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DEC 29 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 16-ALJ-15-0012-IJ

Appellate Case No. 2016-002100

BASIL W. AKBAR, #065498APPELLANT

v.

SOUTH CAROLINA DEPARTMENT OF PROBATION,
PAROLE AND PARDON SERVICES.....RESPONDENT

INITIAL BRIEF OF RESPONDENT

Tommy Evans, Jr.
Assistant General Counsel

**South Carolina Department of Probation,
Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250**

ATTORNEY FOR THE RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- 1. Did the ALC err in dismissing the Appellant's appeal due to his failure to file the notice of appeal within the time limit imposed by the rules**

STATEMENT OF THE CASE

On December 23, 1970, the Appellant along with his co-defendants entered a cab with the intent to rob the driver. The cab driver only had in her possession eight dollars and fifty cents (\$8.50). After submitting to the Defendant's demands offering all the money she had in her possession, the Appellant shot the victim in the neck and head. The victim immediately died due to those gun shot wounds. After a lengthy investigation by the Richland County Sheriff's Department, the Appellant along with his co-defendant's were arrested and charged with the offenses of armed robbery and murder.

On September 8, 1971, the Appellant appeared before the Court of General Sessions to answer to these charges. Upon the conclusion of this appearance the Appellant was sentenced to a period of incarceration for the remainder of his natural life for murder. At the time the Appellant committed this offense, South Carolina law allowed a person serving a life sentence for murder parole eligibility upon the service of ten (10) years. The Appellant made his initial appearance before the Board on April 8, 1981. Upon the conclusion of this hearing the Board granted the Appellant an opportunity to be released on parole.

While on parole the Appellant violated and appeared before the Board on September 1, 1985. His parole was revoked due to this failure to refrain from the unlawful use of narcotic drugs; failing to avoid injurious habits; failing to refrain from associating with persons of a bad reputation or harmful character; failing to conduct himself honorable and work diligently at a lawful occupation; being found guilty in the Richland County Court of General Sessions on numerous drug offenses¹; and failing to carry out all instructions of his parole agent. Since that revocation the Appellant has appeared before the Parole Board eight times each resulting in a denial of parole.

¹ While on parole the Appellant was convicted of trafficking cocaine, trafficking marijuana, and possession of marijuana.

His last appearance occurred on September 23, 2015, parole was denied due to: 1) a prior criminal record indicating poor community adjustment; and, 2) a failure to successfully complete a community supervision program. Upon being notified of this denial of parole the Appellant delivered a request for an appeal to the Director. On November 17, 2015, General Counsel Matthew C. Buchanan informed the Appellant that there exist no appeal for a routine denial of parole. After this the Appellant twice notified the Director requesting the statute that requires a risk and needs assessment; and information regarding the COMPAS risk assessment program. His final request was responded to on February 12, 2016. After receiving this response the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this notice the Appellant argued that he was denied due process; that he was not notified of the new criteria regarding the risk assessment; and he was denied the right to seek a rehearing.

The Respondent argued before the ALC that the Appellant failed to file his notice of appeal prior to the time limit proscribed within the rules. On September 23, 2016, the Honorable Ralph King Anderson, III, Chief Administrative Law Court Judge issued an order dismissing this Appeal. Within his order Judge Anderson determined that the Appellant did fail to file his brief within the thirty day limit imposed by the rules of the ALC. This made this case subject to dismissal under the rules, and it was properly dismissed by the lower Court.

Upon being notified of this dismissal the Appellant has decided to file a notice of appeal before the South Carolina Court of Appeals. The Respondent will argue that the ALC was correct in dismissing the appeal of the Departments decision due to the Appellant's failure to file the appeal within the time allotted under the rules. There was no error in law; therefore, this Court should affirm the decision of the ALC in the dismissal of this appeal.

ARGUMENTS

- 1. The Appellant failed to file his notice of appeal prior to the time allotted pursuant to the rules of the Administrative Law Court; therefore, the ALC was proper in dismissing this appeal.**

The Respondent argues that the Appellant failed to file his notice of appeal before the thirty (30) deadline imposed under the rules of the Administrative Law Court. The notice of appeal from the final decision to be heard by the Administrative Law Court shall be filed with the Court and a copy served on each party including the agency, within thirty (30) days of receipt of the decision from which the appeal is taken. Rule 59 SCRALC. The Appellant had only thirty (30) days upon the final decision of the Department to file his appeal, he failed to file within that time limit missing it dramatically so the decision of the ALC was correct and should be affirmed by this Court.

The Appellant was denied parole on September 24, 2015, after this denial he requested a reconsideration. On November 17, 2015, the Respondent decided to deny his request for reconsideration. The ALC decided that is the date he received the final decision of the Board so he failed to file his notice of appeal timely. The Respondent argues that the decision of the ALC is correct. The ALC correctly stated that the rule allowed that the notice of appeal should be filed within thirty days "after receipt of the final decision from which the appeal is taken." The final decision was made on November 17, 2015, so the notice of appeal should have been filed on December 17, however, according to the ALC it was not filed until April 19, 2016.²

² Appellant attempted to file a document entitled "notice of appeal" on which the date was February 22, 2016. This notice of appeal did not comply with Rules 57 and 59 of the rules of the Administrative Law Court which requires the notice of appeal be filed on the proper form proscribed by the Court pursuant rule 57 so the ALC determined the appeal not filed. The notice of appeal was return with notification that it must be filed on the proper form, the Appellant did not file the proper form until April 19, 2016.

The Appellant argues that the notice of appeal was due some thirty days after the final letter regarding the release of records. This letter did not pertain to the final decision of the Parole Board. This was a letter pertaining to information the Board used in making its final decision. When the final decision denying parole is made, that is when the Appellant should reasonably realize his thirty day time period began; especially since that is what is stated within the rules. The Court must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist. Young v. S.C. Dept. of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (1999). The Appellant should have known that his appeal began at the time of the decision and not after his request for records.

The ALC properly made the decision to dismiss the appeal due to the Appellant failing to file his notice of appeal within the thirty day time limit. "The requirement of filing and service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for filing and services of the notice." Wells Fargo Bank, N.A. v. Fallon Props. S.C. LLC., 413 S.C. 642, 647, 413 S.E.2d 575, 578 (Ct. App. 2015), quoting USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). This Court only has the ability to reverse decisions when there is an error in law regarding the decision of the lower court. There have been substantial evidence in the entire record that the Appellant failed to file his notice of appeal prior to the time limit imposed under the rules. In determining whether the administrative law court's decision was supported by substantial evidence, the Supreme Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion as the administrative law court, however,

the Court of Appeals may reverse where it is in violation of a statutory provision or it is affected by an error of law. Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control, 411 S.C. 16, 766 S.E.2d 707 (2014). It is obvious reviewing the record the Appellant filed his appeal at the earliest on February 22, 2016, well beyond the thirty day time limit imposed by the rules. In following the rules the notice of appeal would have been required to be filed by December 17, 2015. The ALC made the correct decision by dismissing this appeal.

Due to the Appellant failure to file his notice of appeal within the thirty day time limit imposed by the rules, the ALC was correct in dismissing this appeal. Upon motion of any party, or on its own motion, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section. Rule 62 SCRALC. The rule is clear the notice of appeal must be filed within thirty days after the final decision. The ALC had no choice than follow the rules. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statutes operation. Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996).

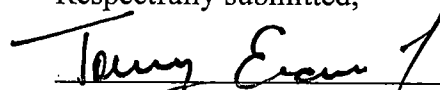
Within his brief the Appellant has argued multiple issues; however, since the ALC made the determination to dismiss due to his failure to abide to the rules the Respondent requests these other issues not be addressed. The appellate court need not address remaining issues when disposition of prior issue is dispositive. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). It is clear in reviewing the record the Appellant failed to file his notice of appeal within the time limited established under the rules. Since this was shown, the ALC was well within their duty to dismiss this appeal. The Appellate court may affirm any ruling, order,

decision, or judgment upon any ground(s) appearing in the Record on Appeal. Rule 220(c) SCACR.

CONCLUSION

Based on the foregoing reasons the ALC correctly dismissed this appeal; therefore the Respondent respectfully requests the final decision of the Administrative Law Court dismissing this appeal be affirmed.

Respectfully submitted,



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Columbia, South Carolina
December 27, 2016

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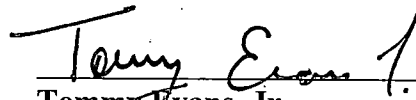
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES.....RESPONDENT

CERTIFICATE OF SERVICE

I, Tommy Evans, Jr. Assistant General Counsel, hereby certify that I have served the within
the *Initial Brief of Respondent, and Designation of Matter* dated December 27, 2016, on the
Appellant this 27th day of December, 2016, by depositing a copy of same in the United States
mail, postage paid, addressed to:

Basil W. Akbar #065498
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

I further certify that all parties required by Rule 54 to be served have been served.



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State of South Carolina
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December 27, 2016

The Honorable Jenny Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street – 5th Floor
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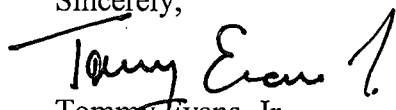
RE: Basil W. Akbar v. SCDPPPS

Dear Ms. Kitchings:

Enclosed please find the original *Initial Brief of the Respondent, and Designation of Matter* along with proof of service in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,


Tommy Evans, Jr.
Assistant General Counsel

TE:te
Enclosures

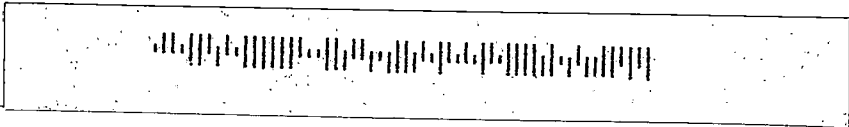
Cc: Basil W. Akbar



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