STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Lynel Witherspoon, 254076, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 17-ALJ-04-0250-AP Grievance No.: TCI 108-17

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to the Notice of Appeal filed May 16, 2017 by Lynel Witherspoon ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections ("the Department"). After careful review of the Record and briefs, the Court affirms the Department's decision.

BACKGROUND

Appellant is currently serving a seventeen-year sentence, after being convicted on July 25, 2013, for Possession with Intent to Distribute Cocaine Base or Methamphetamine, 3rd offense, in violation of S.C. Code Ann. § 44-53-375(B)(3) (Supp. 2016). Prior to the 2013 conviction, Appellant had two 1998 convictions,[1] one for Possession with Intent to Distribute Crack Cocaine and one for Crack Distribution, in violation of S.C. Code Ann. § 44-53-375(B)(1) (Supp. 2016). On February 8, 2017, the Department notified Appellant that his projected maxout date changed from July 6, 2021 to April 27, 2027 pursuant to the interpretation of S.C. Code Ann. §§ 44-53-370 and 44-53-375 (Supp. 2016) in conjunction with Bolin v. S.C. Dep't of Corr., 415 S.C. 276, 781 S.E. 2d 914 (Ct. App. 2016). The Department further explained that Appellant was convicted of a third drug offense and his prior convictions were not simple possessions, therefore, he must be treated as an 85% offender and serve 85% of his sentence.

ISSUE ON APPEAL

Whether the Department erred in recalculating Appellant's sentence under the 85% rule?

[1] The two 1998 convictions are reflected in a printout from the Department's "Offender Management System."

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). The Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker v. S.C. Dep't of Corrs., 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). Such as a liberty interest is at stake in the calculation of an inmate's sentence. Tant v. S.C. Dep't of Corrs., 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) (citation omitted) ("There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest."); see also Sullivan v. S.C. Dep't of Corrs., 355 S.C. 437, 441–42, 586 S.E.2d 124, 126 (2003) (quoting Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750) (recognizing that Al-Shabazz created review in the ALC for sentence calculation cases).

In sentence calculation cases, the Court sits in an appellate capacity, applying the appellate standard of the Administrative Procedures Act (APA). Al-Shabazz, 338 S.C. at 377–80, 527 S.E.2d at 754–56. Consequently, the Court's review is limited to the record. S.C. Code Ann. § 1-23-380(4) (Supp. 2016). Additionally, the Court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, but may modify or reverse the decision of the agency when substantial rights of the appellant have been prejudiced. S.C. Code Ann. § 1-23-380(5) (Supp. 2016). Substantial rights of the appellant are prejudiced when the agency's decision, including the agency's findings, inferences, and conclusions, are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

DISCUSSION

In this appeal, Appellant argues that the Department violated his statutory and constitutional rights. Specifically, Appellant argues that when the Department recalculated his maxout date requiring him to serve 85% of his sentence for a 3rd or subsequent drug offense, the Department (1) lacked authority to do so, (2) unconstitutionally enhanced his sentence, and (3) denied him due process.

As to Appellant's first grounds for appeal, the legislature created the Department as an administrative agency to "implement and carry out the policy of the State with respect to its prison system...and the performance of such other duties and matters as may be delegated to it pursuant to law. See S.C. Code Ann. § 24-1-30. See also S.C. Const. art. XII, § 9 ("The Penitentiary and the convicts thereto sentenced shall forever be under the supervision and control of officers employed by the State..."). Administering inmate sentences is an integral part of its creation as an administrative agency, and the Court has acknowledged that administering inmate sentences is a part of the Department's responsibility as an agency. See Tant v. S.C. Dept' of Corrections, 408 S.C. 334, 342, 759 S.E.2d 398, 402 (2014) (..."we respect the Department's responsibility to administer a sentence as intended by the judge"...). Additionally, rules relating to parole and inmates' sentences fall under Title 24 of the South Carolina Code, therefore, the legislature intended for this matter to fall under the purview of the Department and delegated the matter to the Department as a matter of law.

In this instance, Appellant's sentencing sheet stated that Appellant is committed to the State Department of Corrections for a determinate seventeen years, therefore the Department is vested with authority over Appellant and issues relating to Appellant's length of incarceration. Additionally, via Appellant's sentencing sheet, the circuit court judge directed the Department to calculate and apply credit for time served to Appellant's sentence in accordance with S.C. Code Ann. § 24-13-40. See generally S.C. Code Ann. § 24-1-30 (stating that the Department is to perform duties delegated to it pursuant to law). Therefore, I conclude that while the Department does not have authority to change Appellant's sentence ordered by the circuit court judge, the Department is well within its authority to review Appellant's sentence to ensure Appellant serves the appropriate length of his sentence in accordance with South Carolina statute and case law.[2] See State v. Bennett, 375 S.C. 165, 170, 650 S.E.2d 490, 493 (Ct. App. 2007) (explaining that this Court cannot alter or modify a circuit court judge's sentence, but this court can determine if the Department is properly enforcing the inmate's sentence pursuant to the circuit court judge and under the relevant laws).

[2] The Court clarifies that requiring an inmate to serve 85% of their sentence pursuant to statute and case law is not an alteration or modification of the sentence ordered by the circuit court judge. For example, when the Department calculates an inmates sentence to account for time served in accordance with S.C. Code Ann. § 24-13-40, the Department is not altering or modifying the inmate's sentence ordered by the circuit court judge, but the Department is ensuring that the inmate serves the appropriate length of the ordered sentence in accordance with South Carolina statute and case law.

As to Appellant's second grounds for appeal, the Court will review Appellant's case to determine whether the Department properly enforced Appellant's sentence issued by Order of the circuit court judge and under the relevant laws. See id. The Court must presume that the sentencing court's sentence is correct, unless there are ambiguities in the sentencing sheet. 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."). In this instance, the Court concludes that the sentencing sheet for Appellant's July 25, 2013 conviction is unambiguous, and the Department properly calculated Appellant's sentence in accordance with the sentencing sheet.

According to Appellant's sentencing sheet, his July 25, 2013 conviction of Possession with Intent to Distribute Cocaine Base or Methamphetamine was a 3rd offense and an offense in violation of S.C. Code Ann. § 44-53-375 (B)(3) (Supp. 2016). More specifically, Appellant's offense is a class A felony, as defined by S.C. Code Ann. § 16-1-90(A). Pursuant to S.C. Code Ann. § 24-13-100 (2007), a class A felony is a no parole offense.[3] When the Department calculates sentences for no parole offenses, S.C. Code Ann. § 24-13-150(A) dictates the following:

> 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" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, ..., 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, ...

Here, as previously discussed, Appellant's third offense is a no parole offense, specifically a class A felony, which requires Appellant to serve 85% of his sentence, pursuant to S.C. Code Ann. § 24-13-150(A). However, the South Carolina Supreme Court, following the Omnibus Crime Reduction and Sentencing Reform Act of 2010, requires the reviewing Court to consider the

[3] Additionally, a class B, or C felony or an offense exempt from classification as enumerate in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more, are also no parole offenses. S.C. Code Ann. § 24-13-100 (2007).

amended version of S.C. Code Ann. § 44-53-375 (Supp. 2016), as it repealed[4] S.C. Code Ann. § 24-13-100 to the extent that it conflicts. Bolin, 415 S.C. at 282-83, 781 S.E.2d at 917.

S.C. Code Ann. § 44-53-375(B)(3) (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.

Therefore, for Appellant to be exempt from being considered an 85% offender for his third offense, Appellant's prior offenses had to be possession of a controlled substance pursuant to Subsection (A) of S.C. Code Ann. § 44-53-375.

Appellant's Record reflects that he was convicted twice in 1998, once for Possession with Intent to Distribute Crack and once for Distribution of Crack, in violation of S.C. Code Ann. § 44-53-375(B)(1) (Supp. 2016). The Record further reflects that in 2013 Appellant was convicted for Possession with Intent to Distribute Cocaine Base or Methamphetamine, 3rd offense, in violation of S.C. Code Ann. § 44-53-375(B)(3) (Supp. 2016). Therefore, I conclude that because Appellant's prior offenses do not fall under Subsection (A) of S.C. Code Ann. § 44-53-375, Appellant must be classified as an 85% offender.

As to Appellant's third grounds for appeal, I disagree with Appellant's contention that due process was not received. While administrative agencies are not exempt from meeting the minimum standards of due process, "due process is flexible and calls for such procedural protections as the particular situation demands." Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (citation omitted). For example, while not the direct situation here, the South Carolina Supreme Court has enunciated the

[4] S.C. Code Ann. §§ 44-53-370 and 44-53-375 (Supp. 2016) repealed S.C. Code Ann. § 24-13-100 to the extent they conflict, however, S.C. Code Ann. § 44-53-370 (Supp. 2016) will not be discussed as it is not applicable to this particular discussion.

following five requirements which, if established, show the minimum constitutional requirements for procedural due process in inmate prison disciplinary matters[5]:

> (1) the inmate was given advance written notice of the charge at least twenty-four hours before the hearing; (2) the fact finder(s) prepared a written statement of the evidence relied on and reasons for the disciplinary action; (3) the inmate was allowed to call witnesses and present documentary evidence; (4) counsel substitute was allowed to help the inmate if the inmate was illiterate or if the case was too complex for the inmate to handle alone; and (5) the person(s) who heard the matter, who may be prison officials or employees, were impartial.

See Al-Shabazz, 338 S.C. at 371, 527 S.E.2d at 751 (citing Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974)).

Here, Appellant received a Due Process hearing on Wednesday, February 8, 2017 at 10:57 am regarding the recalculation of his sentence. At the hearing, Appellant stated his name and inmate identification number. Thereafter, the Chairperson for Classifications representative informed Appellant of the recalculated max out date of his sentence. Additionally, the representative stated what statutes and case law the Department relied on in the recalculation process. Prior to concluding the hearing, the representative stated the following:

> "If you provide additional information to counter this interpretation, that information will be forwarded to the South Carolina Department of Corrections General Counsel's Office for review and necessary action (if warranted). You have the right to ... appeal this decision by filing an inmate grievance pursuant to SCDC Code GA-01.12, 'Inmate Grievance System.'"

Therefore, I conclude that under the circumstances of a sentence recalculation, this is sufficient due process. See Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) (citation omitted) (stating that due process is flexible dependent upon the situation). This was not a factual or testimonial based hearing[6], and the Record was left open for Appellant to provide additional information for further review. Appellant did not provide additional information and Appellant has not shown that his sentence was improperly recalculated pursuant to South Carolina statute and case law. Moreover, assuming that a due process hearing is required for sentence calculation matters, any error by the Department may be cured by this Court's ruling upon Appellant's petition for judicial review. See James Acad. of

[5] The Court clarifies that the procedural due process in inmate prison disciplinary matters were given as an example to show the flexibility of due process requirements; the Court is not asserting that the due process requirements in prison disciplinary matters are the same as what is minimally required in a sentence recalculation matter.

[6] The Court notes that there is no known case law requiring these types of hearings.

Excellence v. Dorchester Cty. Sch. Dist. Two, 376 S.C. 293, 299, 657 S.E.2d 469, 472 (2008) (citing Ross v. Med. Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997)).

Based upon the foregoing,

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

AND IT IS SO ORDERED.

SHIRLEY C. ROBINSON
Administrative Law Judge

September 27, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above-entitled action upon all parties to it by addressing a copy hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s):

This 27 day of September 2017

By _____
Judicial Law Clerk

South Carolina Court of Appeals

Jenny Abbott Kitchings, Clerk
P.O. Box 11629
Columbia, S.C. 29211

Re: Lynel Witherspoon #254026 v. SCDC
Appellate Case No: 2017-002216

Dear Mrs. Kitchings;

The following deficiencies under the South Carolina Appellate Court Rules (SCACR) have been corrected and is included in this letter.

- Order(s) and/or judgement(s) challenged on Appeal.
- Motion And Affidavit to proceed In Forma Pauperis.
- Proof of service showing A copy has been served on the ALC.

Lynel Witherspoon #254026
11/3/17

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