

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT SC Court of Appeals

H.W. Funderburk, Jr., Administrative Law Judge
Appellate Case No. 2021-001149

Russell Mawyer, #139176,

Appellant,

v.

South Carolina Department of Probation,
Parole, and Pardon Services,

Respondent.

APPELLANT'S FINAL BRIEF

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STATUTES

S.C. Code Ann. §16-3-20(A)(Supp.1987)

S.C. Code Ann. §24-21-640

STATEMENT OF ISSUES ON APPEAL

1. DID THE ADMINISTRATIVE LAW COURT FAIL TO ADDRESS AND RULE ON THE ISSUE RAISED BY APPELLANT THAT THE PAROLE BOARD GEOSSLY ABUSED IT'S DISCRETION WHEN IT DECIDED TO ARBITRARILY AND CAPRICIOUSLY DENY APPELLANT PAROLE FOR THE THIRD TIME USING THE EXACT SAME FIXED (UNCHANGEABLE) JUSTIFICATIONS IN A ROTE FASHION, WHEN THERE WAS SUBSTANTIAL EVIDENCE BEFORE IT SHOWING THAT APPELLANT HAD SATISFIED THE CRITERIA SET BY THE S.C. LEGISLATURE IN §24-21-640 OF THE S.C. PENAL CODE FOR PAROLE; AND THAT THE PAROLE BOARD DEVIATED FROM THE PROCEDURE PROMULGATED BY THE S.C. LEGISLATURE IN §24-21-640 AND ITS INTENT, WHEN THE PAROLE BOARD RENDERED IT'S DECISION DENYING APPELLANT PAROLE?
2. DID THE ALC ERR IN CONCLUDING THAT THE PAROLE BOARD'S DENIAL OF APPELLANT'S PAROLE WAS A "ROUTINE" DENIAL OF PAROLE?

STATEMENT OF THE CASE

This case is before the South Carolina Court of Appeals pursuant to the appeal of Russell Lee Mawyer of the Order of Administrative Law Judge H.W. Funderburk, Jr. dated September 14, 2021 affirming the final decision of the Respondent's parole board. (R.pp.122-125)

On January 19, 1987, after pleading guilty to the offense of murder in the General Sessions Court of Pickens County, Appellant was sentenced to life with parole eligibility after the service of thirty (30) years pursuant to S.C. Code §16-3-20(A)(Supp.1987)

Appellant's first appearance before the parole board was on January 11, 2017, where the board denied him parole stating the following FINDINGS OF FACT:

- Nature and seriousness of current offense.
- Indication of violence in this or previous offense.
- Use of deadly weapon in this or previous offense. (R.p.2)

Since his initial appearance before the parole board on January 11, 2017 and denial, Appellant has appeared before the parole board twice more, the last being on April 14, 2021, and each time the parole board denied his parole request, stating the exact same FINDINGS OF FACT in all three denial letters, why he was being denied parole. (R.pp.3-4)

Appellant requested a reconsideration of his April 15, 2021 parole denial, but was denied by letter dated April 29, 2021. (R.p.136)

Appellant filed a Notice of Appeal dated May 17, 2021 to the South Carolina Administrative Law Court, appealing the parole board's denial of his request for parole. Appellant's case was assigned to Hon. Judge H.W. Funderburk, Jr., who by Order dated September 14, 2021 dismissed Appellant's appeal. (R.pp.122-125)

ARGUMENT

THE ADMINISTRATIVE LAW COURT (ALC) FAILED TO ADDRESS AND RULE ON THE ISSUE RAISED BY APPELLANT THAT THE PAROLE BOARD GROSSLY ABUSED IT'S DISCRETION WHEN IT DECIDED TO ARBITRARILY AND CAPRICIOUSLY DENY APPELLANT PAROLE FOR THE THIRD TIME USING THE EXACT SAME FIXED (UNCHANGEABLE) JUSTIFICATIONS IN A ROTE FASHION, WHEN THERE WAS SUBSTANTIAL EVIDENCE BEFORE IT SHOWING THAT APPELLANT HAD SATISFIED THE CRITERIA SET BY THE S.C. LEGISLATURE IN §24-21-640 OF THE S.C. PENAL CODE FOR PAROLE; AND THAT THE PAROLE BOARD DEVIATED FROM THE PROCEDURES PROMULGATED BY THE S.C. LEGISLATURE IN §24-21-640 AND ITS INTENT, WHEN THE PAROLE BOARD RENDERED IT'S DECISION DENYING APPELLANT PAROLE.

Appellant submits that the essential issue of his appeal is not the "routine" denial of parole, but that the parole board deviated from the procedures promulgated by the S.C. Legislature in §24-21-640 of the S.C. Penal Code and its intent, when for the third time the parole board denied Appellant parole using only the crimes for which he was convicted, as justifications to do so. (R.pp.2-4) There was substantial evidence before the parole board, and before the ALC, showing that Appellant has satisfied the criteria set by the Legislature in §24-21-640 for the parole board to determine, to their satisfaction, whether or not to grant parole, (R.pp.5-110) but the parole board ignored this substantial evidence before it and arbitrarily and capriciously denied Appellant parole for the third time using only factors which can never change.

The arbitrariness of their decision is made clear by the Respondent's own words in it's Initial Brief before the ALC, where they asserted that "the Board is always authorized to grant parole each time Appellant appears before it; a denial at one parole hearing does not operate to deny parole at a future hearing." (R.p.119) This statement of admission by the Respondent makes it clear that the parole board's decision was not based upon any consideration or course of reasoning and exercise of judgment within the context of the determining principles and

fixed rules or standards set by the S.C. Legislature in §24-21-640.

Black's Law Dictionary, 11th ed.(2019) defines arbitrary as "of, relating to, or involving a determination made without consideration of or regard for the facts, circumstances, fixed rules, or procedures." The decision of the parole board denying Appellant parole for the third time using the exact same fixed (unchangeable) justifications in a rote fashion, was clearly not based on the facts concerning Appellant's record before them, the circumstances surrounding his imprisonment or after his imprisonment; or on the fixed rules (criteria) set by the Legislature in §24-21-640.

If, as the Respondent state in it's Initial Brief before the ALC, that a denial at one parole hearing does not preclude Appellant from successfully obtaining parole at a future parole hearing, the question becomes "what then will the parole board base it's decision on to grant Appellant parole at this future parole hearing?" If the same facts surrounding Appellant's record before and after his imprisonment exists before them, at this future parole hearing, which they also had before them at all the previous hearings where they denied his parole, how can this not be arbitrary and capricious decision making by the parole board? Black's Law Dictionary, 11th ed.(2019) defines capricious as "(Of a person) characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways." The facts in the record at Appellant's parole hearings remains the same, it is the parole board's decisions which are changing in unpredictable, impulsive and unexpected ways, not based on the criteria set by the Legislature in §24-21-640, but arbitrarily based on how the parole board feels that day.

Appellant acknowledges that the parole board has the sole discretion to decide whether or not to grant or deny parole. However, as the Court made clear in Cooper v. S.C.Dep't of Prob., Parole and Pardon Servs., 377 S.C. 489, 661 S.E.2d 106(2008),

"the Legislature created this Board to operate within certain parameters." These parameters were set by the Legislature when they enacted Chapter 21 of the S.C. Penal Code §24. It may be lawful for the parole board to deny parole using the fixed (unchangeable) justifications: the nature and seriousness of Appellant's current offense (Appellant has no prior offense), the use of a deadly weapon, and the indication of violence. What Appellant is arguing is that, it becomes a gross abuse of their discretion and a deviation from the procedures promulgated by the Legislature in §24-21-640, to use these same fixed justifications over and over again to deny parole, when there is substantial evidence before it which shows that Appellant falls within the criteria set by the Legislature in §24-21-640 for parole to be granted within the discretion of the parole board.

When the S.C. Legislature set the criteria for parole to be granted within the discretion of the parole board in §24-21-640, it set the parameters within which the parole board is supposed to exercise it's discretion when determining whether or not to grant parole. As public officials or employees, the discretion of the parole board is to act and make decisions based on his or her own judgment or conscience within the bounds of reason and the law (parameters) set by the S.C. Legislature, and any deviation outside these bounds (parameters) amounts to an abuse of discretion.

THE ADMINISTRATIVE LAW COURT ERRED IN CONCLUDING
THAT THE PAROLE BOARD'S DENIAL OF APPELLANT'S
PAROLE, WAS A "ROUTINE" DENIAL OF PAROLE.

Appellant further submits that a "routine" denial of parole in which the Court envisioned in Cooper and Compton v. S.C. Dep't of Prob., Parole and Pardon Servs., 392 S.C. 361, 709 S.E.2d 639 (2011), is a denial in which the parole board actually examines Appellant's record before, during and after his imprisonment within the context of the criteria (parameters) set by the Legislature in §24-21-640 and determine to their satisfaction

whether or not Appellant "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." Had the parole board actually complied with this procedure, it would have examined Appellant's record before it within these criteria (parameters), and would have found that Appellant's record before them answers all these questions in the affirmative.

The arbitrary and capriciousness of the parole board's decision, which Appellant has shown, denying him parole for the third time using the exact same fixed (unchangeable) justifications in a rote fashion, ignoring the facts in the Appellant's record before them, proves that the parole board deviated from the procedure promulgated by the S.C. Legislature in §24-21-640 and its intent, and rendered a decision outside of what the Court in Cooper and Compton envisioned to constitute a "routine" denial of parole.

CONCLUSION

Based on the foregoing reasons and legal authorities, Appellant prays for an Order reversing and vacating the Order of Administrative Law Judge H.W. Funderburk, Jr. affirming the Respondent's final decision denying him parole, not as a routine denial of parole, but as a deviation from the procedure promulgated by the S.C. Legislature in §24-21-640, and a gross abuse of their discretion.

JAN. 10th 2022
DATE

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