

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Deborah Brooks Durden

ALC Case No. 16-ALJ-04-0393-AP
Appellate Case No. 2016-002227

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JAN 23 2017

SC Court of Appeals

ALBARR ALI ABDULLAH, # 191449,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Christina Catoe Bigelow
Deputy General Counsel
Office of General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

THE APPEAL SHOULD BE DISMISSED WHERE APPELLANT FAILED TO PRESERVE HIS ISSUES FOR REVIEW BY RAISING THE ISSUES AT HIS EARLIEST OPPORTUNITY AND WHERE APPELLANT CANNOT SHOW PREJUDICE.

STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Albarr Ali Abdullah, an inmate in the custody of the South Carolina Department of Corrections. On February 22, 2016, Appellant was convicted of disciplinary offense # 898, possession of any communication device. As a result of the conviction, Appellant lost eighteen days of accrued good time. Appellant submitted a Step 1 Grievance appealing his conviction which was denied on March 25, 2016. His Step 2 Grievance was also denied on May 3, 2016, and Appellant filed a notice of appeal in the Administrative Law Court. On September 27, 2016, Administrative Law Judge Deborah Brooks Durden filed an order affirming the Department of Corrections' denial of Appellant's grievance and upholding Appellant's disciplinary conviction. This appeal follows.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610(B) provides the applicable standard of review:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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 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.

S.C. Code Ann. § 1-23-380(5).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. Hendley v. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. Id.

ARGUMENT

THE APPEAL SHOULD BE DISMISSED WHERE APPELLANT FAILED TO PRESERVE HIS ISSUES FOR REVIEW BY RAISING THE ISSUES AT HIS EARLIEST OPPORTUNITY AND WHERE APPELLANT CANNOT SHOW PREJUDICE.

Relevant Facts

On January 27, 2016, a cell phone was found in the prison library where Appellant worked. (Disciplinary Hearing Transcript, p. 1). On February 1, 2016, Lt. Price was listening to a recording of inmate phone calls from January 27, 2016. (Disciplinary Hearing Transcript, p. 1). Lt. Price heard Appellant, who was speaking to a female, state that he would have to call the female on the “wall phone” now because the other asset had a “bad misfortune today.” (Disciplinary Hearing Transcript, p. 1 & p. 5). At the disciplinary hearing, Appellant admitted the wall phone conversation, indicated he was talking to his sister, and claimed that the “asset” he was referring to was another inmate who typed documents for him. (Disciplinary Hearing Transcript, p. 5-6). The hearing officer did not find Appellant’s explanation credible and found him guilty of possession of a communication device. (Disciplinary Hearing Transcript, p. 6-7).

Error Preservation

Appellant claims on appeal that he was not given sufficient information and opportunity to be able to present an alibi defense to the cell phone charge. However, these issues are not preserved for appellate review because Appellant failed to raise them at his earliest opportunity.

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a

timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). When a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (“A defendant must object at his first opportunity to preserve an issue for appellate review.”). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Here, Appellant did not raise any issue regarding being prevented from raising an alibi defense at his disciplinary hearing. (See Disciplinary Hearing, p. 1-7). Instead, as mentioned above, Appellant admitted he was the person on the wall phone and he attempted to explain the conversation. (Disciplinary Hearing, p. 5-6). Accordingly, Appellant waived any issue with respect to an alibi defense, and consequently, the issues he raises on appeal are not preserved for review.

Lack of Prejudice

Furthermore, even assuming, for argument’s sake, that there was some error with respect to sufficient notice and/or opportunity to call witnesses, Appellant cannot show prejudice.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991). “In order for an error to warrant reversal, the error must result in prejudice to the appellant.” State v. McLeod, 362 S.C. 73, 79-80, 606 S.E.2d 215, 219 (Ct. App. 2004). “Error without prejudice does not warrant reversal.” Owners Ins. Co. v. Clayton, 364 S.C.

555, 562, 614 S.E.2d 611, 615 (2005); see also State v. Wyatt, 317 S.C. 370, 372, 453 S.E.2d 890, 891 (1995) (“While we agree there was error, appellant cannot show sufficient prejudice from it to warrant reversal.”).

Again, at his disciplinary hearing, rather than complaining about lack of notice and attempting to assert an alibi defense, Appellant admitted he was the person on the wall phone and provided an explanation for the conversation. (See Disciplinary Hearing Transcript, p. 5-6). Obviously, Appellant did not have an alibi defense. Therefore, Appellant cannot show prejudice from any purported error and any purported error was harmless.

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal and affirm the Department’s final agency decision.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

BY: 

CHRISTINA CATOE BIGELOW
Deputy General Counsel
Office of General Counsel
S. C. Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

January 23, 2017

STATE OF SOUTH CAROLINA
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Administrative Law Judge Deborah Brooks Durden

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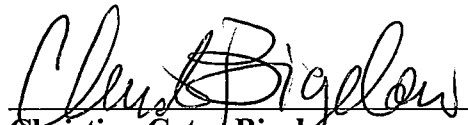
v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on today's date, I mailed a copy of the **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal** to Appellant, addressed as follows: **Albarr Ali Abdullah, # 191449**, Kershaw Correctional Institution, 4848 Goldmine Highway, Kershaw, South Carolina, 29067.



Christina Catoe Bigelow
Deputy General Counsel
Office of General Counsel
S. C. Department of Corrections
Post Office Box 21787
Columbia, S. C. 29221
(803) 896-8508

January 23, 2017



NIKKI R. HALEY, Governor
BRYAN P. STIRLING, Director

OFFICE OF GENERAL COUNSEL

January 23, 2017

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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RE: Albarr Ali Abdullah, # 191449, v. South Carolina Department of Corrections
Appellate Case No. 2016-002227

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal** in the above captioned appeal, along with **Proof of Service**.

Thank you for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

Christina Catoe Bigelow
Deputy General Counsel
South Carolina Department of Corrections

cc: Albarr Ali Abdullah, # 191449
Kershaw Correctional Institution
4848 Goldmine Highway
Kershaw, SC 29067