THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk Jr.; Administrative Law Judge

Case No. 2017-000694

Jerome A. Owens, Appellant

v.

South Carolina Department of Corrections, Respondent

FINAL BRIEF OF THE APPELLANT

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Did the Administrative Law Judge err in his order ruling that the Appellant failed to comply with SCALC 59 by not timely providing proof of service that Notice of Appeal had been served on SCDC?

STATEMENT OF THE CASE

This matter comes before this Court by way of appeal of Jerome Owens an inmate in the South Carolina Department of Corrections. On February 19, 2004 The Honorable Reginald I. Lloyd sentenced the Appellant to twenty eight years straight sentence for trafficking crack cocaine. This sentence became final May 25, 2006.

Execution of this sentence began in 2004 and the Appellant was informed by an employee of the DOC that he would be released December 23, 2026.

Appellant served ten and a half years at a level three institution before being transferred to a level two institution. Upon orientation at the level two institution Appellant discovered his sentence had been changed from the trial Court pronouncement.

Without any notice to Appellant on June 24, 2014 one Stephanie Willis of DOC Inmate Records changed the Appellant's sentence to twenty five years mandatory day for day.

The Appellant has filed three grievances in this matter. The latest grievance from Step 1 was filed June 23, 2016 challenging the change of his sentence and the manner in which it was done. Thereafter on July 22, 2016 Appellant filed a Step 2 grievance alleging the illegal change of his sentence. On August 30, 2016 DOC denied the Appellant Step 2 and Appellant appealed to the Administrative Law Court.

On March 8, 2017 Administrative Law Judge H.W. Funderburk filed an order dismissing Appellant's appeal for non compliance with SCALC Rule 59 and Appellant now appeals.

STANDARD OF REVIEW

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

The review of the administrative's law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for futher 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.

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 subtantial 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 and Control Bd., 333 S.C. 455, 510 S.E.2d 421 (1999) "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

ARGUMENT

The Administrative Law Judge erred in not exercising his discretionary authority by not ruling on the whole of the record where judicial review is required where an inmate challenges the Deparment of Corrections change in his sentence.

The Appellant entered the executive branch of the South Carolina Judicial System over fourteen years ago. Appellant is serving a twenty eightyear sentence for trafficking crack cocaine. On January 15, 2004 Appellant started serving his sentence at a level three prison. Appellant was classified at Lieber Corrections and assigned a release date of December 23, 2026.

While at Lieber he was given yearly custody classification reviews. May 2014 the Appellant was informed that he scored out as a level two custody inmate. June 26, 2014 he was shipped to Allendale Corrections level two prison.

After a classification custody review and new arrival orientation at this prison (Allendale). The Appellant was informed by one (Mrs. Jamison) classification case worker that his release date was changed to March 8, 2028. Such information being explained to him July 10, 2014.

Thereafter the Appellant immediately filed a grievance that was denied as untimely because of this department's procedure for filing grievances. See, the Grievances filed in the Record on Appeal.

Recently the Supreme Court of South Carolina decided the ease of Tant V. S.C.D.C. 408S.C.334 759S.E.2d 398(2014) The South Carolina Supreme Court held that an inmate must receive due process when S.C.D.C attempts to recalculate an inmates sentence. citing State V. Binnarr 400s.c. 156, 165, 733 S.E.2d 890, 894, (2012)

Whether the Appellant has been denied due process will require inquiry into whether the interest involved can be defined under the meaning under the Due Process Clause. Bd of Regents of State Colls V. Roth, 408 U.S. 564, 571-73, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

This Court answered in the affirmative that there can be no doubt the length of an inmate's sentence implicates a constitutional liberty interest Greenholtz V. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 18, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) Thus determining what process is required, the Supreme Court of this state **outlined** the procedure S.C.D.C must comply with concerning Due Process.

See Tant V. S.C.D.C Footnote (2)

The Department has no independent sentencing authority and nothing in our opinion indicates otherwise. In carrying out the executive function of incarcerating inmates, the Department must review the sentencing sheets provided by the judiciary to ascertain the sentence imposed by the court.

Based on this review, the Department may run across judicial pronouncements of a sentence that are not clear from the face of the sentencing sheets alone.

Here, as the Court has dicussed in Footnote (2), S.C.D.C as the executive branch

performs the administrative task of implementing the law as set forth by the **judiciary** and is in no way imposing a sentence or resentencing an inmate.

Contrary to the case law as discussed in Tant V. South Carolina Dept. of Corrections, the Appellant has run into the identical situation as Tant with a few serious differences. One the judge that sentenced the Appellant did not contact the Department of Corrections in 2014 to instruct a change in the Appellant's sentence.

Two, the Appellant was not notified about a change in his sentence prior to his sentence being changed in June 2014 and the Department of Corrections has maintained Appellant's sentence as Stephanie Willis pronounced it.

Three, the Appellant's sentence had become final over a decade ago and no judicial officer took part in this untimely visitation of Appellant's sentence.

Four, the Department of Corrections has exceeded it's authority in changing the Appellant's sentence.

Five, a violation of Due Process has already occurred since June 2014 and the Department of Corrections then deceitfully attempted to correct what Stephanie Willis had done.

During June 20, 2016 while at Allendale Corrections, classification employee's of this department executed a revision/clarification hearing in an undisclosed meeting with the Appellant at Allendale.

As detailed by the Appellant the events are true. The Administrative Law Judge was

statutorily empowered to inquire and decide Appellant's appeal from this department. The issue before the Administrative is one of Constitutional importance.

S.C. Code Ann. §1-23-380 (2005) governs and authorized the Administrative Law Judge to determine several factors that are enumerated in the statute:

1-23-380 (6) (relevant language) The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure
(d) effected by an error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole of the record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The standard of review is identical by this Court as authorized by statute see, S.C. Code Ann. §1-23-610(B) (2005).

The sole issue concerning this question presented to this Court is very important. The Appellant in a situation like this '**must**' receive '**judicial review**' of his particular appeal before the Administrative Law Judge because of the Constitutional question and violation posed to the Court. And in this particular circumstance according to the '**mandatory**' procedure mandated

by the Supreme Court of this State in Tant V. South Carolina Dept. of Corrections Supra, that due process is **required and timely** formal notice must suffice when the Department of Corrections seeks to recalculate it's Initial determination. 408 S.C. at 347, 759 S.E.2d. at 398

Clearly the '**whole**' of the Appellant's appeal record before the Administrative Law Judge shows that the process used in June 2014 exemplified a violation of Due Process. Such process that has continued to remain in full force.

Pursuant to Tant Supra citing State V. Campbell 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008) after ten years considering it was June 2014 when the Appellant's sentence was changed (the long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgement was entered expires," except for post-trial motions filed within ten days pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure).

Therefore, Judge Reginald I. Lloyd could not have exercised his judicial authority after so long ago.

June 20, 2016 Allendale caseworkers notified the Appellant of what happened to his sentence

May 25, 2006 the Appellant's sentence became final.

The exercise of sentencing authority by the Department of Corrections is a violation of the separation of powers doctrines doctrine, see, S.C. Const. art. 1, §8 ;(Stephanie Willis performed the imposition of a sentence in June 2014. The whole of the record reveals that she imposed a '**Mandatory**' sentence day for day twenty five years. An administration function that only a judicial officer of

the Court must perform. See the Record on Appeal a pronouncement at sentencing is attached. The Court Verbatim, sir the sentence for trafficking on indictment 185, is 28 years.

Therefore, the implementation of such a sentence violates Separation of Powers doctrine State V. Archie 322 S.C. 135, 470 S.E.2d 380 (1996).

Finally Appellant did not receive due process in June 2014 and the whole of the record reveals this fact. The Appellant suffered due process violation over three years ago. He also alerted this Department about the ruling in Tant V. South Carolina Department of Corrections. Appellant only believes that the Administrative Law Judge did err by not reviewing the whole of the record. And by not doing so he failed to exercise his disretionary authority Cf. State V. Smith 276 S.C. 494, 280 S.E.2d 200 (1981) it is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise discretion improperly). Judicial review of the Department of Correction's change in the Appellant's sentence should have been exercised.

The Administrative Law Judge erred in his order ruling that the Appellant failed to comply with South Carolina Administrative Law Court rule 59 by not timely providing proof of service that notice of appeal had been served.

The Administrative law judge has erred in his order that the Appellant failed to timely provide proof of service that notice of appeal had been served on the Department of Corrections.

Pursuant to the South Carolina Administrative

Law Court Rules, rule 59, the Forms provided to an inmate comes directly from the Grievance Department's Director.

Rule 59 of the South Carolina Administrative Law Court states, in relevant part,

The notice of appeal from the final decision to be heard by the Administrative Law Court shall be filed with the Court and a copy served on each party, including the agency, within (30) days of receipt of the decision from which the appeal is taken. The notice shall be on the form prescribed by the Court pursuant to Rule 57 and shall contain the following information:
section D also says,
Any notice of Appeal which is incomplete or not in compliance with this rule or Rule 71 **will not** be assigned to an administrative law judge until all required information is received . . . . . .

Rule 59 is self explanatory and unambiguous. It is undoubtedly to the very point that any case not in compliance with Rule 59, **will not** be assigned a law judge to such appeal from the decision of an administrative body.

Appellant points out that his compliance of this rule was the initial process of entering litigation at the Administrative Law Court.

The Appellant provided the necessary forms and documents to intiate his appeal at the Administrative Law Court level. Service was completed and proper in accordance with Rule 59. Judge H.W. Funderburk Jr. was immediately assigned to this case on October 28, 2016.

The Appellant is confined and has no idea who does the assignments of cases to an Administrative Law Judge.

Appellant does know that Judge H.W. Funderburk was assigned to his appeal Otober 28, 2016 and the filing of Appellant's appeal was accepted and completed October 13, 2016. The necessary documents as found in the record on appeal, notified the Appellant of the same (See Record on Appeal S.C. ADMIN. LAW COURT informing Appellant of procedure).

In Henning V. Kaye 307 S.C. 436, 415 S.E.2d 794 (1992) Failure to comply with rules of appellate procedure governing initial brief did not require dismissal, but instead, appellate was required to serve and file initial brief in compliance with the rules.

In the case before this Court, Appellant believes that dismissal of his appeal is not warranted. The Appellant has diligently participated in the procedural process of the rules with the Court See also Whitlock V. Collins 2013 WL 8538745.

The Respondent and The Clerks of Courts have maintained responding to all of the Appellant's filing and substantial evidence suggests the same. Had Rule 59 not been adhered to, then the assignment of the Judge would not have attached per Rule 59 SCALC Rules. Cf. Huck V. Oakland Wings, LLC July 19, 2017 WL 3044750 citing Green by and through Green V. Lewis Truck Lines, Inc." . . . 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) "In interpreting the languange of a court rule, we apply the same rules of construction used interpreting statutes.

Compliance of Rule 59 by the Appellant immediately alerted the Court for a Judge to be assigned to the Appellant's case.

CONCLUSION

For the foregoing reasons, the Court should reverse the Administrative Law Courts decision because there is substantial evidence that exists on the whole of the record that judicial review must suffice to determine length of the appellant's sentence.

Respectfully Submitted

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August 31, 2017

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.
August 1, 2017

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