

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-04-0003-AP
Appellate Case No. 2016-002412

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SC Court of Appeals

ERNEST BATTLE, # 165247,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Kensey E. Collins

Staff Attorney

Office of General Counsel

South Carolina Department of Corrections

Post Office Box 21787

Columbia, South Carolina 29221

(803) 896-1943

ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT'S CALCULATION OF HIS SENTENCE WAS INCORRECT.
- II. APPELLANT HAS NOT PROPERLY PRESERVED THE ISSUE OF FORMAL NOTICE. HOWEVER, REGARDLESS OF ANY ISSUE PRESERVATION CONCERNS, THE DEPARTMENT DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS BY NOT PROVIDING HIM NOTICE.

STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Ernest Battle, an inmate in the custody of the South Carolina Department of Corrections. On August 28, 2015, Appellant submitted a Step One Grievance complaining about the Department's calculation of his sentence. The Step One Grievance was denied on the ground that no error was found in Appellant's sentence calculation. On November 27, 2015, Appellant submitted a Step Two Grievance form, which was also denied on the ground that there were no errors in the calculation of Appellant's sentence. Appellant filed a Notice of Appeal in the Administrative Law Court ("ALC") on December 31, 2015. Thereafter, the appeal in the ALC went forward, and on November 15, 2016, the Honorable Deborah Brooks Durden issued an order affirming the decision of the Department of Corrections regarding Appellant's sentence calculation. 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 the 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

I. THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT'S CALCULATION OF HIS SENTENCE WAS INCORRECT.

In this case, the ALC properly affirmed the decision of the Department of Corrections, and Appellant has failed to show that the Department committed any error with respect to the calculation of his sentence. On June 15, 2001, Appellant was sentenced to twenty-five years' incarceration for a third offense of Trafficking in Cocaine, with 196 days of jail time credit. Appellant argues that he is required to serve only eighty-five percent of his sentence. Furthermore, Appellant argues that he was originally serving eighty-five percent of his sentence (App. Brief at 4). After a recalculation, he is now serving his full sentence, day-for-day. Id.

Appellant is correct that his sentence was recalculated. The recalculation was performed in order to comply with the statute under which he was sentenced. Appellant was sentenced to twenty-five years' incarceration under S.C. Code Ann. § 44-53-370(e)(2)(b)(3), which states:

(e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into [South Carolina], or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into [South Carolina], or who is knowingly in actual or constructive possession or who knowingly attempts 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[.]

The statute further states:

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:

S.C. Code Ann. § 44-53-370(e).

As the Administrative Law Judge found, Appellant is required to serve the full length of his sentence. See Final Order, page 4 of 6 (“a person sentenced to a mandatory minimum twenty-five-year sentence, like Appellant, must serve each day of the sentence.”). The sentence was originally entered incorrectly as only requiring eighty-five percent of the sentence to be served. This was corrected in 2011 to comply with the mandatory minimum requirement of the above statute. SCDC is “confined to the face of the sentencing sheets in determining the length of a sentence [unless . . .] there is an ambiguity in the sentencing sheets.” Tant v. S. Carolina Dep't of Corr., 408 S.C. 334, 337, 759 S.E.2d 398, 399 (2014), reh'g denied (July 10, 2014). As there is no ambiguity in the sentencing sheet, SCDC simply applied a term of incarceration of twenty-five years and later corrected a mistake in order to comply with the mandatory minimum language of the statute at hand. See Final Order, page 3 of 6.

Appellant has failed to show that the Department's calculation is incorrect in any way. Therefore, Respondent respectfully requests that the order of the Administrative Law Judge be upheld.

II. APPELLANT HAS NOT PROPERLY PRESERVED THE ISSUE OF FORMAL NOTICE. HOWEVER, REGARDLESS OF ANY ISSUE PRESERVATION CONCERNS, THE DEPARTMENT DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS BY NOT PROVIDING HIM NOTICE.

Initially, Appellant has not preserved his due process issue of formal notice. Appellant now complains of not receiving formal notice for his sentence recalculation. However, Appellant never raised the issue to the Department in his Step One and Step Two Grievances; nor did he raise it to the ALC in his Initial Brief. In order for an issue to properly be preserved for appellate review, the issue must be: (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); see JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), citing Creech v. S.C. Wildlife and Marine Resources Dep't., 328 S.C. 24, 491 S.E.2d 571 (1997). Appellant did not give Respondent a chance to address his concern of formal notice and hearing at the agency level, and therefore did not preserve the issue for appeal.

Nevertheless, Respondent did not err in not providing Appellant with formal notice or a hearing when his sentence was recalculated to a day-for-day sentence. Appellant's sentence

was recalculated in accordance with the statutory construction in 2011, prior to the guidance of Tant. Tant v. S. Carolina Dep't of Corr., 408 S.C. 334, 759 S.E.2d 398 (2014), reh'g denied (July 10, 2014). Regardless, as Judge Durden properly found, Respondent's correction of an administrative error does not trigger "the protocol laid out in Tant[.]" Final Order, page 4 of 6.

CONCLUSION

For the foregoing reasons, the Court should affirm the Administrative Law Court's decision below.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS



KENSEY E. COLLINS

Staff Attorney
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-1943

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