

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM MARLBORO COUNTY
ADMINISTRATIVE LAW COURT

DEBORAH B. DURDEN, ADMINISTRATIVE LAW JUDGE

CASE NO. 2013-001541

DOCKET NO. 12-ALJ-04-0916-AP

GRIEVANCE NO. ECI 1137-12

DUSTIN GAINES, #316068

APPELLANT,

V.

SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS,

RESPONDENT,

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GRIEVANCE NO. ECZ-1137-12

APPELLANT PRO SE BRIEF

GROUND(S) FOR RELIEF

1.) VIOLATION OF SCDC POLICY AND APPELLANT'S
CONSTITUTIONAL RIGHTS.

STATEMENT OF ISSUES ON APPEAL

A.) IS THERE ANY EVIDENCE IN THE RECORD THAT COULD SUPPORT THE CONVICTION OF 898 "POSSESSION OF ANY CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE"?

B.) DID ADMINISTRATIVE LAW JUDGE, RALPH K. ANDERSON, OVERTURN, REVERSE, AND VACATE THE DECISION OF THE DEPARTMENT OF CORRECTIONS IN THE RECORD OF THE APPEAL OF VIRGIL HAYGOOD #300382, AN INMATE LISTED AS THE 1ST NAME ON THE INCIDENT REPORT OF THE CASE IN WHICH APPELLANT IS APPEALING?

STATEMENT OF THE CASE

THIS MATTER IS BEFORE THE SOUTH CAROLINA COURT OF APPEALS PURSUANT TO AN APPEAL OF DUSTIN GAINES #316068, AN INMATE INCARCERATED WITH THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. APPELLANT WAS CONVICTED OF VIOLATING SCDC DISCIPLINARY CODE § 898 (POSSESSION OF ANY CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE) UNDER SCDC POLICY OP-22.14 INMATE DISCIPLINARY SYSTEM (OP-22.14). AS A RESULT OF CONVICTION, APPELLANT RECEIVED SANCTIONS THAT INCLUDED THE LOSS OF SIX HUNDRED-FIFTEEN (615) DAYS OF GOOD-TIME CREDITS.

BACKGROUND HISTORY

ON MAY 15, 2012 OFFICER HUNTER AT THE EVANS CORRECTIONAL INSTITUTION CONFISCATED A SMART PHONE FROM INMATE CLYDE CHAPPELL. UPON REVIEWING THE SMART PHONE'S HISTORY, CORRECTIONAL OFFICIALS FOUND PHOTOGRAPHS AND VIDEOS OF VARIOUS INMATES. OFFICERS AT EVANS C.I. TRANSFERRED THE VIDEOS AND PICTURES TO A FLASH DRIVE TO ENHANCE THE PICTURES FOR POSITIVE IDENTIFICATIONS. ON MAY 23, 2012, OFFICER DAVIS ALONG WITH LIEUTENANT MOULTRIE AND SERGEANT HEYWARD, IDENTIFIED JUSTIN GAINES AS ONE OF THE INMATE WHOSE IMAGE WAS ON THE SMART PHONE. AS A RESULT OF THE IDENTIFICATION, APPELLANT WAS CHARGED WITH VIOLATION OF SCDC DISCIPLINARY CODE § 898 (POSSESSION OF ANY CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE).

APPELLANT RECEIVED NOTICE OF THE HEARING ON MAY 31, 2012 BY SERGEANT FOX WHO ERRED BY PROCEDURE PROCESS. HOWEVER, APPELLANT WAS RESERVED A NOTICE OF [REDACTED] THE HEARING ON JUNE 1, 2012 BY OFFICER T. DAVID AND THE HEARING WAS HELD ON JUNE 11, 2012 BEFORE DISCIPLINARY HEARING OFFICER (DHO) ANNIE SELLERS. APPELLANT HAD COUNSEL SUBSTITUTE HUDSON AT THE HEARING, AND HIS ACCUSER APPEARED AT THE HEARING. THE DHO READ OFFICER DAVIS' WRITTEN REPORT INTO THE RECORD. THE DHO ALSO PLAYED IMAGES FROM THE SMART PHONE AND THERE WAS TESTIMONY IDENTIFYING APPELLANT IN THE IMAGE. AT THE CONCLUSION OF THE HEARING, THE DHO FOUND APPELLANT GUILTY OF THE CHARGE OF VIOLATING SCDC DISCIPLINARY CODE § 898 (POSSESSION OF ANY CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE) UNDER SCDC POLICY OP-22.14, INMATE DISCIPLINARY SYSTEM BASED ON DAVIS' WRITTEN REPORT, LT. TOMS' TESTIMONY AND PICTURES AND VIDEOS

THE DHO ISSUED SANCTIONS THAT INCLUDED THE LOSS OF SIX HUNDRED-FIFTEEN (615) DAYS OF "GOOD-TIME" CREDITS. APPELLANT FILED A STEP 1 GRIEVANCE ON JUNE 24, 2012 RECEIVED BY [REDACTED] I.G.C. ON JUNE 25, 2012, THAT HE WAS NOT AFFORDED DUE PROCESS AND THAT THE PHONE WAS NOT IN HIS POSSESSION.

AFTER APPELLANT RECEIVED THE DENIAL OF HIS STEP 1 GRIEVANCE ON JULY 19, 2012 HE THEN FILED HIS STEP 2 GRIEVANCE ON JULY 23, 2012. ON NOVEMBER 11, 2012 APPELLANT'S STEP 2 GRIEVANCE WAS DENIED. APPELLANT THEN FILED A NOTICE OF APPEAL WITH THE ADMINISTRATIVE LAW JUDGE COURT (ALT) DECEMBER 17, 2012. APPELLANT WAS ASSIGNED (ALT) DEBORAH B. DURDEN ON JANUARY 9, 2013. APPELLANT'S ADMINISTRATIVE LAW COURT CASE NO. 12-ALT-04-0916-AP GRIEVANCE NO. ECI-1137-12 WAS SUBSEQUENTLY DENIED IN SUCH REQUESTED RELIEF. APPELLANT THEN APPEALED (ALT) DEBORAH B. DURDEN'S DECISION WITH THE SOUTH CAROLINA COURT OF APPEALS ON JULY 22, 2013 IN WHICH CASE WAS ACCEPTED AS CASE NO. 2013-001541. ON SEPTEMBER 17, 2013 APPELLANT AND RESPONDENT WAS SERVED A TEN (10) DAY ORDER FOR APPELLANT TO FILE A BRIEF WITH THE COURT. ON SEPTEMBER 20, 2013 APPELLANT RECEIVED NOTICE THRU (EVANS) CORRECTIONAL INSTITUTION'S MAIL ROOM.

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). THE COURT'S APPELLATE JURISDICTION IN INMATES APPEALS IS LIMITED TO STATE-CREDITED LIBERTY INTERESTS TYPICALLY INVOLVING: (1) CASES IN WHICH AN INMATE CONTENTS THAT PRISON OFFICIALS HAVE ERRONEOUSLY CALCULATED HIS SENTENCE, SENTENCE RELATED CREDITS, OR CUSTODY STATUS; AND (2) CASES IN WHICH AN INMATE HAS RECEIVED PUNISHMENT IN A MAJOR DISCIPLINARY HEARING AS A RESULT OF A SERIOUS RULE VIOLATION. Id. FURTHERMORE, WHEN REVIEWING THE DEPARTMENT'S DECISIONS IN INMATE GRIEVANCE MATTERS, THE COURT SITS IN AN APPELLATE CAPACITY. Id. AT 377; 527 S.E. 2d AT 754; SEE ALSO S.C. CODE ANN § 1-23-600 (E) (SUPP. 2012) (DIRECTING ADMINISTRATIVE LAW JUDGES TO CONDUCT APPELLATE REVIEW IN THE SAME MANNER PRESCRIBED IN § 1-23-380). SECTION 1-23-380 (A) (5) STATES:

THE COURT MAY NOT SUBSTITUTE ITS JUDGEMENT FOR THE JUDGEMENT OF THE AGENCY AS TO THE WEIGHT OF THE EVIDENCE ON QUESTION OF FACT, THE COURT MAY AFFIRM THE DECISION OF THE AGENCY OR REMAND THE CASE FOR FURTHER PROCEEDINGS. THE COURT MAY REVERSE OR MODIFY THE DECISION IF SUBSTANTIAL RIGHTS OF THE APPELLANT HAVE BEEN PREJUDICED

BECAUSE THE ADMINISTRATIVE FINDINGS, INFERENCES, CONCLUSIONS, OR DECISIONS ARE:

- (A) IN VIOLATION OF CONSTITUTIONAL OR STATUTORY PROVISIONS;
- (B) IN EXCESS OF THE STATUTORY AUTHORITY OF THE AGENCY;
- (C) MADE UPON UNLAWFUL PROCEDURE;
- (D) AFFECTED BY OTHER ERROR OF LAW;
- (E) CLEARLY UNWARRANTED AND ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD; OR
- (F) ARBITRARY OR CAPRICIOUS OR CHARACTERIZED BY ABUSE OF DISCRETION OR CLEARLY UNWARRANTED EXERCISE OF DISCRETION.

ARGUMENT AND FACTS

S.C. CODE ANN. § 1-23-380(5) (SUPP. 2012).

CONSEQUENTLY, AN ADMINISTRATIVE LAW JUDGE MAY NOT SUBSTITUTE HIS JUDGEMENT FOR THAT OF AN AGENCY "AS TO THE ADMINISTRATIVE LAW JUDGE AND THE WEIGHT OF THE EVIDENCE ON QUESTION OF FACT." ACCORDINGLY, THE POSSIBILITY OF DRAWING TWO INCONSISTENT CONCLUSIONS FROM THE EVIDENCE DOES NOT PREVENT ADMINISTRATIVE AGENCY'S FINDING FROM BEING SUPPORTED BY SUBSTANTIAL EVIDENCE. GRANT V. S.C. COASTAL COUNCIL, 319 S.C. 348, 353, 461 S.E. 2d 388, 391 (1995).

ADDITIONALLY, IN SUPERINTENDENT, MASS. CORR. INST. WALPOLE V. HILL, 472 U.S. 445, 455-456, 105 S. Ct. 2768 (1985), THE U.S. SUPREME COURT HELD THAT "THE RELEVANT QUESTION IS WHETHER THERE IS ~~ANY~~ ANY EVIDENCE IN THE RECORD THAT COULD SUPPORT THE CONCLUSION REACHED BY THE DISCIPLINARY BOARD."

A.) APPELLANT HAS ALLEGED THAT THERE WAS NO EVIDENCE TO SUPPORT THE CONVICTION FOR VIOLATING SCDC DISCIPLINARY CODE § 898 (POSSESSION ██████████ OF ANY CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE); IN EVALUATING THE EVIDENCE PRESENTED AT THE HEARING, "[T]HE FACT FINDER IS IMBUEO WITH BROAD DISCRETION IN DETERMINING CREDIBILITY OR BELIEVABILITY OF WITNESSES." SMALL V. PIONEER MACHINERY, INC., 329 S.C. 442, 465, 494 S.E. 2d 835, 843 (Ct App. 1997) MOREOVER, IN HILL, 472 U.S. AT 455-56, 457 (1985), THE U.S. SUPREME COURT HELD THAT THE REVOCATION OF GOOD TIME MUST BE SUPPORTED BY "SOME EVIDENCE IN THE RECORD."

HOWEVER, "[A]SCERTAINING WHETHER THIS STANDARD IS SATISFIED DOES NOT REQUIRE EXAMINATION OF THE EVIDENCE, INSTEAD, THE RELEVANT WEIGHT AND WITNESS REQUIRED EXAMINATION OF THE ENTIRE RECORD, INDEPENDENT ASSESSMENT OF THE CREDIBILITY OF WITNESSES, OR WEIGHING OF THE EVIDENCE. INSTEAD, "THE RELEVANT QUESTION IS WHETHER THERE IS ANY EVIDENCE IN THE RECORD THAT COULD SUPPORT THE CONCLUSION REACHED BY THE DISCIPLINARY BOARD." Id. AT 455. THUS, IF REASONABLE MINDS COULD ARRIVE AT THE DHO'S CONCLUSION BASED UPON THE EVIDENCE PRESENTED, THE DEPARTMENT'S DECISION MUST BE UPHOLD REGARDLESS OF THE DERIVATION OF THE EVIDENCE. SEE ALSO SMITH V. SAMU, 54 F. 3d 788 (10th CIR. 1995).

HERE, SCDC DISCIPLINARY CODE § 898 PROVIDES:
THE POSSESSION OF ANY CELL PHONE OR OTHER TYPE OF COMMUNICATION DEVICE: POSSESSION OF, RECEIVES OR USES (AUDIO/VISUAL), CONCEALS, DISPOSES, STORES, FACILITATES, BARTERS, BUYS, SALES OF PHONES OR OTHER COMMUNICATIONS EQUIPMENT AND/OR ANY COMPONENTS THERE OF. THIS INCLUDES BUT IS NOT LIMITED TO, MP3 PLAYERS, I-PODS, OR ANY LIKE DEVICES.

"POSSESSION" IS DEFINED AS "A: THE ACT OF HAVING OR TAKING INTO CONTROL... C: OWNERSHIP" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY. 909 (10th ED. 1993)

STATE V. TABURY, 260 S.C. 355, 196 S.E. 2d 111, WE SAID: "WE RECOGNIZE THAT PROOF OF ██████ POSSESSION REQUIRES MORE THAN PROOF OF MERE PRESENCE, AND THAT THE STATE MUST SHOW DEFENDANT HAD DOMINION AND CONTROL OVER IT."

S.C. 1974, ACCUSED HAS "POSSESSION" OF CONTRABAND MATERIAL WITHIN MEANING OF LAW WHEN HE HAS BOTH THE POWER AND INTENT TO CONTROL ITS DISPOSITION OR USE - STATE V. ELLIS, 207 S.E. 2d 408, 263 S.C. 12.

WHILE THE RECORD ON APPEAL REFLECTS THAT PHOTOGRAPHIC OR ██████ VIDEO EVIDENCE REGARDING APPELLANT WAS ON THE SEIZED PHONE, THE EVIDENCE DID NOT ESTABLISH THAT THE PHONE WAS SEIZED FROM APPELLANT. BEING THAT IT IS KNOWN FACTS THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF POSSESSION OF A CELL PHONE AND THAT CELL PHONES CAN ██████ TRANSMIT PHOTOGRAPHIC IMAGES TO OTHER CELL PHONES, THE PRESENCE OF VIDEOS OR PHOTOGRAPHIC IMAGES SHOULD NOT BE CONSIDERED SUBSTANTIAL EVIDENCE, BECAUSE THE PHOTO COULD HAVE CAME FROM A CELL PHONE THAT APPELLANT WAS ALREADY CONVICTED ██████ OF.² THE EVIDENCE IN THE RECORD REFLECTS THAT THE DHO RELIED ON THE WRITTEN REPORT AND TESTIMONY OF THE PRISON EMPLOYEE THAT THE APPELLANT'S PICTURE AND VIDEOS OF APPELLANT WERE FOUND ON THE CELL PHONE. ██████ A STILL PHOTO OF APPELLANT WAS SHOWN AT THE HEARING. NEVERTHELESS, THERE IS NOTHING IN THE RECORD ON APPEAL TO SHOW APPELLANT EVER POSSESSED THE CELL PHONE DURING THE IMAGE OF THAT DATA. THE RECORD ALSO DOES NOT SHOW THAT ANYONE SAW THE CELL PHONE OR DEVICE IN APPELLANT'S POSSESSION. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE CONCLUSION REACHED BY THE DHO, OR TO SUSTAIN APPELLANT'S ERRONEOUS CONVICTION WHICH SHOWS PREJUDICE BY (ALT) DEBORAH B. DURDEN'S DECISION IN APPELLANT'S APPEAL CASE NO. 12-ALT-04-0916-AP.

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"SUBSTANTIAL EVIDENCE IS NOT A MERE SCINTILLA OF EVIDENCE NOR THE EVIDENCE VIEWED BLINDLY FROM ONE SIDE OF THE CASE, BUT IS EVIDENCE WHICH, CONSIDERING THE RECORD AS A WHOLE, WOULD ALLOW REASONABLE MINDS TO REACH THE CONCLUSION THAT THE ADMINISTRATIVE AGENCY REACHED OR MUST HAVE REACHED IN ORDER TO JUSTIFY IT'S ACTION." LARK V. BI-LO, 276 S.C. 130, 135, 276 S.E. 2d 304, 306 (1981) (QUOTING LAW V. RICHLAND COUNTY SCH. DIST. NO. 1, 270 S.C. 492, 495-96, 243 S.E. 2d 192, 193 (1978)).

B.) APPELLANT FILED A DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL PROPOSING THAT ALL DOCUMENTS CONCERNING OR PERTAINING TO THE APPEAL OF VIRGIL HAYGOOD # 300382 BE INCLUDED IN THE RECORD ON APPEAL. VIRGIL HAYGOOD WAS INDEED CHARGED ALONG WITH APPELLANT, WAS CONVICTED OF THE CHARGE, AND APPEALED THE DHO'S DECISION WHERE HE EVENTUALLY SOUGHT RELIEF IN THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT. THE HONORABLE RALPH K. ANDERSON REVERSED HIS CASE ~~AND~~ AND ORDERED THE ADMINISTRATIVE AGENCY TO UPLIFT ALL SANCTIONS AND REINSTATE ALL LOSS OF GOOD-TIME CREDITS.

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CONCLUSION

FOR THE RECORD APPELLANT RESPECTFULLY REQUEST FROM THE HONORABLE SOUTH CAROLINA COURT OF APPEALS THIS COURT REVERSE, OVERTURN AND VACATE THE DECISION OF THE DEPARTMENT OF CORRECTIONS AND THAT APPELLANT'S "GOOD TIME" CREDITS BE REINSTATED.

JENNY ABBOTT KITCHINGS, CLERK
POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

RESPECTFULLY SUBMITTED,
Dustin Gaines
DUSTIN GAINES #316068
EVANS CORR INST.
610 HWY 9 WEST
BENNETTSVILLE SC. 29512

CERTIFICATE OF SERVICE

I CERTIFY WITH MY SIGNATURE UNDER A PENALTY OF [REDACTED] PERJURY THAT THIS BRIEF IS TRUE TO THE BEST STATED NARRATIVE AND MY ABILITY WITH NO EXPERTISE OF ANY KIND. I ALSO STATE THAT A COPY OF THE EXACT SAME BRIEF WAS SERVED TO ALL PARTIES BY PLACING A COPY IN (EVANS) MAIL BOX.

DATE: SEPTEMBER 27, 2013

S/ Dustin Gaines
DUSTIN GAINES

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 27th DAY OF September,
2013.

[Signature]
NOTARY PUBLIC
MY COMMISSION EXPIRES: Feb 9th 2020

!!!!!!!