

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Billy Pee, #111433,

) Docket No. 17-ALJ-04-0233-AP
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Appellant,

vs.

ORDER

South Carolina Department of Corrections,

RECEIVED

FILED

September 14, 2017

Respondent.

) OCT 17 2017
)

SC ADMIN. LAW COURT

SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Billy Pee (Appellant), an inmate incarcerated by the South Carolina Department of Corrections (Department or SCDC).

FACTS/PROCEDURAL HISTORY

Appellant filed a Step 1 Grievance on February 7, 2017, questioning the Department's sentencing calculation requiring that Appellant serve 85% of his sentence for a 3rd or subsequent drug offense. Appellant argued that the Department erred by reclassifying him as an 85% offender and changing his release date because he had already come up for parole before "any time cut or any decision was made on [his] 3rd offense drug charge." He argued that this violated "due process and constitutional law."* The Warden denied Appellant's Step 1 Grievance, stating that the Department's recent interpretation of S.C. Code Ann. §§ 44-53-370 and -375 (Supp. 2016) together with *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 781 S.E. 2d 914 (Ct. App. 2016) is that inmates who are convicted of 3rd or subsequent drug offenses are treated as 85% offenders unless all of the offender's prior drug offenses are for simple possession under Sections 44-53-370 or -375. The Warden determined that because Appellant had a prior conviction(s) for manufacturing, distribution, possession with intent to distribute, or conspiracy, his current sentence of a 3rd or subsequent drug offense required his sentence to be calculated at 85%.*

Appellant subsequently filed a Step 2 Grievance arguing that the Department's policy violated his plea agreement and that the Department was discriminating against those who had a 3rd offense drug charge. The Inmate Grievance Coordinator denied this grievance. Appellant then filed his Notice of Appeal on May 5, 2017, arguing that his "sentence was [erroneously] changed from a non-violent sentence to a violent sentence" because the Department misinterpreted

S.C. Code §§ 24-13-100, 16-1-60, and 44-53-375. The Record on Appeal was filed on July 6, 2017. Appellant filed his brief on June 5, 2017, and the Department filed its brief on August 22, 2017. On September 8, 2017, Appellant filed a Reply Brief.¹

ISSUE ON APPEAL

Did the Department err in classifying Appellant as an 85% offender for purposes of its sentencing calculation?

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C. Dep't of Prob., Parole and Pardon Servs.*, 352 S.C. 594, 576 S.E.2d 146 (2003). When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2016) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(A)(5) states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. 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) 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) (Supp. 2016).

Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency "as to the weight of the evidence on questions of fact." *Id.* Furthermore, an Administrative

¹ Notwithstanding the erroneous title of the document that Appellant filed on September 8, 2017 ("Notice Of Motion And Motion In Opposition To Respondents"), based on the content of this document, the Court will consider it his Reply Brief.

Law Judge may not reverse or modify an agency's decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary or affected by an error of law. *Id.*; see also *Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep't of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

Additionally, in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-456, 105 S.Ct. 2768 (1985), the U.S. Supreme Court held that "the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." Moreover, in *Al-Shabazz*, the South Carolina Supreme Court underscored that except where there is a possible Constitutional violation, since prison officials are in the best position to decide inmate disciplinary matters, the courts, and therefore this tribunal, adhere to a "hands off" approach to internal prison disciplinary policies and procedures when reviewing inmate appeals under the Administrative Procedures Act.

DISCUSSION

Appellant argues that the Department erred in reclassifying him as an 85% offender and changing his max-out date because it changed his underlying offense from a "non-violent offense to a violent offense." *As such, Appellant contends that the Department "chang[ed his] sentence." Accordingly, he argues that by changing his sentence, the Department violated the separation-of-powers doctrine in the U.S. Constitution and unconstitutionally interfered with his contract with the State, i.e., his plea agreement. *

* As an initial matter, Appellant is correct that the Department cannot change an inmate's actual sentence pursuant to a plea agreement once the sentencing court has accepted that agreement and imposed the sentence. However, the Department did not change Appellant's sentence in this

case. Instead, the Department followed the statutes and calculated the percentage of the sentence that Appellant would have to serve before becoming eligible for parole; it did not change the sentence itself. ✱

✱As to Appellant's offense, the sentencing sheets in the Record reflect that on May 12, 2014, Appellant pled guilty to two counts of "Distribution of Cocaine Base, 3rd," under S.C. Code Ann. § 44-53-375(B)(3).² Absent any ambiguity in the sentencing sheet, the Court must presume that the sentencing court's sentence is correct. *See Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 337, 759 S.E.2d 398, 399 (2014), *reh'g denied* (July 10, 2014) ("[T]he Department is generally confined to the face of the sentencing sheets in determining the length of a sentence . . . [unless] there is an ambiguity in the sentencing sheets."). The Court finds the sentencing sheet for Appellant's May 12, 2014 conviction unambiguous, and thus the Department was required to calculate Appellant's sentence according to that sheet. ✱

Appellant's sentencing sheet reflects that he pled guilty to distribution of cocaine base, third or subsequent offense, under Section 44-53-375(B)(3). This offense is a violation of Section 44-53-370(a)(1) and thus a felony under Section 44-53-375(B), and specifically a Class A felony under S.C. Code Ann. § 16-1-90(A) (Supp. 2016). "[A] class A, B, or C felony or an offense exempt from classification" is a "no parole offense." S.C. Code Ann. § 24-13-100 (2007). Regarding no parole offenses, S.C. Code Ann. § 24-13-150(A) sets forth the following:

(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 of 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. . . .

Because Appellant's third or subsequent offense is a Class A felony, it is a "no parole defense," generally requiring a service of 85% of the sentence. However, as the Court in *Bolin* discussed, following the Omnibus Crime Reduction and Sentencing Reform Act of 2010, this Court must also consider the amended versions of Sections 44-53-370 and/or -375 (whichever is applicable), as they repealed Section 24-13-100 to the extent that it conflicts with these other two sections. 415 S.C. at 282-83, 781 S.E.2d at 917.

² Appellant also pled guilty to "Resisting Arrest," but that offense is not at issue in this case.

S.C. Code Ann. § 44-53-375(B) (Supp. 2016) provides in pertinent part:

Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which **all prior offenses were for possession of a controlled substance pursuant to subsection (A)**, may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. **In all other cases, the sentence must not be suspended nor probation granted[.]**

Thus, in order to satisfy the exemption from being considered an 85% offender for his third offense of distribution of cocaine base (a Class A felony), **all** of Appellant's prior offenses had to be simple possession of less than one gram of methamphetamine or cocaine base pursuant to Section 44-53-375(A).

Here, the Record reflects that on May 12, 2014, Appellant pled guilty to the charge of distribution of cocaine base, 3rd or subsequent offense. The Record also reflects that Appellant had already been convicted and sentenced on February 17, 2012 for distribution of cocaine within proximity of a school, which falls under S.C. Code Ann. § 44-53-445 (Supp. 2016).³ Thus, because one of Appellant's prior offenses did not fall under subsection (A) of Section 44-53-375, Appellant must be classified as an 85% offender.⁴

ORDER

IT IS THEREFORE ORDERED that the Department's decision is **AFFIRMED**.
AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

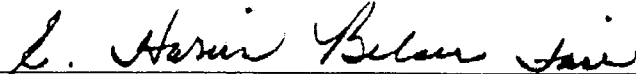
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³ The Court is not stating that this was Appellant's only offense prior to his conviction for a third or subsequent offense under subsection (B), but is simply pointing out one of Appellant's prior convictions that falls outside of subsection(A), which is all that is necessary to deny Appellant's claim to an exemption from 85%-offender status.

⁴ Appellant appears to be under the misapprehension that the Department classified him as an 85% offender by changing his offense to a violent crime under S.C. Code Ann. § 16-1-60 (Supp. 2016). As Appellant correctly points out in his brief, trafficking cocaine base as defined in Section 44-53-375(C) is a violent crime, not his distribution offense under subsection (B). However, as explained above, the Department did not change his underlying offense but instead based his status on his third or subsequent offense and the nature of his prior convictions.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

September 14, 2017
Columbia, South Carolina