

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Administrative Law Court

John D. McLeod Administrative Law Judge

Appellate Case No. 2014-001093

Perry Gilmore #344879

APPELLANT

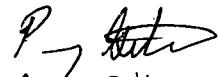
V.

South Carolina Department
of Corrections

RESPONDENT

INITIAL BRIEF OF APPELLANT

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Perry Gilmore #344879
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March 13, 2015

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SC Court of Appeals

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TABLE OF AUTHORITIES

CASES

Wolff v. McDonnell, 418 U.S. 539 (1974)
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Sandefur v. Lewis, 937 F. Supp. 890 (D. Ariz. 1996)
Castaneda v. Marshall, 1997 WL 123253 at *3 (M.D. Cal. March 10, 1997)
Wicker v. South Carolina Department of Corrections, 360 S.C. 421, 602 S.E.2d 56
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Jones v. N.C. Prisoners Labor Union, Inc, 433 U.S. 119 (1977)
Adderley v. State of Florida, 385 U.S. 39
Cohen v. California, 403 U.S. 15 (1971)

STATUTES

S.C. Code § 1-23-380 (A) (6)

S.C. Code § 1-23-380 (5)

Court Rules

South Carolina Appellate Court Rules: Rule 202 (1) SCACR

STATEMENT OF ISSUES ON APPEAL

1. Judge McLeod's ruling ("ruling") fails S.C. Code §1-23-380 (A) (6) review ("review") where he found Appellant was not given twenty-four (24) hour due process notice of disciplinary charge but did not find a due process violation or grant relief.
2. Ruling fails review where Accuser violated due process rights of Appellant where South Carolina Department of Corrections ("SCDC") disciplinary procedure OP-22.14 §§ 3 thru 3.2 mandates Accuser, on the incident report, write her full name, sign her full, real signature, list herself as the employee involved, and write Appellant's name and she did neither.
3. Ruling fails review where Accuser violated due process rights of Appellant where Accuser negated the claim she saw Appellant masturbating where she failed to list herself as the 'employee involved' under the caption provided for such on the incident report and the incident report was the only evidence the Hearing Officer relied on to convict Appellant.
4. Ruling fails review where Appellant's due process rights were violated where the Accusers' supervisor signed the incident report charging Appellant with committing the offense before the Accuser had even alleged the commission of the offense.
5. Ruling fails review where Appellant's due process rights were violated where the Hearing officer convicted Appellant, whose name is Perry Gilmore, based solely on a report which accused an inmate named Gilmore Perry.
6. Ruling fails review where Appellant's due process rights were violated where the definition of the offense requires an inmate to have exposed and/or stimulated his genitals in a person's view and the Accuser never specified in the report the Hearing Officer relied on that she actually saw Appellant's exposed genitals or Appellant's hand stimulating his genitals as opposed to only assuming Appellant was masturbating behind his nonsee-through solid steel door.
7. Ruling fails review where Appellant's due process rights were violated where the Hearing Officer convicted and sanctioned Appellant for allegedly masturbating in view of the Accuser in the same cell Respondent permits Appellant to expose his genitals in view of others in.

(P.B.)

STATEMENT OF THE CASE

Record sent up from Administrative Law Court and notice of appeal filed in this case incorporated by reference. Appellant appeals to the Court of Appeals Administrative Law Judge McLeod's ruling upholding final decision of Respondents convicting Appellant of disciplinary offense called Exhibitionism and Public Masturbation and sanctioning him with, inter alia, revocation of goodtime credits.

ARGUMENT

1. Issue 1 on appeal incorporated by reference. See Order of Judge McLeod ("Order") finding Appellant was not given 24 hour notice but not granting relief. See *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that when goodtime credits are revoked 24 hour due process notice of charge is due). See South Carolina Appellate Court Rules: Rule 202 (1) SCACR (prison disciplinary hearing not included in definition of lower court). See *Belton v. State*, (S.C. 1994) 313 S.C. 549, 443 S.E. 2d 554 (Issue not raised in grievance hearing could be raised in higher court). See Rule 59 (e) Motion to Alter or Amend Judgment preserving issue. See S.C. Constitution ("Const.") Article ("Art.") I § 22 and S.C. Code § 1-23-380 (5) (Appellant entitled to judicial review for decisions affecting his rights).
2. Issue 2 on appeal incorporated by reference. See Appellant Brief and Reply Brief arguing issues. See Order not ruling on issues. See Rule 59 (e) Motion to Alter or Amend Judgment preserving all issues not ruled on. See Step 1 & 2 grievance raising issues to Respondent on appeal of conviction before final decision. See Rule 202 (2) SCACR, supra. See *Belton*, supra. See S.C. Const. Art. I § 22 and S.C. Code § 1-23-380 (5), supra. See *Sandefur v. Lewis*, 937 F.Supp. 890, 895 (D. Ariz. 1996), *Castaneda v. Marshall*, 1997 WL 123253 at *3 (M.D. Cal. March 10, 1997), and *Wicker v. South Carolina Department of Corrections*, 360 S.C. 421, 424-25, 602 S.E. 2d 56, 58 (2004) (state regulations create liberty interests post *Sandin*). See SCDC procedure OP-22.14 § 3 thru 3.2 mandating Accuser, on incident report, write her full name, sign her full, real signature, list herself as employee involved, and write Appellant's name). See SCDC 19-29A, "Incident Report" ("19-29A") showing she did neither.
3. Issue 3 on appeal incorporated by reference. See Appellant's Brief and Reply Brief arguing issues. See Order not ruling on same. See Rule 59 (e) Motion to Alter or Amend Judgment ("Rule 59 (e) motion") preserving all issues not ruled on. Also see Step 1 & 2 grievance raising issues to Respondent on appeal of conviction before final decision. See Rule 202 (1) SCACR, supra. See *Belton*, supra. See S.C. Const. Art. I § 22 and S.C. Code § 1-23-380 (5), supra. See 19-29A showing Accuser failed to list herself as employee involved. See SCDC 19-69, "Disciplinary Hearing Record and Report" ("19-69") showing Hearing Officer relied on report only to convict Appellant.
4. Issue 4 on appeal incorporated by reference. See Appellant's Brief and Reply Brief arguing issues. See Order not ruling on same. See Rule 59 (e) motion preserving all issues not ruled on. Also see Step 1 & 2 grievance raising issues to Respondent on appeal of conviction before Agency's final decision. See S.C. Const. Art. I § 22 and S.C. Code § 1-23-380 (5), supra. See *Belton*, supra. See Rule 202 (1) SCACR, supra. See 19-29A showing ~~Supervisor signing report charging Appellant before time of incident.~~ (P. 4.)
5. Issue 5 on appeal incorporated by reference. See Appellant's Brief & Reply Brief arguing issues. See Order not ruling on same. See Rule 59 (e) Motion preserving all issues not ruled on. Also see Step 1 & 2 grievance raising issues to Respondent on appeal before final decision. See Rule 202 (1) SCACR, supra. See *Belton*, supra. See S.C. Const. Art. I § 22 and S.C. Code § 1-23-380 (5), supra. See 19-29A showing accused is named Gilmore Perry. See Appellant's name herein is Perry Gilmore.

6. Issue 6 on appeal incorporated by reference. See Appellant's Brief and Reply Brief arguing same. See Order not ruling on same. See Rule 59(c) motion preserving all issues not ruled on. Also see Step 1 & 2 grievances raising issues to Respondent on appeal of conviction before final decision. See Rule 202(1) SCACR, *supra*. See Belton, *supra*. See Const. Art. I § 22 and S.C. Code § 1-23-380(5), *supra*. See SLDL procedure OP-22.14 disciplinary offense 854 showing an inmate must have exposed and/or stimulated his genitals in a person's view to constitute offense. See 19-29A showing Accuser never stated she actually saw such as opposed to "assuming" Appellant was masturbating behind his door while he signed for mail. See Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328, 41 332 (1998) (the Accuser's report must be "sufficiently detailed to enable [the reviewing body] to determine whether the [allegation meets the definition of the offense charged]"). A "recital of conflicting testimony followed by a general conclusion is patently insufficient." Id.

7. Issue 7 on appeal incorporated by reference. Respondent permits Appellant to urinate, wash in his sink, shower, and undress to change his boxers in view of staff and cellmates in his cell. Therefore, punishing him for allegedly exposing his genitals in view of another in his cell is contradictory, capricious, and under-inclusive. See Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (decision may be reversed if "capricious"); Conner v. Town of Hilton Head Island, (S.C. 1994) 314 S.C. 251, 442 S.E.2d 608 (underinclusive ordinance regulating nudity violative). Also, see Jones v. N.C. Prisoners Labor Union, Inc. 433 U.S. 119, 136 (1977) (correctional facilities not "public"). And finally, see Cohen v. Cal. Farms, 403 U.S. 15, 21 (1971) (A person can "avoid further bombardment of their sensibilities by averting their eyes.")

CONCLUSION

For the foregoing reasons, ruling falls review and Appellant requests reversal.

I swear under penalty of perjury above is true to best of my knowledge.


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(APPELLANT)

March 13, 2015
Ridgeville, SC

The State of South Carolina
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John D. McLeod

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PROOF OF SERVICE

This certifies service of designation of matter to be included
in the Record on Appeal has this 13 day of March 2015
been made on all parties to this appeal by placing same in the
United States Mail postage paid as has Appellant's Brief.

This 13 day of March 2015
By: PJ [Signature]

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SC Court of Appeals

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