THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory Pencille, № 312332, Appellant

v.

South Carolina Department of Corrections, Respondent.

Appellate Case № 2019-002115

Appeal From The Administrative Law Court
Ralph King Anderson, Jr. Administrative Law Judge

Unpublished Opinion № 2023-UP-321
Heard October 5, 2022 - filed September 27, 2023
Withdrawn, Substituted, and Refiled November 1, 2023

Petition for Rehearing

Gregory Pencille, the Appellant above, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court to Rehear this matter based upon the following:

1. This Court correctly noted that Gregory Pencille filed his action pursuant to SCDC Policy PS-10.05. This Court then incorrectly held "Although Pencille cited to federal RFRA and RLUIPA statutes and caselaw on his inmate grievance forms and in his filings to the ALC, he failed to cite to SCRFRA or section 24-27-500." *Pencille v. South Carolina Department of Corrections,* Op. № 2023-UP-321 (S.C.Ct. App. filed November 1, 2023) at 6. As noted above Mr. Pencille raised the SCDC Policy PS-10.05 which incorporates the state law as to the protections of religious freedom. The SCDC Policy is cited on pages 3, 20, 25 and 26 of the

Record on Appeal. If this Court does not recognize that the Policy incorporates the South Carolina Religious Freedom Restoration Act, then this court erred in failing to recognize that the Policy itself is in fact a state-created liberty interest to which Mr. Pencille is entitled to rely in seeking relief.

2. This Court erred in failing to remand the case back to the Administrative Law Judge for two reasons. First, as noted by this Court, the administrative law judge did not rule upon the merits of the case because the judge deemed he did not have jurisdiction. This Court has found that conclusion to be in error. Having found error, this court should remand to the administrative law judge for a ruling on the merits. Secondly, this court erred in failing to remand this case rather than finding that Mr. Pencille's failure to request a rehearing forfeited his claim on the merits. Perhaps if Mr. Pencille had filed such a specific rehearing, this court could then address the merits. The failure to file such a rehearing petition simply means this Court should have remanded the case once this Court determined that the Administrative Law Court did in fact have jurisdiction. Once the Administrative Law judge determined it did not have jurisdiction, then the judge had no need to rule upon the merits. The failure to rule on the merits was not inadvertent, but a conscious decision based upon the judge's belief in the lack of jurisdiction. Once a judge has ruled they do not have jurisdiction, this court should not expect that judge to then rule upon the merits. If the judge had simply denied the motion for rehearing with no further finding, this court would still have been required to remand the case back to the Administrative Law judge to rule upon the merits before this court ruled upon the merits. The Administrative Law judge would then have the authority to expand the record and take testimony, a power his court does not have. The ruling on the merits would then be after a full hearing.

3. This Court further erred in holding "To the extent Pencille expands upon his SCRFRA argument in his reply brief, we find this argument is not properly before the court." *Id.* at 7. The error in this conclusion is that Mr. Pencille did cite the SCRFRA in his opening brief at page 4. The fact that the reply brief expanded on the argument is of no consequence. The SCRFRA was not raised for the first time in the reply brief. This Court should now recognize that the issue was raised in his opening brief. The fact that the issue was more fully discussed in his reply brief does not change the fact that the opening brief advised the South Carolina Department of Corrections that he was seeking relief under the SCRFRA.

4. This Court stated, "[H]is state claims were neither raised to nor ruled upon by the ALC." *Id.* at 6. This is simply not correct. The Administrative law judge ruled, "In conclusion, because Appellant has not alleged a deprivation of a state-created liberty or property interest in this matter, the Court finds that summary dismissal is appropriate." Rec. on App. at 41. This conclusion by the administrative law judge is a finding that SCDC PS 10.05 did not create a state-created interest in the right of Mr. Pencille to practice his religion. As noted above the policy incorporated the SCRFRA and S.C. Code § 24-27-500. The ruling by the administrative law court was that the SCDC PS 10.05, and by implication the SCRFRA and S.C. Code § 24-27-500, did not give Mr. Pencille a state created liberty interest in the use of religious oils as part of this religious practice. The plain wording of both statutes creates a state-created liberty interest in the exercise of religion by prisoners in South Carolina.

5. After finding that the issue of Mr. Pencille using religious oils is not preserved for review, this Court then proceeded to rule, incorrectly, that, "We hold Pencille's claim did not implicate a state-created liberty interest such that it invoked the procedural protections of due

process." *Id.* at 10. This Court further held, "Section 24-27-500 and SCDC Policy 10.05 create a liberty interest in religious practice. . . . Accordingly, we find inmates have an interest in religious practices arising from state law and state policy." *Id.* at 10. After these correct findings, this court then concluded, with no basis in fact in the record, "[W]e find SCDC's denial of Pencille's request to use religious oils in the practice of his religion for security reason did not present an atypical or significant hardship n relation to the ordinary incident of prison life." *Id.* at 10. Such a statement can be made about virtually any religious practice in the Department of Corrections. After finding that S.C. Code § 24-27-500 applies to this case, this Court then ignored the clear mandate of the statute. The Statute places the burden on the institution to provide a reason the denial of a religious practice. The statute provides:

> [I]f the facility demonstrates that the religious activity:
> (1) sought to be engaged by a prisoner is presumptively dangerous to the health or safety of that prisoner; or
> (2) poses a direct threat to the health, safety, or security of other prisoners, correctional staff, or the public.

The record in this case is devoid of any evidence that the use of religious oils by the Wiccan community is dangerous to the prison system or presents any security risk. This Court stated in the discussion of facts, "As noted in the 2018 request, a similar purchase request was approved in 2014 (the 2014 request." *Id.* at 2. The record in this case demonstrates that the SCDC never produced any evidence as to any danger in the use of oils by the Wiccans. This Court erred in finding, with no evidence in the record, "Due to his incarceration, Pencille is not entitled to the use of substances - even those used for religious practices - deemed a security threat." *Id.* at 11. The record in this case is devoid of any proof by SCDC that the oils were a security threat.

For the foregoing reasons, this Court should grant the petition for rehearing and order the South Carolina Department of Corrections to permit the use of religious oils in the Wiccan services or remand this matter to the Administrative Law Court for a ruling of the merits of the claim of Gregory Pencille.

November 16, 2023

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail,com
S.C. Bar № 6188

Attorney for Gregory Pencille

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APPEAL FROM ADMINISTRATIVE LAW COURT
Ralph K. Anderson, III, Administrative Law Judge

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CERTIFICATE OF SERVICE

Sandy Traynham, Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case hereby certifies that on November 16, 2023, she did send a copy of the Petition for Rehearing in the above matter, via e-mail, to Kensey Evans, South Carolina Department of Corrections, at evans.kensey@doc.sc.gov and Christina Catoe Bigelow at bigelow.christina@doc.sc.gov

November 16, 2023

/s/ Sandy Traynham
Sandy Traynham
Secretary

C. Rauch Wise
Attorney at Law
305 Main Street
Greenwood, SC 29646
864-229-5010
SC Bar No. 6188