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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court

Judge Ralph K. Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2022-000965

Joseph Kelsey.....Appellant,

v.

*South Carolina Department of Probation,
Parole, & Pardon Services*Respondent.

**RETURN TO RESPONDENT’S MOTION TO STRIKE BRIEF OF APPELLANT AND
DISMISS**

Appellant Joseph Kelsey (“Joe”), by and through his attorneys, respectfully requests that this Court deny Respondent’s Motion to Strike Brief of Appellant and Dismiss for the following reasons:

Respondent contends that Joe failed “to present or argue any issues which are preserved for appellate review.” Resp’t Mot. to Strike Brief of App. & Dismiss, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 2022-000965 at 1 (Oct. 24, 2022). In order to preserve an issue for review in this Court, all that is required is that the appellant have raised the issue to the Administrative Law Court (ALC). *See Pye v. Estate of Fox*, 369 S.C. 555, 564–65, 633 S.E.2d 505, 510 (2006).

Respondent is correct that in general, a matter is not preserved unless it was “raised to and ruled upon by the trial court.” *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 609 S.E.2d 286, 299 (2005). The purpose of this rule—and of Rule 59(e), SCRPC, upon which the rule is based—is “to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” *Pye*, 369 S.C. at 565, 633 S.E.2d at 510 (cleaned up and internal quotation marks omitted). However, in hearing appeals from parole denials, the ALC sits in an appellate capacity, not a trial capacity. *Al-Shabazz v. State*, 338 S.C. 354, 377, 527 S.E.2d 742, 754 (1999). Moreover, the ALC rules provide that in parole appeals, any “decision of the Administrative Law Judge is a final decision and motions for reconsideration will not be considered.” SCALC Rule 65. Consequently, in order to be preserved for appellate review, Joe’s claims must only have been “raised to” the ALC. *Floyd v. Floyd*, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (2005).

Joe raised all of the issues presented in his Initial Brief to the ALC in his Notice of Appeal, his Motion to Supplement the Record, and his Motion to Compel. *See* Notice of Appeal, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP (Admin. L. Ct. Feb. 15, 2022); App. Mot. to Supp. ROA, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP (Admin L. Ct. May 12, 2022); App. Mot. to Compel Resp’t to Complete ROA, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP (Admin L. Ct. May 28, 2022). Joe put before the ALC several issues related to “errors in [the Parole Board’s method and procedure” and other jurisdictional and procedural issues, including, among others, the following:

- (1) the issue of the ALC’s jurisdiction over Joe’s case (Motion to Supplement at 3);
- (2) the necessity of allowing Joe to supplement the record on appeal (Motion to Supplement at 3–4; Motion to Compel at 3);

- (3) the necessity of allowing potential parolees the opportunity to see and challenge potentially inaccurate information on which the Board bases its parole denials (Notice of Appeal at 3);
- (4) the violation of Joe’s due process rights through the Board’s arbitrary and capricious decision-making and failure to consider the requisite criteria of S.C. Code Ann. § 24-21-640 (Notice of Appeal at 2);
- (5) the violation of Joe’s due process rights when the Board failed to provide a concise and explicit statement of the facts underlying his denial, backdated his denial letter, considered factually incorrect information, and failed to consider the information that Joe put before it (Notice of Appeal at 2–3); and
- (6) the violation of Joe’s due process and First Amendment rights when the Board denied him parole vindictively and in retaliation for appealing his 2019 denial (Notice of Appeal at 3, 4).

No issues that Joe raised in his Initial Brief were presented to this Court “for the first time on appeal.” *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (2006).

Respondent also contends, as the ALC did, that Joe forfeited his right to appeal by failing to “belatedly” file a brief. Resp’t Mot. to Strike Brief of App. and Dismiss, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 2022-000965 (Oct. 24, 2022) at 2. As the ALC did, Respondent ignores that Joe did in fact request to file a delayed brief: He asked the ALC to stay the briefing schedule so that he could (belatedly) file a brief in the event that the ALC did not rule on his Motion to Supplement the Record until after the deadline for Joe to file a brief had passed. App. Mot. to Supp. ROA, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 22-ALJ-15-0004-AP at 4 (Admin L. Ct. May 12, 2022). The ALC denied Joe’s request to file a delayed brief in its June 3 Order. Order, *Kelsey v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, No. 22-ALJ-

15-0004-AP at 6 (Admin. L. Ct. June 3, 2022). As discussed above and in Joe’s Initial Brief, Joe was prohibited under the Administrative Law Court Rules from asking Judge Anderson to reconsider his decision, SCALC Rule 65, and as such, filing or requesting to file a delayed brief after Joe *was already told that he could not* would have been a waste of the ALC’s time at best and sanctionable at worst. *See* S.C. Admin. L. Ct. R. 72 (“If the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous . . . , the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.”).

Applying Respondent’s position would require courts to treat appeals that are dismissed before the appellant has a chance to file an initial brief as never having existed at all. The ALC decided that it did not have jurisdiction over Joe’s case before Joe had a chance to file an initial brief, but that decision, as Respondent argues, does not require this Court to ignore the issues that Joe did in fact raise. Joe set forth and asked the ALC to rule on numerous claims in his Notice of Appeal and Motion to Supplement, and the ALC’s dismissal of Joe’s case, regardless of its basis, constitutes a consideration of and ruling on the issues that Joe put before it. Because Joe asked the ALC to consider all of the issues included in his Initial Brief, and the ALC issued a final appealable ruling on those questions, the issues in Joe’s Initial Brief are preserved and ripe for reconsideration, and properly raised before this Court. This Court should therefore deny Respondent’s Motion to Strike Brief of Appellant and Dismiss and allow Joe’s case to proceed.

[Signature block appears on following page]

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Return to Respondent's Motion to Strike Brief of Appellant and Dismiss was served on opposing counsel by e-mail at the address provided in the Attorney Information System: Matthew.Buchanan@ppp.sc.gov. Service was made on November 1, 2022.

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