

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
APPELLATE CASE NO: 2013-001277

APPEAL FROM THE ADMINISTRATIVE LAW COURT  
HONORABLE PHILLIP LEWSKI  
ADMINISTRATIVE LAW JUDGE

APPEAL FROM FINAL DECISION OF  
THE S. C. DEPT OF CORRECTIONS  
DOCKET NO: 12-ALJ-04-839-AP  
GRIEVANCE NO: KRCI-1110-12

TRACEY F. CARTER #247387

APPELLANT

RECEIVED

JUL 15 2013

V.

S. C. DEPT OF CORRECTIONS SC Court of Appeals RESPONDENT

BRIEF OF APPELLANT

I SWEAR UNDER PENALTY OF PERJURY THE  
CONTENTS OF THIS BRIEF ARE TRUE AND CORRECT

SUBORN TO BEFORE ME THIS  
10 DAY OF July 2013  
Catherine A. Amador

NOTARY PUBLIC OF SOUTH CAROLINA  
MY COMMISSION EXPIRES \_\_\_\_\_

St. Tracey Carter  
TRACEY CARTER  
247387 PB38  
4848 GOLDMINE HWY  
KEESHAW SC  
29067

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TABLE OF AUTHORITIESCASES

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ENG V COUGHLIN	858 F2D 898
GRANDISON V CUYLER	774 F2D 598 (3rd cir 1985)
PIND V DALSHAM	605 FSUPP 1305
BALLA V IDAHO STATE BOARD OF COLLECTIONS	595 FSUPP-1558
HENDRICKS V STATE OF N.Y DEPT OF CORR	560 NY 2D 521
HRBEK V STATE	478 NW 2D 617

& CDC DISP POLICY

898 POSSESSION OF CELL PHONE

817 ALTERED RADIO

STATEMENT OF ISSUES ON APPEAL

1. WERE THE SANCTIONS IMPOSED BY THE DHO (DISCIPLINARY HEARING OFFICER) EXCESSIVE?
2. WAS APPELLANT DENIED COUNSEL SUBSTITUTE?
3. WAS APPELLANT PROPERLY CHARGED?
4. WERE PROCEDURAL ERRORS PREJUDICIAL?
5. WAS DENIAL OF WITNESS TESTIMONY/PRESENCE PREJUDICIAL?

# STATEMENT OF THE CASE

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ON 7/12/2012. OFFICER HUNT AND THE AGENCY SEARCH TEAM CONDUCTED A ROUTINE SHAKEDOWN OF DORMITORY UNIT PALMETTO B ROOM 38 THE ASSIGNED LIVING AREA OF THE APPELLANT AND FOUND IN SAME WHAT WAS A INSTITUTIONALLY PURCHASED RADIO, HOWEVER THE RADIO WAS ALTERED

THEREBY OFFICER HUNT CHARGED APPELLANT WITH AN ERRONEOUS CHARGE OF 898: POSSESSION OF A CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE ETC.

THE PROPER CHARGE IN THIS MATTER WOULD HAVE BE A LESSER CHARGE 817 ALTERED INMATE PROPERTY.

THE CASE WAS HEARD ON 7/31/2012 AND THE DHD FOUND APPELLANT GUILTY OF 898

ON 8/8/2012 APPELLANT FILED A STEP 1 GRIEVANCE APPEAL OF THE DHD HEARING REQUESTING THE

DISCIPLINARY CONVICTION BE VACATED).

THE WARDENS DECISION STIPULATED "YOUR APPEAL IS WITHOUT MERIT AND THEREFORE DENIED."

ON 8/28/2012 APPELLANT APPEALED THE WARDENS DECISION WHICH WAS AGAIN DENIED VIA RESPONSIBLE OFFICIALS ON 10/26/2012.

NOTICE OF APPEAL OF THE AGENCY DECISION WAS FILED ON 11/21/2012 AND ASSIGNED TO THE HONORABLE S. PHILIP LENSKI ON 12/5/2012. ON MAY 3 2013 THE ADMINISTRATIVE LAW COURT ISSUED AN ORDER OF DISMISSAL AND THIS APPEAL FOLLOWS.

ARGUMENT 1

WERE SANCTIONS IMPOSED BY THE DHO EXCESSIVE?

THE SANCTIONS IMPOSED BY THE DHO WERE EXCESSIVE.

IN THIS APPEAL THE CHARGING OFFICER CHARGED APPELLANT WITH AN IMPROPER MORE SERIOUS OFFENSE WHICH CARRIES A STIFFER PENALTY THAN THE PROPER OFFENSE OF 817. APPELLANT ADMITTED TO VIOLATION OF S.C.D.C. OFFENSE OF 817 POSSESSION OF CONTRABAND BEING THAT HE ALTERED HIS RADIO

817 PROVIDES "THE POSSESSION OF ANY UNAUTHORIZED ALTERED OR EXCESSIVE PROPERTY" ETC.

THE ITEM CONFISCATED WAS ADMITTEDLY ALTERED TO BE A VOLUME CONTROL FOR APPELLANT'S TV AND RADIO AND NOT A COMMUNICATIONS AS ALLEGED BY THE CHARGING OFFICER. THE PUNISHMENT FOR THIS OFFENSE IS ONLY 0-30 DAYS LOSS OF GOOD TIME.

898 POSSESSION OF A CELL PHONE CARRIES PUNISHMENT OF 0-360 DISCIPLINARY DETENTION TIME LOSS OF ALL GOOD TIME AND 360 DAYS OF PRIVILEGE SUSPENSIONS

FURTHERMORE THE WARDEN DOES NOT EXAMINE OR REVIEW ANY EVIDENCE OR CIRCUMSTANCES OF APPELLANT'S OFFENSE AS SHE RESPONDS "INMATE CARTER YOU WERE FOUND GUILTY ON THE CHARGE OF 898 POSSESSION OF A CELL PHONE".

CLEARLY, THIS STATEMENT BY THE WARDEN (EXHIBIT A TO BE INCLUDED IN THE RECORD) ESTABLISHES LACK OF REVIEW AND INVESTIGATION OF THE CONDUCTED HEARING AND ESTABLISHES TECHNICALITIES, PROCEDURAL ERRORS AND MISREPRESENTATIONS OF EVIDENCE NECESSARY PURSUANT TO DUE PROCESS STANDARDS TO SUPPORT THIS CONVICTION.

BY APPELLANT'S BEING CHARGED AND FOUND GUILTY OF THE IMPROPER OFFENSE, THE SANCTIONS FOR A MORE SEVERE OFFENSE WERE EXCESSIVE.

ARGUMENT 2

WAS APPELLANT DENIED COUNSEL SUBSTITUTE?

APPELLANT WAS DENIED COUNSEL SUBSTITUTE AFTER WRITTEN REQUEST (SEE EXHIBIT B TO BE INCLUDED IN THE RECORD) ON APPEAL) WITH ASSISTANCE OF A STAFF MEMBER (MR. ARMSTRONG).

THIS HEARING WOULD HAVE BEEN MORE EFFECTIVE AS SURELY THE DHO WOULD HAVE LISTENED TO RECOMMENDATIONS OF A MALE STAFF MEMBER WITH EXPERIENCE IN WHAT TYPE OF EVIDENCE HIGHLIGHTED THIS OFFENSE AND SUBMIT OPERATIVE VISUAL DEMONSTRATION TO THE DHO (FEMALE) TO SUPPORT THE OFFENSE OF 817 ALTERED RADIO. SEE WOLF V. McDONNELL.

ONE COURT (FEDERAL COURT) HAS HELD THAT "STAFF ASSISTANCE MUST BE PROVIDED IN GOOD FAITH AND IN THE BEST INTERESTS OF THE INMATE" SEE ENG V. COUGHLIN 858 F2D 898. THE COURTS HAVE HELD THAT THE ASSISTANT'S JOB IS TO INVESTIGATE AND GATHER EVIDENCE.

SEVERAL COURTS HAVE HELD THAT SUCH A FAILURE TO ASSIST DENIES DUE PROCESS. SEE GRANDISON V. CUYLER 774 F2D 598 (3RD CIR 1985) (ALLOWANCE FOR ONLY FIVE MINUTE CONSULTATION WITH AN INMATE ASSISTANT WAS INADEQUATELY JUSTIFIED); CLAUSE V. SULLIVAN 709 FSUPP 1209 (SDNY 1985) (DUE PROCESS WAS VIOLATED BY ASSISTANT'S FAILURE TO CARRY OUT "BASIC REASONABLE AND NON-DISRUPTIVE REQUESTS."); SEE BALLA V IDAHO STATE BOARD OF CORRECTIONS 595 FSUPP 1558 (D. IDAHO 1984) (SIMILAR TO GRANDISON); ALSO SEE HENDRICKS V. STATE OF NEW YORK DEPT OF CORRECTIONS 560 NY 521 (ASSISTANT'S FAILURE TO ASSIST VIOLATED STATE REGULATIONS); ALSO SEE NIX V EVATT 850 F2D 458 (ASSISTANT'S FAILURE TO PROCURE WITNESS THROUGH IGNORANCE OF PROCEDURES SUPPORTED A DUE PROCESS CLAIM)

### ARGUMENT 3

WAS APPELLANT PROPERLY CHARGED? (SEE ARGUMENT 1)

### ARGUMENT 4

WERE PROCEDURAL ERRORS PREJUDICIAL?  
(SEE ARGUMENT 1)

## ARGUMENT 5

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WAS DENIAL OF WITNESS TESTIMONY / PRESENCE PREJUDICIAL?

DENIAL OF WITNESS TESTIMONY AND PRESENCE WAS PREJUDICIAL TO APPELLANT'S DEFENSE AS APPELLANT WAS DENIED HIS RIGHT TO HAVE PRESENCE OF WITNESS AND THAT WITNESSES TESTIMONY

PRISONERS HAVE THE RIGHT TO CALL WITNESSES WHEN DOING SO IS NOT "UNDULY HAZARDOUS TO INSTITUTIONAL SAFETY OR CORRECTIONAL GOALS"

HERE, IN THIS CASE APPELLANT WAS DENIED A WITNESS COUNSEL SUBSTITUTE AND WITNESS CHANGING OFFICER'S PRESENCE DURING TAKING OF TESTIMONY. COUNSEL SUBSTITUTE NEVER APPEARED AFTER REQUEST AND CHANGING OFFICER TESTIFIED VIA TELEPHONE.

WITNESSES MUST APPEAR AT THE HEARING, *HRBEK V. STATE* 478 N.W.2D 617 (IDAHO 1991) (AN UNJUSTIFIED REFUSAL TO PERMIT LIVE TESTIMONY OF A DEFENSE WITNESS WILL WARRANT REVERSAL)

WITNESSES SHOULD TESTIFY AT THE HEARING AND NOT OUTSIDE OF IT UNLESS THERE IS A GOOD

## ARGUMENT 5 (CONTINUED)

CONNECTIONAL REASON FOR FAILING TO DO SO IN A PARTICULAR CASE. THIS IS THE "COMMON SENSE" MEANING OF "CALLING" A WITNESS. IT IS ALSO CONSISTANT WITH THE U. S. SUPREME COURT HOLDING IN WOLF V McDONNELL.

BESIDES, AS A PRACTICAL MATTER, IT IS IMPORTANT FOR THE (ACCUSED) PRISONER TO HAVE THE OPTION OF QUESTIONING A WITNESS HE CALLS - OR AT LEAST OF HEARING THE WITNESS AND SUGGESTING QUESTIONS TO THE HEARING COMMITTEE TO BE SURE ALL RELEVANT INFORMATION IS BROUGHT OUT. SEE WOLF V McDONNELL AND MAVERS V STATE 437 NW 2D 568. APPELLANT COULD NOT HEAR WITNESS TESTIMONY OR SPEAK TO WITNESS WHO TESTIFIED BY PHONE AND ONE WITNESS NEVER APPEARED OR TESTIFIED.

THE PRISONER MUST HEAR THE TESTIMONY IN ORDER TO RESPOND TO IT.

THE COURTS HAVE ACKNOWLEDGED THESE NECESSITIES IN CONNECTION WITH WITNESSES WHO TESTIFY BY TELEPHONE.

BALLA V MURPHY 116 IDAND 257, 775 P2D 152 (IDAND APP 1987) (WITNESSES MAY BE INTERVIEWED BY TELEPHONE ONLY IF THE ACCUSED PRISONER CAN SPEAK DIRECTLY TO THE WITNESS AND HEAR HIS ANSWERS); MATTER OF PLUNKET V. WASH. APP 230, 788 2D 1090 (WASH. APP 1990) IF A TELEPHONIC HEARING IS USED THE INMATE SHOULD HAVE THE SAME OPPORTUNITY TO HEAR TESTIMONY AS DOES THE HEARING OFFICER. ONLY THEN CAN THE PRISONER BE ASSURED OF HAVING AN OPPORTUNITY TO GIVE RESPONSIVE TESTIMONY IN HIS DEFENSE.

CONCLUSION

BASED ON THE EVIDENCE OF THIS CASE AND CASE LAW IN SUPPORT, APPELLANTS CONVICTION SHOULD BE VACATED.

RESPECTFULLY SUBMITTED

Stacey Carter  
 4848 GOLDMINE HWY  
 KIRKSHAW SC 29067

STATE OF SOUTH CAROLINA  
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TRACEY F. CARTER # 247387

APPELLANT

VS

S C DEPT OF CORRECTIONS

RESPONDENT

PROOF OF SERVICE

THIS IS TO CERTIFY THAT ON JULY 11 2013 I  
SERVED A COPY OF BRIEF OF APPELLANT ON THE  
FOLLOWING PARTIES BY PLACING A COPY IN THE U.S.  
MAIL POSTAGE PREPAID ADDRESSED ALONG WITH AFFIDAVIT  
TO PROCEED IN FORMA PAUPERIS AND DESIGNATION OF MATTER

S.C. ADMINISTRATIVE LAW COURT  
1205 PENDLETON ST SUITE 224  
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*St. Tracey Carter*

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
AND

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
APPELLATE CASE NO: 2013-001277

TRACEY F CARTER #247387

APPELLANT

✓  
S C DEPT OF CORRECTIONS

RESPONDENT

AFFIDAVIT OF INDIGENCY

I SWEAR UNDER PENALTY OF PERJURY THAT  
I DON'T HAVE FUNDS AVAILABLE TO PAY FILING  
FEES ASSOCIATED WITH THIS APPEAL OR WHAT AS MY  
ACCOUNT BALANCE (SCDC) IS CURRENTLY 0.53¢  
AND 0/100

SWORN TO BEFORE ME THIS

10 DAY OF July 2013

Cathrine A. Cunniff

NOTARY PUBLIC

MY COMMISSION EXPIRES \_\_\_\_\_

St Tracy Carter

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