

IV. STATEMENT OF CLAIM - continued.

The State of South Carolina
In The Court of Appeals

Appeal From The Administrative Law Court [The S.C. Dept. of Corrections]
S. Phillip LenSKI, Administrative Law Judge
Appeal No. 2017 - 001181

Bernard M. Fadden, 199135,

RECEIVED Appellant,

JUN 12 2017

vs. SC Court of Appeals

South Carolina Dept. of Corrections,

Respondent.

Informal Brief

Bernard M. Fadden, 199135
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Statement of Issues On Appeal:

Issue # 1:

Did the ALC err in not determining whether Rule 71 warrants a fee waiver suggested by the district court, denying Appellant access to court, in view of his 10/08/2017 and 12/02/2017 letters, in violation of Appellant's 14th Amendment right under the U.S. Constitution?

Issue # 2:

Where Appellant is indigent and cannot pay the \$65.00 filing fee, and renewed an in forma pauperis motion with declaration, did the ALC err in not ruling on Appellant's Renewed In Forma Pauperis Motion, in violation of Appellant's 1st and 14th Amendment rights "to petition" and "to be heard" under the U.S. Constitution?

Issue # 3:

Where Appellant's rights under the 1st and 14th Amendments of the U.S. Constitution were allegedly violated where his DHO hearing transcript was altered, exculpatory evidence was withheld via not transcribing testimony and withholding DVD, did the ALC err in not allowing discovery?

Statement of the case:

Appellant was convicted in a prison disciplinary proceeding for allegedly striking a psychotic inmate Rasi Gillard, #107089, in violation of SCOC OP-22.14, Section 810, resulting into (among other things) a loss of (60) days good time. After receiving SCOC's final decision on 7/21/2015, Appellant timely filed his Notice of Appeal. However, because the clerk returned the notice before a judge ruled that Petitioner had (3) prior frivolous cases within the meaning of 1-23-670, he filed a Motion To Compel the Clerk to file Appeal # KRCI-0165 Or, In Alternative For, Motion To Proceed In Forma Pauperis And Declaration.

Like the notice, the clerk returned this motion, contrary to Martin vs. State, 471 S.E.2d. 134, 135 (S.C. 1995) (when indigent litigant files motion to proceed in forma pauperis and complaint does not appear to fit within statutory or constitutional exception to requirement of filing fees, clerk of court must submit motion to judge for a ruling as to whether complaint fits within statutory exception or concerns fundamental right that require waiver of filing fee).

Appellant next filed a mandamus petition to compel the ALC's clerk to file the motion in forma pauperis with a judge. The petition was filed in S.C. Supreme Court, and was denied 10/30/2015.

Appellant then filed a petition for habeas corpus in the U.S. District Court for the District of South Carolina. The Hon. Judge Michelle Childs opined that Rule 71(b) fee waiver is not clear..., and that because petitioner's case arguably involves fundamental rights for which the constitution requires indigents to be allowed access to courts, the question is whether the method petitioner took in filing an in forma pauperis motion was the proper method.... Judge Childs ultimately determined that dismissal of the habeas petition was the

proper method so the S.C. state courts could determine whether Petitioner's request under Rule 71 warrants a fee waiver.

Appellant then filed two letters with the ALC requesting information and an application pursuant to Judge Child's order, one on 10/28/2016 and one on 12/02/2016. After docketing this case in the ALC, the ALC dismissed this case after Appellant filed his Brief for a lack of jurisdiction, although Appellant filed a timely notice of appeal in the original case. The ALC also vaguely denied Appellant's pending Renewed Motion to Compel Clerk to File Appeal # KRCI-0165 Or, In Alternative For, Motion to Proceed In Forma Pauperis ...; and Motion for Enlargement of Time Upon Receipt of ROA And to Subpoena Shauna Land's DVD, Objection to Altered DHD Transcript / Other Records with Declaration.

This case follows.

Facts For Issue # 1

After Appellant filed his writ of habeas corpus petition in the the district court, the district court dismissed the habeas petition without prejudice after it suggested that the state court should determine whether Rule 71 warrants a fee waiver on 09/19/2016. (See Record on Appeal at p. 45 of 100, district court's 09/19/2016 Order dismissing habeas petition without prejudice.) On October 28th, 2016, Appellant submitted a letter in accordance with the district court's ruling with the ALC Court's office, but the clerk did not respond to this first 10/28/2016 letter. (See ROA at p. 78 of 100, notarized letter asking clerk for an application and information on Rule 71.) Appellant submitted a second letter on December 02, 2016, and, again, the clerk did not send any information on Rule 71 or an application. (See ROA at p. 80 of 100, Appellant's second notarized letter requesting information and an application on Rule 71 was also ignored by the clerk's office.) Both these letters were served on the counsel for SCOC. (See ROA at p. 79 and 81 of 100, Proof of Mailing dated 10/29/2016 with note on same letter served a second time in ROA at p. 80.)

In contrast, the ALC stated in its Order of Dismissal that the Department noted that almost two years after filing the Notice of Appeal,^{A)} the Appellant has not paid the filing fee, nor has he properly applied for waiver under Rule 71. (See ROA at p. 96 of 100, ALC's Order of Dismissal. Absolutely nowhere in Respondent's [Mrs. Melissa Arnold's] responses do the even mention these two (2) letters. And nowhere in the ALC's order does it mention the letters or address the district court's suggestion as to whether Rule 71 warrants a fee waiver, or whether Appellant's In Forma Pauperis Motion satisfied the fee requirement or otherwise was the proper method. *Id.*

^{A)} Despite the fact that Appellant's notice of appeal was filed in 2015, the ALC converted his inability to pay into a jurisdictional reason for denial or for granting Respondent's Motion To Dismiss; Appellant contends this was also err.

Argument For Issue # 1 :

The U.S. Supreme Court stated in Boddie vs. Connecticut, 91 S.Ct. 780, 787 (U.S. 1971) in relevant part,

"... due process of law prohibits a state from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriages."

The U.S. Supreme Court also stated in Boddie that, "Just as a valid notice procedure may fail to satisfy due process because of circumstances of the defendant, a cost requirement, valid on its face, may offend due process because it operates to foreclose particular parties opportunity to be heard." *Id.* at 91 S.Ct. 787. See also Studemine vs. South Carolina Dept. of Corrections, 2009 WL 2607819 (D.S.C. 2009) (citing Martin vs. State, 471 S.Ct. 134, 135 (S.C. 1995) (noting, "where certain fundamental rights are involved, the constitution requires that an indigent be allowed access to the courts.")).

Because the ALC's order does not determine whether Rule 71 warrants a fee waiver, and because Appellant was denied access to the ALC solely because of his inability to pay, this court should find that his right of access to court has been violated under the U.S. Constitution's 14th Amendment, and thus, hear the underlying (4) federal claims fully briefed with all facts and relevant case laws (See RDA at p. 55-72 of 100, Appellant's Brief in the ALC dated 03/15/2017.)

Facts For Issue # 2 :

Unable to pay the \$2500 filing fee approximately 2 years later, Appellant filed a renewed Informa pauperis motion. (See RDA at p. 66 of 100, Renewed Informa Pauperis Motion incorporated in Brief

at p. 35 of 100.) However, the ALC arguably did not address the pauper's status by citing factual basis with conclusions of law in its order vaguely denying the motion(s), stating all motions not specifically addressed in this Order of Dismissal are hereby denied. (See ROP at p. 97 of 100, ALC's Order at p. 2 of 2.)⁸⁾

Argument For Issue # 2:

Appellant contends that his right to be heard and to petition were also denied where the ALC did not rule on his (IFP) motion or determine whether he couldn't pay the \$25.00 filing fee; nor did it address the declaration claiming he could not - and still cannot - receive more than \$6.43 in his account at any given time in order to pay the \$25.00 filing fee. In Bayle vs. South Carolina Dept. of Transp., 542 S.E.2d 736, (S.C. App. 2001) this very Court stated:

¹² "An abuse of discretion occurs when the trial judge's ruling is based upon error of law or, when based on factual conclusions, is without extraordinary support."¹³

Therefore, this Court should find that the ALC did err in not ruling with factual basis and conclusions of law on Appellant's Renewed Motion To Proceed In Forma Pauperis.

Facts For Issue # 3:

Because testimony given at the DHO hearing was allegedly altered by transcriptionist Shauna Land to again withhold exculpatory evidence that charging officer / Sgt. McKay was locked-out of cell (64) when (4) inmates heard Appellant yelling for McKay to come get alleged

Because law library ofc. Michaw does not allow adequate time in the law library per all the Wardens and the Major, case law cannot be offered at this time.

psychotic inmate Rost Gillard, heard Appellant yelling to McSkay that Gillard hit him while McSkay was locked-out of cell, heard no directs given by McSkay after hearing keys unlocking cell (64) and McSkay entered, and heard Appellant yelled, "What you spray spray me for!" were all allegedly omitted from the transcript prepared by prepared by Mrs. Land. (See ROA at p. 14 of 100, DHD transcript prepared by Mrs. Land, and Appellant's handwritten notations thereon showing what testimony should be on DVD.) Additionally, handwritten notations also indicate testimony was omitted where a second inmate William Pipkin was allegedly assaulted by Gillard approximately (1) hour later, but charging Ofc/Sgt. McSkay concealed this fact from his incident report when charging Pipkin for allegedly striking McSkay's hand. (See McSkay's incident report charging Pipkin without mentioning Gillard allegedly assaulted Appellant and later assaulted Pipkin, ROA at p. 70 of 100.) Moreover, four (4) inmate witnesses have signed declarations stating they were not contacted for their testimony and that they heard Gillard expressed his desire to fight if let loose. (See ROA at pgs. 51-54, (4) Declarations of Inmates Pipkin, Smith, Gunter and Bradshaw.)

However, the ALC did not address Appellant's Motion For Enlargement of Time Upon Receipt of ROA And To Subpoena Shauna Land's DVD, Objection To Altered DHD Transcript / Other Records With Declaration with factual basis and conclusions of law when it vaguely dismissed said motion that challenged additional concealment of exculpatory evidence to support McFadden's fully briefed (4) four federal claims now here before this court. (See ALC Order, ROA at p. 96 of 100, stating all motions not specifically addressed in its Order of Dismissal are hereby denied.) (See also Brief, fully addressing all (4) federal claims with citations of relevant facts and federal case laws, ROA at p. 35-72 of 100.)

Argument For Issue #3:

Appellant contends there were about (60) Kershaw prison officials with a desire to conceal McKay's use of unnecessary force on him by acting as if he and inmate Pipkin were the aggressors (See again McKay's incident report concealing this fact, ROH at p. 70 of 100.) Now there are (1) eleven SCDE officials concealing exculpatory evidence when counting Mrs. Land's alteration of his DHO hearing transcript of testimony that should appear as written thereon, ROH at p. 14 of 100. And that a denial of discovery for this fraud to be established is essentially a denial of his right to petition under the 1st Amendment and access to court under the 14th Amendment of the U.S. Constitution. ⁽¹⁾

Petitioner submits McKay's incident report in the ROH at p. 70 of 100 shows an obvious fraud and 8th Amendment violation within the meaning of Cooper vs. Federal Bureau of Prisons, 453 Fed. Appx. 516, (1120) (U.S. App. 5th Cir. 2011) (Prisoner, who was assaulted by fellow inmate, should have been allowed to engage in further discovery, pursuant to summary judgment rule, as to whether prison officials knew that inmate [Rasi Gillard] was such a danger to his fellow prisoners that they were deliberately indifferent to the safety of other prisoners in failing to take steps to isolate him [Rasi Gillard] or otherwise protect other inmates for 8th Amendment purposes.)

Therefore, where Appellant was not given an opportunity to establish a continuous fraud and conspiracy to conceal the records showing exculpatory evidence to exonerate him and restore the (60) days lost when the ALC did not allow discovery, this court should find that the ALC did err in not allowing discovery of transcript alteration.

⁽¹⁾ Again, because law library, etc. Michaw does not allow adequate time to fully research this issue, no case laws can be cited at this time.

Conclusion:

For the foregoing reasons, this Court should reverse the judgment of the Administrative Law Court.

Respectfully Submitted,
SL [Signature]
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Appellant, pro se

May 31st, 2017

Sworn And Subscribed Before Me
This 31 day of May 2017

[Signature]

Notary Public For South Carolina

My Commission expires Jan 27, 2025

Proof of Mailing

Appeal #: 2017-001181 ^{DMV}

The undersigned hereby certifies that a true copy of the attached matter has been mailed to the person(s) listed below by depositing a properly - addressed - stamped - envelope in the U.S. Mail this 31st day of May 2017; such matter being: McFadden's (10) Page Initial Brief with (10) Page Record on Appeal;

1) Melissa J. Arnold, Staff Attorney, SCDC, Office of General Counsel, 4444 Broad River Rd., Columbia South Carolina 29221; and

2) Hon. Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, P.O. Box 11629, Columbia South Carolina 29211

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SC Court of Appeals

Sworn And Subscribed Before Me
This 31 day of May 2017

Cheryl R. Jones

Notary Public For South Carolina

My commission expires: Jan 27, 2025

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