RECEIVED
May 26 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From The Administrative Law Court
Honorable H.W. Funderburk, Jr., III, Administrative Law Judge

---

Appellate Case No. 2021-001162

LARRY BLACKWELL, # 176790 ..... APPELLANT,

V.

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

INITIAL REPLY BRIEF OF APPELLANT

HANNAH FREEDMAN #103373
Justice 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
(803) 765-1044
hannah@justice360sc.org

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

JON OZMINT #7107
The Ozmint Firm
5205 Forest Drive, Suite 1
Columbia, SC 29206
(803) 782-0042
jon@ozmint.com

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Statutes and Legislative Materials

Cases

Other

ARGUMENT IN REPLY

I. SCDPPPS Is Not Above The Law.

Respondent, the South Carolina Department of Probation, Parole and Pardon Services (SDPPPS), maintains in its Brief that as long as it "informs the inmate in its order rejecting parole that it considered the statutory requirements and published parole criteria," neither the Administrative Law Court (ALC) nor this Court has jurisdiction to consider an appeal challenging the process or procedures used at that inmate's parole hearing, regardless of how patently unconstitutional those underlying process or procedures were. *See* Resp. Br. at 12. In sum, SCDPPPS's argument is that if it provides an inmate with the form denial letter it issues in every parole case, the laws of the State of South Carolina and the state and federal Constitutions do not apply to parole hearings, and even if they do, there is nothing any Court can do about it. SCDPPPS is effectively, in its view, above the law.

This breathtaking view of its insulation from judicial review is grounded in a fundamental misunderstanding of *Cooper v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 377 S.C. 489, 661 S.E.2d 106 (2008), and *Compton v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 385 S.C. 476, 685 S.E. 2d 175 (2009) (per curiam). SCDPPPS reads those cases as holding that so long as the agency asserts, after the fact, that it followed the statutory requirements and published parole criteria, then any appeal by an inmate challenging any decision by the Parole Board or SCDPPPS action must be dismissed for want of appellate jurisdiction as a mere challenge to a "routine parole denial." Resp. Br. at 5. Neither case, however, sweeps nearly so broadly.

At the outset, it is important to acknowledge what *Cooper* and *Compton* share in common with Blackwell's appeal. In all three cases, the inmate appealed the manner in which the Board and the Agency reached their final parole decision, *not* the final decision itself, and in *Cooper* and *Compton*, the Supreme Court confirmed that courts (including the ALC) have jurisdiction to

review Board decisions that are "arbitrary and capricious." *Compton*, 385 S.C. at 479, 685 S.E.2d at 177. Thus, Blackwell is not, as SCDPPPS claims, attempting to "create an enormous exception that would inevitably consume the rule" or asking the Court to "radical[ly] change" the jurisdictional limits on appeals to the ALC. Resp. Br. at 5. Instead, he is simply asking the Court to apply the established law and determine whether there are constitutional and statutory deficiencies in the procedure SCDPPPS used in his case.

Cooper, like Blackwell, did not challenge the actual denial of parole, but rather the process used by SCDPPPS in denying him parole—namely, the Board's failure to utilize the procedures promulgated by the General Assembly in South Carolina Code section 24-21-640 and the Board's own criteria. *See Cooper*, 377 S.C. at 499, 661 S.E. 2d at 111. The Supreme Court held that if the "Board deviates from or renders its decision without consideration of the appropriate criteria, . . . it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Id.* Nothing in *Cooper* indicates that the *only* way an inmate can obtain judicial review of a parole denial is when the Board violates due process by refusing to follow the relevant process and using the established criteria.[1] To the contrary, *Cooper* stands for what Blackwell cited it for in his opening brief: when the Board deviates from constitutional standards, the ALC, this Court, and the Supreme Court have jurisdiction to consider an appeal brought on that basis. *See* App. Br. at 14.

---

[1] *Cooper*'s discussion of *Furtick v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2002) makes this point clear. In *Cooper*, SCDPPPS, relying on *Furtick*, argued that the Court did not have jurisdiction to consider the appeal because Cooper had not been permanently denied parole. The Court made short work of the argument, noting that *Furtick* did not hold that that there must be a permanent denial of parole eligibility before a sufficient liberty interest warranting judicial review is implicated; rather, it "is merely one of the ways that a sufficient liberty interest may be involved." 377 S.C. at 498, 661 S.E. 2d at 111 (internal quotations omitted).

The same is true of *Compton*. After Compton was denied parole, he appealed on the basis that SCDPPPS's decision-making did not comply with *Cooper*. The ALC agreed and remanded. On remand, SCDPPPS issued an "Amended Notice of Rejection" which indicated that it did, in fact, consider the Form 1212 criteria, and the factors outlined in S.C. Code Ann. § 24-21-640. *See* S.C. Board of Paroles & Pardons, Form 1212. On certiorari, the South Carolina Supreme Court determined that, under circumstances where the defects identified by Compton had been cured by the amended notice of rejection and where no other procedural defects in the parole process were alleged, the decision constituted a routine denial of parole that "the ALC [had] limited authority to review." *Compton*, 385 S.C. at 479, 685 S.E. 2d at 177.

Thus, neither decision supports SCDPPPS's position in this case. Blackwell is not alleging that the rejection letter did not comply with *Cooper*. Instead, his core contention is that the Board and SCDPPPS violated the Administrative Procedures Act (APA) and due process when the Board was allowed to consider material, objectively false information indicating that he made specific threats to a Solicitor that were refuted by a SLED investigation. In other words, Blackwell's position is that the Board's process in his case violated his statutory and constitutional rights. But, according to SCDPPPS, that is of no moment because the only due process violation cognizable in the ALC, this Court, or the South Carolina Supreme Court is the precise one identified in *Cooper*.

But that simply cannot be the case. As Blackwell pointed out in his Initial Brief, if SCDPPS is correct, then so long as the final SCDPPS' rejection letter was facially sufficient, an inmate denied parole could not appeal even if Parole Board Members openly stated at the parole hearing that they were voting to deny parole because of the inmate's race, religion or other constitutionally protected status. App. Br. at 17-18. Respondent acknowledges that denials of parole "based on

these protected reasons would be patently unconstitutional," but it nevertheless insists that no court could ever consider evidence to that effect and an appeal based on such an argument would not be cognizable in any court. Resp. Br. at 10-11.

II. SCDPPPS's Rule 61 Arguments Ignore Judicial Efficiency.

Blackwell set forth in detail in his Opening Brief why this Court should hold that SCDPPPS's interpretation of amended SCALC Rule 61 as only permitting the ALC to consider "a copy of the agency decision, and where applicable, the decision following a motion for reconsideration," is inconsistent with the APA and effectively eliminates judicial review (especially by the ALC). He will not repeat those arguments in this Reply Brief, except to highlight that judicial efficiency is another reason to reject SCDPPPS's reading of the rule.

If the ALC appellate record excludes information that the Board in fact considered, or theoretically considered, this means, as the ALC concluded here, that virtually all claims—no matter how potentially meritorious—will be dismissed without meaningful consideration as "routine parole denials." *But see* Order Denying Mot. to Dismiss & Order to Supp. R., *Williams v. S.C. Dep't of Probation, Parole & Pardon Servs.*, No. 21-ALJ-15-0023-AP (May 16, 2022) (holding that "where a Motion to Supplement the Record is made and the relevance of additional matter is shown, it is appropriate for the [ALC] to order that the record be supplemented with additional matter that was presented to the lower tribunal" and ordering SCDPPPS to "supplement the record with all documents considered by the Board in rendering its decision in this case, including, but not limited to, the risk assessment results, the full case summary, notes from the pre-hearing interview, and any recommendations or summaries created by the parole agent"). But, as this Court's order denying SCDPPPS's Motion to Strike makes clear, the information the appellant proffers to the ALC will still be part of the record before this Court. The upshot will be

a significant increase in post-ALC appeals to this Court, on an appellate record that has not been reviewed by any lower court.

The ALC currently plays an important screening and adjudicatory function in inmate appeals, including cases involving denials of parole. Amended Rule 61, as interpreted by SCDPPPS and the ALC below, effectively takes the ALC "out of the game" so to speak, and thereby incentivizes inmates to pursue their grievances past the ALC and directly to this Court. If that practice is allowed to continue, this Court will effectively be required to play the role currently played by the ALC. That is inconsistent with basic principles of judicial efficiency and would generate unnecessary and burdensome work for this Court.

III. SCDPPPS Is Responsible for Reviewing and Correcting Procedural Errors by the Parole Board

SCDPPPS asserts that the Board and SCDPPPS are legally distinct entities and that SCDPPPS is "a neutral body merely providing support to the Parole Board." Resp. Br. at 13-17. The significance of the distinction Respondent attempts to draw is not completely clear to Blackwell, but it appears to be in support of an argument along the line that the "sins of the Parole Board are not the sins of SCDPPPS," and vice-versa. That argument, of course, ignores the fact that the matter under appeal is the final decision of the agency—SCDPPPS—and that the final decision giving rise to this appeal, the form denial letter, was signed by the Director of SCDPPPS. *See Rose v. S.C. Dep't of Probation, Parole & Pardon Servs.*, 429 S.C. 136, 141, 838 S.E.2d 505, 508 (2020). Moreover, SCDPPPS's argument for drawing distinctions between the Board and the Agency is, in any event, irrelevant in this case because both the Board and SCDPPPS have, or should have, the responsibility to make sure that parole decisions are not based on materially

inaccurate information.[2] Even if the Agency's role vis-à-vis the Board is merely to provide support, as SCDPPPS argues, that "support" must encompass the obligation to ensure that the Board does not reach its decisions on the basis of materially false information. If there is no such duty, then it is not an overstatement to characterize parole hearings as "star chamber" proceedings. SCDPPPS refuses to inmates with access to the parole memorandum it prepares and provides to the Board, despite the fact that Parole Form 1212 states that an inmate seeking parole who believes the file is "somehow incomplete or contains some error or other inaccuracy . . . must notify the Board of the specific error or inaccuracy." S.C. Board of Paroles & Pardons, Form 1212. Thus, according to SCDPPPS, an inmate has no right of access to information that he has a duty to correct, and at the same time, SCDPPPS has no obligation to ensure that accurate information is placed in the file and no duty to correct false or misleading information. It is difficult to imagine a process more lacking in transparency, effective notice, or a genuine opportunity to be heard.

CONCLUSION

For these reasons, as well as those set forth in Blackwell's opening brief, this Court should vacate the decision denying parole and remand for another parole hearing conducted in conformity with basic principles of due process.

[Signature Block Appears on the Following Page]

---

[2] Blackwell is especially concerned by SCDPPPS' admission that victims' statements to the Board during parole hearings often "do not match with trial testimony or other court records" and that the Board regularly considers "statements that may be easily demonstrated as 'objectively false.'" Resp. Br. at 16, n. 10. If so, Blackwell can see no reason that SCDPPPS would not have a duty to inform the Board of the actual record evidence.

Respectfully submitted,

HANNAH L. FREEDMAN #103373
Justice 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
(803) 765-1044
hannah@justice360sc.org

JOHN H. BLUME #747
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

JON OZMINT #7107
The Ozmint Firm
P.O. Box 17554
Greenville, SC 29606
(803) 782-0042
jon@ozmint.com

May 26, 2022

RECEIVED
May 26 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court

Judge H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2021-001162

Larry Blackwell, #176790 ..... Appellant,

v.

SCDPPPS ..... Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Initial Reply Brief was served on opposing counsel by e-mail on at the address provided in the Attorney Information System: Matthew.Buchanan@ppp.sc.gov. Service was made on May 26, 2022.

/s/Hannah Lyon Freedman
Hannah Lyon Freedman
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
hannah@justice360sc.org

From: **Hannah Freedman** hannah@justice360sc.org
Subject: Blackwell v. SCDPPPS, No. 2021-001162
Date: May 26, 2022 at 1:45 PM
To: Matthew Buchanan Matthew.Buchanan@ppp.sc.gov
Cc: John Blume jb94@cornell.edu, jon@ozmint.com

HF

Dear Mr. Buchanan,

Please find attached a copy of our initial Reply Brief in the above-referenced matter, which I will file electronically in a moment. Should you have any questions, please let us know. Thank you, and I hope you have a nice end of the week.

Sincerely,
Hannah Freedman

2022.05.26
Reply Brief.pdf