STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Cordarrell McConnell, #351391, Appellant, v. South Carolina Department of Corrections, Respondent.	)	Docket No. 23-ALJ-04-0394-AP **ORDER**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to an appeal filed by Cordarrell McConnell (Appellant), an inmate incarcerated with South Carolina Department of Corrections (SCDC or Department), challenging the calculation of his sentence.

BACKGROUND AND PROCEDURAL HISTORY

On October 21, 2019, Appellant pled guilty to two counts of Distribution of Fentanyl, second offense, in violation of subsection 44-53-370(b)(1) of the South Carolina Code (2018 & Supp. 2023). He was sentenced to thirty years' imprisonment, suspended to fifteen years.

On June 26, 2023, Appellant filed a Step 1 Grievance, requesting his sentence be modified because the statute under which he was convicted was amended. On July 24, 2023, after the grievance was denied, Appellant filed a Step 2 Grievance on the same grounds. On September 12, 2023, the Department denied his Step 2 Grievance.

On October 2, 2023, Appellant filed a Notice of Appeal with this Court, arguing that "[his] sentence of thirty years suspended to fifteen years should be modified to reflect the new fentanyl law as prescribed in S.C. Code Ann. § 44-53-370(d)(4)." The case was assigned on October 20, 2023. Appellant filed a brief on December 29, 2023. The Department filed the Record on Appeal on January 2, 2024. The Department filed its brief on February 8, 2024.

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). In *Al-Shabazz*, the Supreme Court set forth that the ALC has jurisdiction to review inmate appeals

involving state-created liberty interests in which an inmate contends that prison officials have erroneously calculated his or her sentence. *Id.* The Court reviews these matters in "an appellate capacity." *Id.* at 388, 527 S.E.2d at 754.

"A reviewing court will not disturb findings of [an administrative agency] if its findings are supported by substantial evidence on the record as a whole." *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 397, 489 S.E.2d 219, 220 (Ct. App. 1997). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Furthermore "the party challenging a[n administrative agency's] order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

DISCUSSION

Appellant contends that subsection 44-53-370(d)(4) has been amended and his sentence should be modified to reflect the amendment. Appellant also cites to *Bolin v. South Carolina Department of Corrections* to support his argument. 415 S.C. 276, 781 S.E. 2d 914 (Ct. App. 2016). Appellant's reliance on the amendment of subsection 44-53-370(d)(4) and *Bolin* are both misplaced.

Turning to the statute first, Appellant was convicted under subsection 44-53-370(b)(1), which governs the unlawful *distribution* of fentanyl, among other controlled substances, and prescribes a sentence of "not less than five years nor more than thirty years" for a second offense. In contrast, subsection 44-53-370(d)(4), upon which Appellant relies, was amended in 2023 to add a specific penalty for the *possession* of fentanyl—a sentence of "not more than five years" for a second offense. *See* Act No. 72, 2023 S.C. Acts. 403-404. Thus, although Appellant is correct that subsection 44-53-370(d)(4) was amended in 2023 to provide a penalty for fentanyl *possession* that is less than the penalty he received upon his conviction, it is inapplicable to Appellant's conviction under subsection 44-53-370(b)(1) for *distributing* fentanyl.

In addition, even if Act No. 72 had amended subsection 44-53-370(b)(1) to reduce the penalty for the distribution of fentanyl, the savings clause in section five of Act No. 72 prohibits existing penalties from being amended or repealed by the act. Specifically, section 5 states:

> SECTION 5. The *repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide.* After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties. penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 72, 2023 S.C. Acts 406-407 (emphasis added). Therefore, even if subsection 44-53-370(b)(1) had been amended to reduce the penalty for Appellant's conviction, Appellant's claim would have been barred by the savings clause. Accordingly, Appellant's sentence of thirty years' imprisonment, suspended to fifteen years, cannot be modified based on the recent amendment of subsection 44-53-370(d)(4).

Similarly, the South Carolina Court of Appeals' decision in *Bolin* does not support Appellant's argument. The amendment of subsection 44-53-370(d)(4), upon which Appellant bases his argument, includes language that says "[n]otwithstanding any other provision of law," which is the same phrase the court of appeals analyzed in *Bolin* to determine the legislature intended an amendment of a statute to repeal the effect of an existing law. *Bolin*, 415 S.C. 276, 282, 781 S.E.2d 914, 917 ("The legislature's use of the phrase 'Notwithstanding any other provision of law,' in the amendments to sections 44–53–375 and –370 expresses its intent to repeal section 24–13–100 to the extent it conflicts with amended sections 44–53–375 and –370."). Appellant thus argues that the presence of this phrase in the amended version of subsection 44-53-370(d)(4) shows the legislature intended to repeal the section under which he was convicted. However, in the context of subsection 44-53-370(d)(4), this phrase does not operate to repeal the law under which Appellant was convicted, it merely provides that "[n]otwithstanding any other provision of law, a person convicted and sentenced pursuant to this item [for *possession*] for a first or second offense may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits." Thus, while this phrase is present in subsection 44-53-370(d), as

discussed above, this subsection is inapplicable to Appellant and this phrase does not operate to amend any law unrelated to the *possession* of fentanyl.

Finally, Appellant argues the "solicitor's and court's actions were inappropriate as both lacked subject matter jurisdiction to pick for themselves the penalties and punishments for possession[1] of a substance that had not been established by the General Assembly." This argument is a collateral attack on his conviction and sentence, over which this Court does not have jurisdiction. As mentioned above, in *Al-Shabazz*, the supreme court determined an inmate may appeal to the ALC to "seek review of [the] Department's final decision . . . in a **non-collateral**" matter, i.e., matters in which an inmate does not challenge the validity of a conviction or sentence. 338 S.C. at 354, 527 S.E.2d at 754 (emphasis added). Accordingly, the ALC lacks subject matter jurisdiction to consider this issue. *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897, 900 (1989) ("Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by [the] Court.").

In sum, Appellant failed to carry his burden to show the Department's erred, and the Department's decision must be affirmed. *See Porter*, 333 S.C. at 20, 507 S.E.2d at 332 (holding "the party challenging [an administrative agency's] order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record").

ORDER

For the reasons set forth in this Order,

IT IS HEREBY ORDERED that the Department's final agency decision is **AFFIRMED. AND IT IS SO ORDERED.**

Ralph King Anderson, III
Chief Administrative Law Judge

February 27, 2024
Columbia, South Carolina

[1] Notably, Appellant again mentions the offense of possession of a controlled substance instead of the offense for which he pleaded guilty: distribution.

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Stephanie Perez
Judicial Law Clerk

February 27, 2024
Columbia, South Carolina