal their final decisions, abusing their descrection violating SCACR Rule 201.

Argument

Appellant is alledging that 1.) DPPPS is biased toward his case due to the tragic death of his son Noah McCullough. It is preventing the Board from voting yes to grant parole. Appellant goes before Panel B everytime he has a parole hearing. It is always the same three members. The Board fails to take into account that the drug charges are unrelated to the death of his son.

Appellant knows that the Board is biased. The Board fails to understand that the appellant and his co-defendant (wife) was going to family to get help. They were not just riding around; in light of the situation the couple was scared to death and didn't know what to do. In regards, Appellant was ultimatly convicted on drug charges. The Board allows Appellant's son's death in a way that, they are holding it against him and will not allow him parole.

Appellant has only been in prison one other time. His drug charges are all for possession of Meth before the convictions he has now. It is destrubing that the Board gives parole to inmates with multiple prior Manufacture, Distrution convictions, with current contraband charges and with write-ups and a bad disiplinary record. But, Because of Appellant's Son, those circumstances prevents him from parole. That is an abuse of discrection by the board members. He lives with his sons death fresh on his mind everyday and his four other Kids he supports from prison. He meets the Eligibility to participate in offender managagement system.

that can't have the father home with them. Appellant has been a Role model inmate. He has been displinary free for almost 11 years now. He has obtain his GED. He has a perfect work record. He has used his skills and talents to benifit his children and SCDC. He has self rehabilitated, and completed Jumpstart, A/A classes, Substance abuse classes, and has gained certficates in welding, Industrial Manufacturing. He also has family Support and a Job upon his release, So why always an Unanimous To Reject?

a Question is, what is the Board relying on to deny him parole. It has to be the death of his son, and that is being biased. Therefore, Appellant appeals their final decisions because every year DPPPS has new reasons to deny parole. Appellant alledges that they are being vindictive for him exercising his statutory right to appeal under SCACR Rule 201.

1. December 13, 2017 Denied parole for 1.) Nature and Seriousness of Current Offense
2.) Indication of Violence In this or Previous Offense
3.) Criminal Record Indicates Poor Community Adjustment
vote Count: <u>Unanimous to Reject</u>

2. Appellant <u>did not</u> recieve a Review hearing in 2018.

3. March 26, 2019 Denied Parole for 1.) Nature and Seriousness of Current Offense
vote Count: <u>Unanimous to Reject</u>

4. March 25, 2020 Denied Parole for 1.) Nature and Seriousness of Current Offense,
2.) Criminal Record Indicates Poor Community Adjustment
3.) Failure to Successfully Complete A Community Supervison Program
vote Count: <u>Unanimous to Reject</u>

Appellant has went before the Board once again since the last date listed. he was denied parole. Most Recent hearing was April 21, 2021 where he was represented by counsel.

Therefore, Appellant alligation of vindictiveness and abuse of discretion, is shown by the Board failing to give him a parole hearing in 2018, and unanimous votes with adding new reasens to deny parole. It is without a shadow of doubt that the Board is biased in this case, and it should be unlawful for them to do so. It is going to take this court to step in.

Being able to just state a reasen without explaning is vague and should not be sufficient. There is no accountablity that the Board did in fact investigate every single facter on Form 1212, when Appellant can show serval and has shown in this appeal where family was never called, Job reference never called, No one in the community that knows the Appellant was called. DPPPS should have to explain each reason so that facts are stated and closes the door for arbitrary and capricious treatment. This case should be an eye opener in how the Board is choosing people for Parole. If DPPPS is not going to give parole to person like the Appellant then why is it even in the Statute under SC. code § 44-53-375.

The pupose of Parole is universally recognized to be reformatory rather than punitive. It is intended as a means of rehabilitating the offender and restoring him to soceity as a law abiding and productive member of it... As an early release mechanism, parole also serves to allienate the high cost to the state, and ultimately to the taxpayer, of keeping offenders in prison. DPPPS is not completely following this language in their discretion.

But, to deny parole on false information, and fail to have hearing that are to be held every 12 months, and deny Appellant a fair opportunity to have family be participating violates S.C. Code 24-21-640 (supp. 2020) (" The Parole Board must carefully consider the record of the prisoner before, during, and after imprisonment.") This criteria must reflect all the aspects of this section and include a review of a prisoners displinary and other records, that the prisoner has shown a disposition to reform, that in the future he will probelly 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 intrest of society will not be impaired and suitable employment has been secured for him. Cooper 377 S.C. 489, 500; 661 S.E.2d 106, 112 (2008)

The Board has deviated from and rendered it decision without consideration of the fact Appellant completed a supervised program, the fact that the Board has infringed on a state created liberty that the Appellant has by the State and the U.S. Constitution under the Fourteenth Amendments. Given the facts that the Board used false information to deny parole and denied a hearing in 2018 violated those rights and Parole shall be granted.

CONCLUSION

Based on the foregoing reasons the Appellant respectfully request that Relief be granted and DPPPS grant Parole.

Respectfully Submitted,

S/ [signature]

Chuck McCullagh #311608
Appellant

ON this 11 day of August 2021

Livesay Correctional Institution
P.O. Box 580
UNA, S.C. 29378