RECEIVED
Jan 24 2024
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI-COA

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph K. Anderson, III

Appellate Case No. 2023-001971

Gregory Pencille #312332 ..... Petitioner,

v.

South Carolina Department of Corrections ..... Respondent,

PETITION FOR WRIT OF CERTIORARI

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar # 006188
rauchwise@gmail.com
(864) 229-5010

Attorney for Petitioner

TABLE OF CONTENTS

Table of Authorities

Cases: **Page:**

Statues:

Other Authorities:

Statement of Issue On Appeal

Did the South Carolina Department of Corrections violate the religious rights of Gregory Pencille and the Wiccan community as protected by South Carolina Code § 24-27-500, South Carolina Code § 1-32-10, *et seq.* and SCDC policy P.S. 10.05 when the Department of Corrections refused to permit Mr. Pencille and the Wiccan community the use of religious oils when the Department failed to establish any security reason for prohibiting the use of the religious oils?

Statement of the Case

On September 22, 2014, the senior chaplain at Lee Correctional Institution with the Warden and the Program Director approved for the Wiccan community the use of Religious oils for use during Wiccan services. App. at 29. The oils would be given out to the Wiccan Community Coordinator, Gregory Pencille and over seen by the Chaplin. On November 21, 2018, Associate Warden Kenneth Sharpe approved the use of oils by the Wiccan Community. On November 29, 2018, Warden Aaron S. Joyner denied the Appellant the use of oils in Wiccan services. App. at 30.

On February 7, 2019, Appellant filed a Step 1 grievance asserting "Administrative Staff refuses to RSTM/kiosk requests to allow use of religious oils in the Wiccan community services and discriminates against religious requests for Wiccan communities needs." App. at 3. The Warden denied the step 1 grievance. Appellant then filed a step 2 grievance on March 6, 2019, which was denied by the responsible official on April 19, 2019. Appellant received the notice of the denial of his grievance on May 7, 2019. On May 21, 2019, Appellant filed his notice to appeal to the Administrative Law Court asserting the department violated equal protection rights by denying Wiccans the use religious oils and allowing other religions use of sacramental oil.

The record on appeal was filed on August 9, 2019. Appellant filed his brief on September 23, 2019. App. at 20-28. On October 23, 2019, the department filed a motion to dismiss on the ground that there is no state-created liberty interest implicated by Appellant's allegations pursuant to *Slezak v. South Carolina Department of Corrections*, 361 S.C. 331, 605 S.E.2d 508 (2004). App. at 31-34. On October 28, 2019, Appellant filed a Response to the Motion to Dismiss. App. at 35-38.

By final order dated November 27, 2019, the Administrative Law Court judge granted the motion to dismiss and dismissed Appellant's appeal with prejudice. App. at 39-41. Appellant filed his Notice of Appeal on December 27, 2019.

On September 27, 2023, the South Carolina Court of Appeals, in an unpublished opinion, affirmed the decision of the Administrative Law Court. Appellant on October 12, 2023, filed a petition for rehearing. The Court of Appeals granted the Petition for rehearing and issued a new opinion on November 1, 2023 affirming the Administrative Law Court decision. Appellant then filed his second Petition for Rehearing on November 16, 2023. The Petition was denied on November 28, 2023. This Court granted two extensions to file the Petition for Writ of Certiorari. The Petition is due on January 24, 2024.

Standard of Review

As the issue involved in this case is an error of law, the standard of review should be de novo. "We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

Question

Did the South Carolina Department of Corrections violate the religious rights of Gregory Pencille and the Wiccan community as protected by South Carolina Code § 24-27-500, South Carolina Code § 1-32-10, *et seq.* and SCDC policy P.S. 10.05 when the Department of Corrections refused to permit Mr. Pencille and the Wiccan community the use of religious oils when the Department failed to establish any security reason for prohibiting the use of the religious oils?

In response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the South Carolina Legislature passed the South Carolina Religious Freedom Act. S.C. Code § 1-32-30. The act provides as to its purpose, "(1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened." To further implement this act, the legislature made it specifically applicable to the South Carolina Department of Corrections. S. C. Code § 24-27-500 is titled, "Application of Religious Freedom Act to prison regulations." As to prison regulations, the act provides:

> For the purposes of Chapter 32 of Title 1:
> (A) A state or local correctional facility's regulation must be considered "in furtherance of a compelling state interest if 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.
> (B) A state or local correctional facility regulation may not be considered the "least restrictive means" of furthering a compelling state interest if a reasonable accommodation can be made to protect the safety or security of prisoners, correctional staff, or the public.

Thus, the burden is upon the South Carolina Department of Corrections to establish that the religious practice poses a danger or threat to the Department of Corrections. A simple conclusion that a practice is a threat to security is not sufficient. In this case, the Department did nothing more than state the use of oils was dangerous. They provided no factual reason. The court of appeals accepted at face value this claim of threat to security. What makes this conclusion more suspect is that the Wiccan community, through Mr. Pencille as their leader, had previously been granted the permission to use religious oils. When his renewal request was denied, the Department did not even mention any security problems with the previous use of oils. Based upon these facts, which are mainly undisputed, Mr. Pencille has established at the very least a prima facia case of a denial of a religious practice. The court of appeals erred in affirming this case as Mr. Pencille had established a prima facie case of a violation of the South Carolina Religious Freedom Act.

The South Carolina Court of Appeals, in affirming the administrative law court decision made several legally erroneous and factually incorrect conclusions.

The Court of Appeals correctly noted that Gregory Pencille filed his action pursuant to

SCDC Policy PS-10.05. The Court then incorrectly held "Although Pencille cited to federal RFRA and RLUIPA statutes and case law 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. Mr. Pencille based his claim on SCDC Policy PS-10.05 which incorporates the state law as to the protections of religious freedom. The policy provides "STATE/FEDERAL STATUTES: South Carolina Code of Laws, Section 1-32-10, et seq., as amended; S.C. Code §24-27-500; 42 U.S.C. §2000cc, et seq" SCDC PS 10.05 "Inmate Religion". References to the SCDC Policy is made on pages 3, 20, 25 and 26 of the Record on Appeal. The court of appeals erred in failing to recognize that the Policy incorporates the South Carolina Religious Freedom Act. Even if the court were correct in stating the South Carolina statutes were not raised, the 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 upon in seeking relief.

The court of appeals 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.

The 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." App. at 41. This conclusion by the administrative law judge is a finding that SCDC PS 10.05, and the statutes to which it refers, did not created 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. This is an error as a matter of law. The plain wording of both statutes creates a state-created liberty interest in the exercise of religion by prisoners in South Carolina. The ruling by the Administrative Law judge was legally not correct. The court of appeals erred in also finding Mr. Pencille stated no state created liberty interest.

The SCRFRA has not been litigated in South Carolina in any reported appellate cases. Its application to prisons has also not been tested. The decision by the court of appeals is a license to the Department of Corrections to deny any religious practice to an inmate simply because the Department, with no facts, states a religious practice is dangerous. Such was not the intent of the legislature. While great deference should be given the Department, this does not mean their decisions are not without limitation. In abuse of discretion cases this court has said, "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001). This court should not sustain a ruling as to religious liberty that is without evidentiary support. Requiring the Department to supply some evidence is not too great of a burden.

After finding that the issue of Mr. Pencille using religious oils is not preserved for review, the 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. The 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. The two findings seem to be inconsistent. Is the court of appeals saying the SCRFRA and Policy 10.05 never create a liberty interest? After these findings, the 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 any religious practice in the Department of Corrections. The denial of a religious practice will never interfere with an ordinary incident of prison life. After finding that S.C. Code § 24-27-500 applies to this case, the 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. The 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. The 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.

Remand to the Administrative Law Court

In the event this court were to conclude the record in this case is not sufficient for this court to rule upon the merits of this case as to the use of religious oils, this court should grant the Petition for Writ of Certiorari and remand the case back to the Administrative Law Judge for two reasons. First, as noted by the court of appeals, the administrative law judge did not rule upon the merits of the case because the judge deemed he did not have jurisdiction. The court of appeals has found that conclusion to be in error. Having found error, the court should have remanded the case to the administrative law judge for a ruling on the merits. Secondly, the court of appeals 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. If Mr. Pencille had filed such a specific rehearing, and the administrative law court simply denied the motion, there would have been no ruling on the merits below. The failure to file such a rehearing petition simply means the court of appeals should have remanded the case once the court of appeals 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, no court

should expect that judge to then rule upon the merits. If the judge had simply denied the motion for rehearing with no further finding, the 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 an appellate court does not have. The ruling on the merits would then be after a full hearing.

CONCLUSION

For the foregoing reasons this court should grant the petition for writ of certiorari to review the ruling of the South Carolina Court of Appeals. This court should then reverse the decision of the court of appeals an hold that the South Carolina Department of Corrections failed to establish a compelling reason to deny Gregory Pencille and the Wiccan community the use of oils in religious services. In the alternative, after granting the petition, this court should remand the case to the South Carolina Administrative Court for a hearing on the merits.

January 24, 2024

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

Attorney for Gregory Pencille