STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Ernest Battle,#165247,)
Appellant,)
V.)
South Carolina Dept. of Corrections,)
Respondent.)

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Hon: Deborah Brooks Durden, Judge

Appellate Case No. 2016-002412

INITIAL PRO-SE BRIEF OF APPELLANT

Other Counsel of Record:
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(Pro-Se)

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STATEMENT OF ISSUES ON APPEAL

1. Did the Suoth Carolina Dept. of Corrections denied Appellant due process by recalculating his sentence without providing him with formal notice brfore altering/changing the recording of his sentence imposed by the judge?

2. Did the Administrative law judge erred by misinterpreting the Legislative,s intent when applying the amount of time a defendant is required to serve on a mandatory minimum drug sentence?

STATEMENT OF THE CASE

This matter was before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed January 4, 2016, by Ernest Battle (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). The Administrative Law judge issued an Order for Briefing on August 8, 2016. Thereafter, the Court issued an Order denying Appellant relief and a timely Notice of Appeal was filed. Appellant requested review of the Department's final decision regarding the recalculation of his sentence without giving formal notice. This appeal follows:

FACTS

On June 15,2001, Appellant was sentenced to twenty-five yaers under Section 44-53-370(3)(2)(b)(3) Of the South Carolina Code for Trafficking in Cocaine, 28 grams or more, but less than 100 grams, third offense. On the same day, Appellant was concurrently sentenced to ten years for a School zone charge. Appellent filed a timely Notice of Appeal. In approximately June, 2011, the Department recalculated Appellant's twenty-five year sentence, with a new projected releases date, or "max-out," date reflecting the requirement that Appellant serve one hundred percent of his sentence, instead of eighty-five percent that was previously recorded. In this Appeal, Appellant challenges the Department's decision that he must serve his sentence day for day and violation of his due process rights.

ARGUMENT I.

Appellant was denied due process when the South Carolina department of Corrections recalculated his sentence without providing him with formal notice before altering/changing the orginal recorodng of his sentence imposed by the judge.

Appellant is currently serving a twenty-five year sentence for trafficking in cocaine, z§ 44-53-370(e)(2)(b)(3), due to commitment orders of the Charleston County Clerk of Court, and Possession with intnet to distribute cocaine within the proximinity of a school zone § 44-53-445. Sentences were to be served concurrently. During sentencing Appellant was under the impression that he was to serve eighty-five (85) percent of his sentence. After he had served approximately 11 years of his sentence, he was summoned to his caseworker's office in SCDC and informed around June, 2011, that the Department of Corrections had recalculated his sentence, reflecting that he must serve one hundred percent of his sentence instead of the Eight-five percent that was previously recorded by the judge. this recoration and recalculation of Appellant's sentence was done without formal notice to Appellant, thus violating his right to due process guaranteed by the Forteenth Amendment to the U.S. Constitution.

See: Administrative law judge's order For Briefing, page 2, in which is stated that: There is no evidence in the record of the exact time which the recalculation was made, or at which time Appellant became aware of the change. It is appearent that Appellant was investigatiog the matter in 2011. ft.Note-2

See: Cf. Tant v. S.C. Dept. of Corrs., 408 S.C. 334,759 S.E.2d 398 (2014) which the South Carolina Supreme Court Held that:
1. When Dept. decides its orginal recordation of a sentence was erroneous, it must afford the inmate formal notice of the amended sentence and advise him of

his opportunity to be heard through the grievance procedures.
2. Dept. of Corrs., is generally confined to the face of the sentencing sheet, in determining the length of a sentence, but may refer to the eentencing transcript if there is any ambiguity in the sentencing sheet.
3. Fundamental requirements of due process includes notice, an opportunity to be heard in a meaningful way, and judicial review.
4. Length of inmate's incarceration implicates a CONSTITUTIONAL Liberty interest for due process purposes. U.S.C.A. Amend. 14.

The Court further held that: The Dept. of Corrs., must provide an inmate with timely formal notice when it seeks to recalculate its initial determination of his sentence and advise him of his right to file a grevience and obtain a hearing. Cf. Tant v. S.C. Dept. of Corrs., 408 S.C. 334,759 S.E.2d 398 (2014).

See also; Appellant's sentencing sheets in hte Designation of Matters To Be Included In the Record On Appeal, along with insert from sentencing transcript.

ARGUMENT II.

The Administrative Law judge erred in its interpretation of the Legislative's intent by the South Carolina Dept. of Corrections application of mandatory minimum sentences in drug offenses, pursuant to §44-53-370(e)(2)(b)(3) of the S.C. Code of Laws, and the amount of time an inmate must serve if convicted prusunat to this Subsection.

In this case, Appellant was ocnvicted under Section 44-53-370(e)(2)(b)(3) in which the statute provides that:

(e) Any person who knowingly sell, manufactures, cultivates, delivers, purchases, or bring into this State, or who rpovides financial assistance or other-

wise aids, abets, attempts, or conspires to sell, manufacture, cultivates, deliver, purchase, or bring into this State, or who otherwise is knowingly in actual or constructive possession or who knowingly attempt to become in actual or constructive possession of:

***

(2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:

***

(b) twenty-eight grams or more, but less than one hundred grams:

***

3. for a third or subsequent offense, a mandatory minimum term of imprisonment of not less than twenty-five years and not more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.

S.C. Code Ann. § 44-53-370(e)(2)(b)(3) (Westlaw through 2001) (emphasis added)

At the end of subsection (e), the statute also provides:

A person convicted and sentenced under this subsection to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release, as provided in Section 24-13-610, or supervised furlough, as provided in Section 24-13-710.

Id at § 44-53-370(e).

See State v. Taub, 336 S.C. 310,134-16,519 S.E.2d 797,799-801 (Ct. App. 1999)(discussing the additional meaning of the term "mandatory minimum"). See also; Kerr v. State, 345 S.C. 183,187,547 S.E.2d 494,496 (2001), which held that:

At time Kerr commited his offense of trafficking in cocaine, § 44-53-370 (e)(2)(c), (1985), provided that where the quantity of cocaine involved is 100 grams or more, but less than 200 grams, the defendant shall be sentenced to a

mandatory term of imprisonmnet of twenty-five years, no part of which may be suspended, and a fine of fifty thousand dollars. Kerr was convicted in 1988 and at that time the statute had been amended to read as follows:

S.C. Code Ann. 44-53-370(e)(2)(c) (1988) (empasis added) Regarding parole eligibility, an unnumerated paragraph at the end of Section 44-53-370(e) stated as follows:

Any person convicted ands entenced under this subsection to a mandatory minimum term of imprisonment of twenty-five years is not eligible for parole. (emphasis added).

Ker argued that he was not sentenced to a mandatory minimum, but a mandatory sentence, which makes him eligible for parole.

The Surpeme Court agreed and stated as foldows:
While Section 44-53-370(e), rpescribes sentencing for trafficking based on quantity of drugs involved, several different section authorizes at least a 25 year sentence, however, some provide for a mandatory semtence, while others provide for a mandatory minimum sentence. Despite the various ways that Section 44-53-370(e) mandated a term of imprisonment of at least 25 years sentence the unenumerated paragraph detailing parole eligibility simply stated that someone sentenced to a "mandatory minimum" term of imprisonment of 25 years is "not eligible for parole."

This enumerated paragraph was amended in 1988 to read as follows:

Any person convicted and sentenced under Section 44-53-370(e) to a mandatory minimum term of imprisonment of 25 years or a mandatory term of imprisonment of 25 years or more is not eligible for parole...§ 44-53-370(e)(supp.1988 emphasis on added term).

The Court further held: We specifically find that the 1988 amendment which added "mandatory term" of 25 years to parole ineligibility portion of Section 44-53-370(e), effectuated a substantial change in the law. Whereas, prior to the amendment ot Section 44-53-370(e)(1985-88), a defendant convicted

undre this statute was eligible for parole, however, the amendment added mandatory to make a defendant convicted under this statute ineligible for parole only!

Amendment eff. July 1, 1988, 1988 S.C. Act No. 565.

In its current form, the parole ineligibility paragraph is ever more specific:

Any person convicted and sentenced under this Subsection to a mandatory term of imprisonment of 25 years, a mandatory minimum term of imprisonment of 25 years, or a mandatory minimum term of imprisonment of 25 years, nor more than 30 years is not eligible for parole.....44-53-370)e)(Supp.2000).

There is no finding in the statute mandating that a defendant convicted pursuant to this subsection must serve his/her sentence day for day as implemented by the South Carolina Dept. of Corrections. The statute specifically addresses whether a defendnat ocnvicted under this Subsection is parole eligible, not the amount of time an inmate must serve or is required to serve on a sentence if convicted pursuant to this statute. 44-53-370(e)(2)(b)(3).

In 1996 the S.C. Legislative introduced House Bill No. H3096, and in that bill an Act. to amend the S.C. Code of laws of South Carolina, 1976, by adding Section 24-13-100 so as to provide the conditions and define "No Parole Offens

"Section 24-13-100. For purposes of definition under South Carolina law, a no parole offense, means a class A,B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(D) (2015)., which is punishable by a maximum term of imprisonment for twenty years or more.

Section 24-13-100 includes/incoorperates § 44-53-370(e) as a "no parole offense" as defined in Section 24-13-100 (2007) S.C. Code Ann. Appellant's offense is one exempt from classification. S.C. Code Ann. § 16-1-10(D)(2015). For no parole offenses the law provides:

(A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, an inmate

convicted of a "no parole offense"... is not eligible for early release, discharge, or community supervision...until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application fo earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended...

S.C. Code Ann. § 24-13-150(A)(supp.2015) (emphasis added).

In Appellant's case, the mandatory minimum language in Section 44-53-370 is prior general law and the more specific and recent legislation is S.C. Code Ann. § 24-13-100.

The primary rule of statutory construction is that the Court must ascertain the intention of the legislature...eg.,State v. Blackmon, 304 S.C. 270, 273,403 S.E.2d 660,662 (1991). When the terms of a statute are clear and unambiguous, the court must apply them according to their literal meaning without resort to substle or forced construction to limit or expand the statute's operation. Furthermore, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

See Stone v. State, 133 S.C. 533,535,443 S.E.2d 544,545 (1994)(holding that when two statute are in conflict, the more recent and specific legislature statute must prevail. Hair v. State, 305 S.C. 77,79,406 S.E,2d 332,334 (1991)(the law clearly provides that if two statute are in conflict, the earlier statute is to be repealed of repungency. Strickland v. State, 276 S.C. 17,19,274 s.E.2d 430,432 (1987); see also § 24-13-100, It is without doubt that the statutory definition for the term "no parole offense" in Section 24-13-100, ie., a class A,B, or C felony... simply describes the types of offenses for which the offender is not eligible for parole. This interpretation is consistent with provision in related statutes stating that a no parole offender is not eligible for parole. State v Johnson, 277 S.C.

444,279 S.E.2d 606..; State v. Burton, 301 S.C. 305,391 S.E.2d 583 (1990); State v. Wilson, 315 S.C. 289,294,433 S.E.2d 864,867 (1993); State v. Smith, 330 S.C. 237,498, S.E.2d 648 (Ct. App. 1998); State v. Alls, 330 S.C. 528,531, 500 S.E.2d 781,782 (1998).

CONCLUSION

For the reasons stated, this Court should reverse the judgement of the Administrative Law court.

Respectfully submitted,

February 15,2017

S/ Ernest Battle

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AFFIDAVIT OF SERVICE

I, Ernest Battle,#165247, being duly sworn, swears against penalty of perjury, that on the 15th day of February, 2017, I did forwarded for filing one (1) original Initial Breif of Appellant to the Clerk of the S.C Court of Appeals along with an affidavit of service attached and one (1) true copy of Designation of matter To Be Included in the Record On Appeal. A true copy of both of the above was forwarded to the Office of the Attorney for the respondent, Christina Catoe Bigelow, Esquire at the below listed address, by depositing same in U.S. mail, postage prepaid 1st class to address listed below:

Respectfully submitted,
S/ Ernest Battle,#165247

Ms. Christina Catoe Bigelow, Esquire
Office of the General Counsel for SCDC
4444 Broad River Rd
Columbia, S.C. 29221-1787

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 15 DAY OF February
2017
Nicole R. Chapman
NOTARY PUBLIC
STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 12-22-2026

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SC Court of Appeals

Mr. Ernest Battle #165247
MacDougall Corr. Inst.
1518 Old Gilliard Rd.
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Dear Hon. Clerk,

Enclosed for filing, please find Original Partial Page Brief of Appellant along with proof of service to Respondent. Also, please find enclosed, Designation of Matter to be included in the Record on Appeal. Upon receipt, please check-stamp Cover of Partial Brief and return Checked-Stamp Cover to me for my records at the above listed address.

Thanking you in advance,

Sincerely,

Ernest Battle

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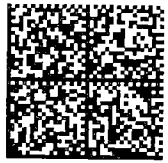

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