STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bernard McFadden, 199135 Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No.: 15-ADJ-04-0289-AP Grievance No.: KRCI 1176-15 ORDER OF DISMISSAL

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to the Notice of Appeal filed June 24, 2015, by Bernard McFadden ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections ("the Department"). Appellant complains the Department has failed to properly calculate sentence-related credits and max out date for a sentence he completed on December 25, 2000. Appellant contends that although he has already completed the sentence he challenges here, the issue is not moot because of collateral consequences from the improper sentence calculation. Specifically, Appellant claims that had the Department properly calculated his sentence, then the evidence of the accompanying conviction would have been too remote to be used to impeach his character under Rule 609 of the South Carolina Rules of Evidence ("SCRE") at his 2010 trial for another offense, for which he was convicted. Appellant intends to use the evidence of his allegedly incorrect sentence to attack his 2010 conviction in a pending PCR action.

BACKGROUND

On August 16, 1995, Appellant plead guilty to three charges, including two counts of Second Degree Burglary (Violent) and one count of Grand Larceny. The judge sentenced Appellant to fifteen years' imprisonment for the First Burglary charge (Indictment Number 95-GS-14-306), ten years' imprisonment for the Second Burglary charge (Indictment Number 95-GS-14-187), and five years' imprisonment for Grand Larceny. The Second Burglary charge was to run concurrent to the First Burglary charge, and the Grand Larceny sentencing sheet contained the notation "concurrent." The First Burglary sentencing sheet also included the notation "credit for time served," while the two other sentencing sheets did not.

On July 11, 2002, in a PCR action, the South Carolina Supreme Court vacated Appellant's conviction for the First Burglary charge, Indictment Number 95-GS-14-306.

Sometime in 2010, Appellant went to trial and was convicted of second degree burglary again.

On February 9, 2012, Appellant submitted two Requests to Staff Member to a Mr. Eury and a Ms. York, requesting an audit of the Second Burglary conviction, arguing his max out date of December 25, 2000, was incorrect and should not have exceeded November 1, 2000. In response, Mr, Eury indicated Appellant needed to take up the issue with the sentencing judge and clerk of court because the judge did not add jail time credit to the sentence. Ms. York indicated Mr. Eury's response was correct.

On October 14, 2014, Appellant filed a Step One Grievance, which was denied. The denial cited with approval Mr. Eury's response that the sentencing judge had failed to indicate Appellant was to receive jail time credit, and, therefore, the Department could not adjust Appellant's sentence. On December 29, 2014, Appellant filed a Step 2 Grievance, which was similarly denied. Appellant then appealed to this Court.

DISCUSSION

Appellant argues that had the Department properly calculated his sentence-related credits for his Second Burglary conviction, his correct max out date for that sentence would have rendered the Second Burglary conviction too remote under Rule 609, SCRE, to be admitted to impeach his character at his 2010 trial. Accordingly, Appellant argues he needs this Court to correct his 1995 Second Burglary sentence max out date in order to properly challenge the resulting 2010 conviction in his pending PCR action. Essentially, Appellant contends he suffered collateral consequences from the Department's incorrect calculation of his sentence, which persist in his current PCR action.

For its part, the Department appears confused by Appellant's argument, arguing (1) Appellant's current sentences and jail time credits are correctly calculated (although Appellant makes no argument about his current sentences), and (2) the only 1995 conviction for which the judge gave Appellant jail time credit was the First Burglary charge, which was vacated. The Department further argued Appellant's remaining 1995 convictions are in no way connected to his current sentences.

Before this court addresses the merits of this case, it must first address jurisdiction.

Although neither party has raised the issue of subject matter jurisdiction, this Court has the authority to raise it *sua sponte*. Badeaux v. Davis, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999) ("Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court.").

The ALC has subject matter jurisdiction when the Department disciplines an inmate and imposes a punishment that deprives the inmate of a constitutionally protected liberty or property interest. Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 441-42, 586 S.E.2d 124, 126 (2003); Al-Shabazz v. State, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000); Skipper v. S.C. Dep't of Corr., 370 S.E. 267, 273-74, 633 S.E.2d 910, 914 (Ct. App. 2006). Slezak v. South Carolina Department of Corrections, 361 S.C. 327, 605 S.E.2d 506 (2004), provided further clarification that this Court has jurisdiction of all inmate grievance appeals that have been properly filed. However, when the grievance appeal does not implicate a state-created liberty or property interest, the ALC may summarily dismiss the appeal at its discretion. Furtick v. South Carolina Department of Corrections, 374 S.C. 334, 649 S.E.2d 35 (2007).

For the purpose of establishing jurisdiction in this case, a state-created liberty or property interest exists when an inmate alleges prison officials have erroneously calculated his sentence, sentence-related credits, or custody status. Sullivan, 355 S.C. at 441, 586 S.E.2d at 126. Appellant argues his sentence for his 1995 Second Burglary conviction was wrongly calculated because certain sentence-related credits were not properly applied. Under Al-Shabazz and Sullivan, this would ordinarily give this Court jurisdiction to address the issue. However, in Appellant's case, it has been over ten years since he completed serving the sentence he now contests, which raises the issue of mootness. Moreover, this issue is complicated by the fact that Appellant is ultimately seeking to make a collateral attack upon a later 2010 criminal conviction. I find this Court does not have jurisdiction to address Appellant's sentencing issue for two reasons: (1) to the extent Appellant has raised an issue cognizable in an administrative action, I find that issue is moot; and (2) I find Appellant's challenge to his sentence is more appropriately raised as part of his pending PCR action.

An action becomes moot when rendering judgment would have no legal effect upon the controversy. Collins Music Co. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005). Ordinarily, when an inmate challenges his sentence or a disciplinary conviction, but the inmate completes his sentence and is released before his or her case reaches this Court, this Court will

dismiss the case as moot. See Willie Evans, Jr., #241416, Appellant, Docket No.: 00-ALJ-04-00525-AP, 2001 WL 1262665, at *1 (Sept. 25, 2001) (holding an inmate's appeal challenging his punishment for a disciplinary conviction was moot because the inmate had been released from state custody and "judgment, if rendered, [would] have no practical legal effect upon the existing controversy (citation omitted)); Earvin Smith, #164245, Appellant, 00-ALJ-04-00232-AP, 2001 WL 1488109, at *1 (Nov. 6, 2001). However, there are exceptions to the mootness doctrine.

Appellant cites to Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997) to support his argument that his case is not moot. In Jackson, the South Carolina Supreme Court held the appellant was entitled to petition for PCR although he had already served his sentence because he was suffering from "continuing consequences as a result of his alleged invalid conviction." Id. at 489-90, 489 S.E.2d at 916-17. In support of its conclusion, the supreme court cited to Sibron v. State of New York, 392 U.S. 40 (1968). Id. at 490 n. 2, 489 S.E.2d at 917 n.2. In Sibron, the United States Supreme Court discussed the doctrine of mootness as it relates to challenges to criminal convictions that have already been served. Sibron, 392 U.S. at 50-58. The Court noted two exceptions to the doctrine of mootness as it relates to criminal convictions. Id. at 51-54. First, a court has jurisdiction when the petitioner could not have brought the case to the court for review before the expiration of his sentence and, second, a court has jurisdiction when the petitioner can show collateral legal consequences persist from the previous conviction. Id. In Sibron, the petitioner challenged a six-month sentence, which he had already served by the time it reached the Court. Id. at 50-52. The Court found petitioner met both exception to the doctrine of mootness because (1) his case could not have made it to the Court before he finished his sentence, and (2) under New York law his conviction could be used to impeach his character should it be at issue in a future criminal trial and it would be a factor in sentencing in any future criminal conviction. Id. at 50-56.

Jackson and Sibon touch on a similar issue to the one raised here - the collateral consequences of a prior conviction. In particular, the Court in Sibron referenced the collateral consequences of a prior conviction being used as character impeachment in a future criminal proceeding, much like Appellant is trying to argue here. See Sibron, 392 U.S. at 55-56. However, I find Jackson and Sibon, are distinguishable from the case at bar because they discuss the rights of a petitioner to *bring a PCR action challenging the prior conviction, not sentence length.* Therefore, the collateral consequences envision by the Jackson and Sibron courts are those

consequences arising from the mere existence of a conviction, not sentence length. Accordingly, I do not find Jackson and Sibron to be directly applicable to Appellant's *administrative action.*

Nevertheless, the similarity of Appellant's plight to the petitioners' plights in Jackson and Sibon raise the question of whether Appellant's action is a PCR action masking as an administrative action. Although Appellant is attacking his sentence length and not his conviction, his ultimate goal is to attack his 2010 conviction in his pending PCR action. The attack on his sentence in this court is merely a part of his PCR case. Therefore, while Al-Shabazz, holds this Court has jurisdiction over non-collateral, administrative matters related to sentencing and sentence-related credits, I find this case is, at its heart, a piece of a collateral attack on Petitioner's 2010 conviction, which the supreme court, in All-Shabazz, held is a matter for the PCR court. Al-Shabazz, 338 S.C. at 367-68, 367, 527 S.E.2d at 749.

Specifically, the PCR court has the authority to address Appellant's ultimate issue, while this Court does not. Appellant's argument centers on the allegation that he should not have been impeached with the Second Burglary conviction under Rule 609, SCRE, at his 2010 trial because the conviction should have been too remote if the Department had properly calculated his sentence. Under Rule 609(b), SCRCP, evidence of a conviction more than ten years old "since the date of the conviction or other release of the witness from the confinement imposed for that conviction, whichever is the later date" is not admissible "*unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.*" Rule 609, SCRE (emphasis added). This Court has no jurisdiction to review the application of Rule 609, SCRE, in Appellant's 2010 trial or overturn Appellant's conviction. See Al-Shabazz, 338 S.C. at 367-68, 527 S.E.2d at 749. In contrast, the PCR court can, for example, review whether Appellant's counsel at his 2010 trial was ineffective for failing to object to the admission of Appellant's Second Burglary conviction under Rule 609, SCRE, and grant any relief it deems proper. See id.; Green v. State, 338 S.C. 428, 432, 527 S.E.2d 98, 100 (2000) (affirming the PCR court's finding that counsel was ineffective for failing to argue the prejudicial effect of admitting his client's prior convictions under Rule 609, SCRE, outweighed their probative value).

Therefore, because Appellant's appeal to this Court is really part of his attempt to overturn his 2010 conviction in the PCR court, I find the PCR court, not this Court, is the appropriate venue for Appellant's issue. See Al-Shabazz, 338 S.C. at 367-68, 527 S.E.2d at 749. Moreover, to the

extent Appellant's appeal falls within the administrative realm, I find the appeal is moot. I find it is moot because Appellant has already served his sentence, and this Court's judgment on the matter would have no practical legal effect, except perhaps a hypothetical effect on his pending PCR action. See Collins Music Co., 365 S.C. at 549, 619 S.E.2d at 3; Willie Evans, Jr., #241416, Appellant, Docket No.: 00-ALJ-04-00525-AP, 2001 WL 1262665, at *1; see also Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25-26, 630 S.E.2d 474, 477 (2006) ("A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract.").[1]

Based on the above, **IT IS HEREBY ORDERED** that this appeal is **DISMISSED** for lack of jurisdiction.

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

January 27th, 2016
Columbia, South Carolina

27 day of January 20__

Law Clerk

[1] I note Appellant had the opportunity to contest his sentence-related credits or max out date at any time during his service of the sentence at issue, but he did not challenge it until over ten years after completing it. Cf. Sibron, 392 U.S. at 51-52 (noting one exception to the mootness doctrine is when the petitioner could not have brought his case for review before the expiration of his sentence).