

STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

SC Court of Appeals

D. Craig Brown, Circuit Court Judge

Appellate Case No. 2017-000909

Ronald Coulter, #300410,

Appellant,

v.

South Carolina Department of Corrections,

Respondent.

INITIAL BRIEF OF APPELLANT

Ronald Coulter, #300410

Ridgeland CI, CA-25

P.O. Box 2039

Ridgeland, SC 29936

Appellant, Pro Se

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STATEMENT OF ISSUES ON APPEAL

1. Whether the lower court, under its appellate jurisdiction to review the Administrative Law Judge's (ALJ's) final decision, erred in granting the respondent's motion to dismiss the appeal for insufficient service of process, pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure (SCRCP), on the grounds of failure to serve the notice of appeal; where, the service of process requirements of Rule 4(d)(5), SCRCP, were not applicable in a proceeding for judicial review under the Administrative Procedures Act (APA), and the record before the lower court included the appellant's proof of service of the notice of appeal upon the respondent.

2. Whether the lower court erred in affirming, in the alternative, the ALJ's finding that summary dismissal, pursuant to Slezak v. S.C. Dept. of Corrections, 605 S.E.2d 506 (2004), was appropriate on the grounds that the appellant had not been deprived of a state created liberty or property interest; where, the substantial evidence on the whole record before the lower court contradicted the ALJ's factual finding and demonstrated an infringement complained of by the appellant that implicated a protected property interest within the scope of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

On September 13, 2004, the South Carolina Department of Corrections (SCDC) implemented a policy change that required the SCDC to withhold portions of non-wage funds deposited into an SCDC inmate's E.H. Cooper Trust Fund account, in order to collect a DNA processing fee, without requiring the inmate to complete a Form 15-1, "Cooper Trust Fund Withdrawal".

On or about September 15, 2004, the SCDC began withholding funds from the appellant's E.H. Cooper Trust Fund account for this DNA processing fee.

The appellant filed a grievance action against the SCDC regarding the unauthorized withholdings. On November 30, 2004, the SCDC denied the appellant's grievance on the grounds that the current statute allows for all deposits to be deducted for the DNA fee. The appellant appealed the SCDC's denial of his grievance on December 3, 2004.

On January 18, 2005, the appellant's appeal was denied. The responsible official for SCDC determined that S.C. Code Ann. § 23-3-670 does not limit the sources from which the DNA processing fee can be collected.

The appellant filed a timely appeal, from the final decision of the SCDC, with the Administrative Law Court (ALC), on February 7, 2005. The respondent filed a motion to dismiss the appellant's appeal with the ALC on April 11, 2005. The appellant's original brief was filed with the ALC on April 19, 2005. On January 30, 2006, the ALC granted the respondent's motion, thereby, dismissing the appellant's appeal.

The appellant sought judicial review of the final decision of the ALC by filing a notice of appeal with the lower court on March 1, 2006.

On January 18, 2015, the respondent motioned to dismiss the appellant's appeal to the lower court. The appellant filed his return to the respondent's motion on March 2, 2015. That same day, the lower court continued the matter for sixty (60) days. On June 9, 2016, the lower court granted the respondent's motion

to dismiss and ordered the respondent to prepare a formal order within ten (10) days. This order was filed on June 13, 2016.

On March 15, 2017, the lower court issued an order affirming the decision of the ALC and dismissing the appeal for insufficient service of process pursuant to Rule 12(b)(5), SCRCP. The appellant received the lower court's order on March 23, 2017.

This action follows:

Arguments

I. THE LOWER COURT OVERLOOKED THE DIRECTIVES OF S.C.CODE ANN. § 1-23-380(A)(1) AND, ALSO, ARTICULATED A SPECIFIC FINDING ON BEHALF OF THE RESPONDENT THAT WAS NEITHER ASSERTED BY THE RESPONDENT NOR SUPPORTED BY THE RECORD.

The final order from the ALJ, in the instant case, was filed on January 30, 2006. The record before the lower court shows that the appellant's notice of appeal, along with proofs of service upon both the ALC and the respondent, was filed on March 1, 2006. At the time the appellant filed his notice of appeal from the final decision of the ALJ, the lower court had appellate jurisdiction to review the ALJ's final decision.

Although the appellant made several inquiries over the years with regards to the status of this appeal from the ALJ, the lower court took no action in this matter until after the respondent filed a motion to dismiss, along with a brief in support of the motion to dismiss, on February 18, 2015. The appellant's return to the respondent's motion to dismiss was filed on March 2, 2015.

In the respondent's brief, the respondent asserted that the appellant did not properly serve the respondent pursuant to Rule 4(d)(5), SCRCP. (Resp. Brief, p.1). The respondent also asserted that it had not been served with any filings or pleadings associated with the case and dismissal pursuant to Rule 12(b)(5), SCRCP, was appropriate. (Id.).

The appellant, in his return, contended that the appellate action before the lower court was not governed by the South Carolina Rules of Civil Procedure and therefore, service pursuant to Rule 4(d)(5) was not applicable. (Apell. Return, p.1). The appellant also contended that dismissal pursuant to Rule 12(b)(5) for insufficient service of process was not warranted and therefore, the respondent's motion to dismiss should be denied. (Appel. Return, pp.3-4).

Furthermore, in response to the respondent's claim that they were never served with any filings or pleadings, the appellant pointed out that the record before the lower court shows that a

notice of appeal and proof of service had been filed. (Appel. Return, p.3). The appellant also pointed out that the claim of not being served with any filings or pleadings was contradicted by the respondent's very own motion to dismiss. (Id.). In the motion to dismiss, the respondent asserted that it "denies the material allegations regarding the alleged violation of any constitutional rights contained in the petition or that plaintiff [appellant] is entitled to any relief as requested in the aforementioned petition". (Resp. Motion, p.1).

It was clear from the respondent's motion, that the respondent had in fact received some form of pleading or filing from the appellant. This point was overlooked by the lower court during its fact-finding. It was also clear from the respondent's brief that although the respondent claimed not to have been served with any filings or pleadings, the respondent never made the assertion that, "more specifically, the notice of appeal associated with this case" had not been served, as the lower court stated in its Order Affirming Decision of the ALC. (Resp. Brief, p.1; Lower Court Order, p.2).

The lower court's articulation, on behalf of the respondent, that the notice of appeal had not been served, does not have support in the record below.

Furthermore, the lower court's conclusion, that dismissal for insufficient service of process is appropriate pursuant to Rule 12(b)(5), SCRCF, is an error of law.

Judicial review under the APA is not an action in which service of process under Rule 4(d)(5), SCRCF, may be had. Cf. Ross v. Medical University, 435 S.E.2d 877, 878, n.2 (S.C.App. 1993), where this Court stated that, "a proceeding for judicial review under the APA is not an 'action' in which discovery under the Rules may be had".

As the Ross Court explained, "the South Carolina Rules of Civil Procedure govern actions brought in the courts of South Carolina in all suits of a civil nature. Rule 1, SCRCF ... An action is a proceeding at first instance in a court having original jurisdiction of the subject matter of the dispute. A

petition for judicial review pursuant to S.C. Code Ann. §1-23-380 is neither a proceeding at first instance nor is it within the original jurisdiction of the circuit court". Id., 435 S.E.2d, at 878 (citings omitted).

In addition, in Al-Shabazz v. State, 527 S.E.2d 742 (2000), the Supreme Court of South Carolina outlined review by the judicial branch, of the ALJ's final decision, pursuant to S.C. Code Ann. §§ 1-23-380(A)(1) and 1-23-610(B) (Supp.1999), and Rule 41, ALJDRP.

Therefore, the service of the summons and complaint upon the agency and upon the Attorney General by registered or certified mail, as required by Rule 4(d)(5), SCRCP, is not applicable in a proceeding for judicial review under the APA.

Consequently, a motion to dismiss, under Rule 12(b)(5), SCRCP, for insufficient service of process pursuant to Rule 4(d)(5), SCRCP, is also not applicable in a proceeding for judicial review under the APA. The lower court misapplied the Rules of Civil Procedure to the service requirements of a petition filed by an aggrieved party seeking judicial review in a proceeding under the APA.

In sum, there is no evidence, or procedural basis, to support the lower court's finding that the appellant had not properly served the respondent. In addition, there is no evidence to support the lower court's finding that the respondent had not been served with any filings or pleadings, more specifically, the notice of appeal associated with this case. And finally, there is no legal, or procedural, basis to support the lower court's conclusion that dismissal for insufficient service of process is appropriate in this case.

II. THE LOWER COURT DEPARTED FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL REVIEW OF THE ALJ'S FINAL DECISION, UNDER THE APA, BY FAILING TO CONSIDER THE ALLEGED ERRORS COMMITTED BY THE ALJ.

"In reviewing a final decision of the ALJ, as when reviewing a final decision of an agency, the circuit court essentially sits as an appellate court to review alleged errors committed by the ALJ". Al-Shabazz, supra, 527 S.E.2d, at 755 (citations omitted). "To afford meaningful judicial review, the ALJ must adequately explain the decision by documenting the findings and basing the decision on reliable, probative, and substantial evidence on the whole record". Id., at 756.

In the instant case, the appellant directed the lower court to the ALJ's finding that was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See S.C. Code Ann. §§ 1-23-380(A)(6) and 1-23-610(D) (Supp.1999).

The ALJ found that the appellant objected to SCDC's enforcement of S.C. Code § 23-3-600, requiring the appellant to pay a processing fee for required DNA testing. (ALJ Order). The ALJ concluded that there was no state created liberty or property interest implicated by the appellant's objection. (Id.).

The appellant pointed out to the lower court that the ALJ's finding was "completely inaccurate". (Notice of Appeal, p.2) The appellant referred the lower court to his statement of the issues on appeal as presented in his original brief filed with the ALJ. (Appell. ALJ Brief, p.1). The appellant alleged, in his notice of appeal to the lower court, that the ALJ failed to address the issues presented. (Notice of Appeal, p.2).

It is clear from the record before both the ALJ and lower court that there is no evidence in the appellant's filings or pleadings, or in any other portion of the record, to support any findings, or contentions, that the appellant lodged an objection to the enforcement of S.C. Code Ann. § 23-3-600.

The ALJ's decision, in the instant case, was not based on any reliable, probative, or substantial evidence from the whole record below. Subsequently, the lower court made no determination

as to "whether the ALJ made an erroneous or unsubstantiated ruling". Al-Shabazz, 527 S.E.2d at 755.

The essence of this appeal is premised on the appellant's belief that he has a protected property interest in his "non-wage" funds held in his prison bank account, and that his substantive due process rights under the Fourteenth Amendment were violated by SCDC's unlawful "takings" of his non-wage funds without consent or compensation.

The Takings Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without compensation", and the limitation on governmental power has been imposed on the States through the Fourteenth Amendment. See Phillips v. Washington Legal Foundation, 118 S.Ct. 1925, 1930 (1998); and, Chicago, Burlington & Quincy R.R. v. Chicago, 17 S.Ct. 581 (1897).

"As we explained, 'a State, by ipse dixit, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property'." Phillips, supra, 118 S.Ct., at 1931 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 101 S.Ct. 446 (1980)).

"Although an explicit statutory provision may indeed be a sufficient condition to the creation of a constitutionally cognizable property interest, it assuredly is not a necessary one. Property rights can, and often do, exist wholly independently of statutes recognizing them as such. As the Supreme Court decisions in Webb's Fabulous Pharmacies, Inc., supra, and Phillips, supra, demonstrate, constitutionally protected property rights can, and often do, exist despite statutes." McMahan v. International Association of Iron Workers, 858 F.Supp. 529, 539 (D.S.C.1994).

The appellant contends that he has a property interest in his non-wage funds deposited into his prison bank account. In Sanders v. SCDC, 665 S.E.2d 231 (Ct.App.2008), this Court did not address the issue of whether Sanders had a property interest in his non-wage funds deposited into his prison bank account. The appellant believes this appeal requires this Court to determine

the nature and extent of the appellant's interest, under traditional private property rights, or otherwise, in his non-wage funds held in his prison bank account.

SCDC provides a fund account on behalf of the appellant, which is used exclusively by the appellant to purchase goods and services from SCDC. All deposits into the appellant's account are made available to the appellant to dispose thereof. The appellant is provided with a SCDC Inmate ID card, which also serves as a debit card, enabling him to purchase those goods and services from SCDC. The appellant can also request the issuance of checks from his fund account by completing SCDC Form 15-1, "Cooper Trust Fund Withdrawal", made payable to qualified individuals and businesses, including SCDC. When the appellant is released from prison, the amount of the fund account, upon request, will be made payable, by check, to the appellant. If the appellant dies before he is released from prison, his beneficiary can claim his personal belongings, including the balance of his fund account. Under these circumstances, it is difficult to conclude that the appellant does not have a property interest in his prison bank account.

On March 18, 2004, the appellant signed SCDC Form 18-15, "DNA Notice & Payment Procedures", which stated that an SCDC inmate must authorize SCDC to deduct funds from his fund account, in order to collect the DNA fee, by completing SCDC Form 15-1, "Cooper Trust Fund Withdrawal", and make payable to SCDC for DNA fee. On July 20, 2004, William M. White, Warden, Broad River Correctional Institution, issued a memorandum for all staff and inmates addressing the new DNA legislation. The purpose of the memorandum was to inform the prison population that, effective July 1, 2004, the DNA statutes were amended to require inmates convicted of any crime punishable by imprisonment of five years or more to submit a DNA sample for inclusion in the state DNA Database. The memo outlined the operational procedure to take place on July 23, 2004, in order to conduct the required DNA testing, which included fingerprinting and one tube of blood to be drawn. The memorandum made no reference to any changes in the

DNA payment procedure. Furthermore, the appellant has never signed any new, or revised, DNA payment form related to SCDC's new procedure as to automatically deducting a percentage of "non-wage" deposits made into the appellant's account.

Nevertheless, any counter-arguments to support the proposition that minimal procedural due process was met by SCDC's advance posting of the new deduction procedure are irrelevant. The appellant has not alleged any procedural due process claims against SCDC. The appellant's claims clearly challenge SCDC's power, and/or ability, to deduct non-wage funds from his prison account.

The Due Process Clause of the Fourteenth Amendment also contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the procedures used to implement them. See Daniels v. Williams, 106 S.Ct. 662 (1986).

"This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." Webb's Fabulous Pharmacies, Inc., supra, 101 S.Ct. at 452.

"Although controversies under this clause historically arose from the government's exercise of eminent domain, the Takings Clause reaches beyond the protection of real property to other forms of private property, such as financial assets ... The purpose of the Fifth Amendment provision forbidding uncompensated takings of private property for public use is to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." McMahan, supra, 858 F.Supp. at 539 (citations omitted).

"Legislature's intent in requiring the production of samples was to protect the public ... purpose of law was to allow State Law Enforcement Division (SLED) to build up the State DNA database by developing DNA profiles on samples for law enforcement purposes and for humanitarian and non-law enforcement purposes ... and processing fees were relatively small and were used as primary source of funding DNA database." In re DNA EX POST FACTO ISSUES, 561 F.3d 294 (2009).

SCDC garnished non-wage funds from the appellant's prison account to help fund the State's DNA database. The appellant did not receive a service or good in exchange for the non-wage funds debited from his account. The appellant did not complete and sign SCDC Form 15-1, "Cooper Trust Fund Withdrawal", authorizing SCDC to deduct funds from his prison account for DNA processing.

SCDC contended that S.C. Code Ann. § 23-3-670 does not limit the sources from which the DNA processing fee can be collected. (SCDC Grievance Form, Step 2). In addition, the Sanders Court found the S.C. Code Ann. § 23-3-670 (Supp.2007) "does not restrict the Department from recovering the fee from non-wages voluntarily deposited in the inmate's account subsequent to notice of the deduction procedure." *Id.*, 379 S.C at 418-419. The appellant disagrees with the Sanders Court and the SCDC.

Any finding that S.C. Code Ann. § 23-3-670 does not restrict SCDC from garnishing non-wage funds is in direct conflict with the "plain language rule" as applied in resolving issues of statutory construction.

"Absent a demonstrated ambiguity, the plain meaning of a statute is determined by the words chosen by the General Assembly." Bayle v. S.C. Dept. of Transp., 542 S.E.2d 736 (S.C.App.2001); Also see Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100 (S.C.2003) (For the purpose of statutory construction, what a legislature says in the text of a statute is considered the best evidence of the legislative intent or will); Hodges v. Rainey, 533 S.E.2d 578, 581 (2000) (If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning).

Accordingly, SCDC's garnishing of the appellant's non-wage funds in order to collect the DNA processing fee was carried out without a change in the intent, or will, of the legislative authority of S.C. Code § 23-3-670.

Consequently, SCDC has exceeded its authority under S.C. Code Ann. § 23-3-670 by garnishing non-wage funds to collect the DNA processing fee.

Ultimately, the appellant was deprived of his private property, without compensation, in violation of the Fifth Amendment's Takings Clause, when the SCDC deducted non-wage funds from his prison account to be used by the State of South Carolina to fund the State's DNA Database.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

Ronald Coulter

Ronald Coulter, #300410
Ridgeland CI, CA-25
P.O. Box 2039
Ridgeland, SC 29936

Appellant, Pro Se

May 8, 2017.

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the South Carolina Department of Corrections by depositing a copy of it in the United States Mail, postage prepaid, on May 8, 2017, addressed to the attorney of record: Shanika Johnson, Office of General Counsel, SCDC, P.O. Box 21787, Columbia, SC 29221.



Ronald Coulter, #300410
Ridgeland CI, CA-25
P.O. Box 2039
Ridgeland, SC 29936

May 8, 2017.

Appellant, Pro Se

RONALD COULTER, #300410
RIDGELAND CI, CA-25
P.O. Box 2039
RIDGELAND, SC 29936



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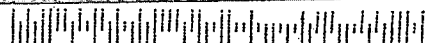
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SC Court of Appeals

JENNY A. KITCHINGS
CLERK, SC COURT OF APPEALS
P.O. BOX 11629
COLUMBIA, S.C.

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