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The State of South Carolina
In The Court of Appeals

ORIGINAL

Appeal from the Administrative Law Court [S.C. Dept. of Corr.]

Case No. 2016-002227

Albarr Ali-Abdullah, 191449,

Appellant,

Vs.

South Carolina Dept. of Corrections,

Respondent,

FINAL BRIEF OF APPELLANT

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MAR 09 2017

SC Court of Appeals

Albarr Ali-Abdullah, #191449
Kershaw Corr. Inst./ OB-57
4848 Goldmine Hwy.
Kershaw, SC 29067

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Statement of Issues on Appeal

- 1.) Where Price's Incident Report does not state a time as to when the call was made, and where Abdullah could not adequately raise an Alibi Defense where he could not narrow down the time the call was made, did the ALC err in not finding SCDC denied Abdullah A (24) hour Notice of facts pursuant to Wolff vs. McDonnell, 94 S.Ct. 2963, 2979 (1974), in violation of his 14th Amendment Right under the U.S. Constitution?
- 2.) Where Abdullah timely requested witnesses in SCDC kiosk reference #16-621103, did the ALC err in not finding the DHO improperly deny Abdullah's witnesses to confirm that he was not present in the dorm to make the call pursuant to Wolff vs. McDonnell, 94 S.Ct. 2963, 2979 (1979), in violation of Abdullah's due process right under the U.S. Constitution requiring record of evidence, violated within the meaning of Wolff vs. McDonnell, 97 S.Ct. 2963, 2979(1973)?
- 3.) Where Abdullah timely requested review of data to cellphone and wall phone (evidence) prior to his 02-22-2016 DHO hearing to contradict Price's claim that he used the phones was denied by the DHO and never recorded or documented on SCDC Form 19-69(A), did the ALC err in finding disclosure of the evidence was not one of the factors deemed necessary, a violation of Abdullah's due process right under the U.S. Constitution requiring record of evidence, violated within the meaning of Sira vs. Morton, 380 F.3d 57, ~~75~~ (U.S. App. 2d. Cir 2004)?

Statement of the Case

On 02-01-2016, Lt. Price discovered a wall phone conversation, supposedly hearing Appellant Abdullah making reference to a cellphone found in the Library area of Kershaw Prison on 1-28-2016, after a search team conducted a search. When Price wrote her Incident Report, she did not indicate the time this alleged call was made in the body of her Incident Report dated 02-01-2016.

Abdullah was served twice with SCDC disciplinary Offense Code 898 (Possession of Any Communication Device). The first charge was served on 02-09-2016, for which Abdullah requested both his accuser present and counsel substitute; and in his kiosk requests, he requested witnesses be present at the hearing, to review the wall phone data, and to review data in the cell phone connecting him prior to his hearing.

On 02-20-2016, a hearing was conducted without Abdullah having any of the requested witnesses present to testify, and without allowing Abdullah to inspect the cell phone data and tape of the wall phone. Abdullah was found guilty and sanctioned with 180 days loss of canteen, visitation and phone with (18) days of loss of good time credits. Abdullah timely filed a Step 1 Grievance #KRCI-0316-16 on 02-22-2016, which was denied by the Warden on 03-23-2016. The Step 2 Grievance was timely filed on 03-27-2016 by Abdullah; it was denied on 04-26-2016 and received by Abdullah on 05-03-2016.

A timely Notice of Intent to Appeal was filed by Abdullah on 05-03-2016 in the SC Administrative Law Court raising (3) Federal Due Process Claims under the 14th Amendment of the U.S. Constitution in Case #16-AJ-04-0393-AP. After briefing these claims, the ALC Judge affirmed the decision of the Department on September 27th, 2016.

This Appeal Follows:

Facts and Arguments #1:

Abdullah argued that where Price's Incident Report does not state a time as to when the call was made and where he could not adequately raise an Alibi Defense where he could not narrow-down the time the call was made, SCDC [Price] did deny him a (24) hour notice of facts pursuant to Wolff vs. McDonnell, 94 S.Ct. 2963, 2979 (1994), in violation of his 14th Amendment rights under the U.S. Constitution. (See Record on Appeal at pg. 10 of 53, Brief of Appellate Abdullah.) However, the SC Administrative Law Court's Order does not even list Issue #1 regarding Price's Incident Report not mentioning the time the call was made. (See ROA at pg. 4 of 53, ALC's 9-27-2016 Order affirming the Department's decision.)

Abdullah filed a Rule 59(E) Motion for the ALC to address Issue #1, but the Court indicated it did not consider such a motion and returned it to Abdullah. (See ROA at pg. 27 of 53, Rule 59(E) Motion returned stamped by the Court.)

Therefore, because there are no findings of fact and conclusions of law regarding Issue #1 brought in Abdullah's Brief that was ignored by the ALC, this Court should address the merits of this claim and vacate the ALC's Decision affirming the Department's decision.

Facts and Arguments #2

Abdullah argued that he timely requested witnesses after signing the First Notice in Kiosk reference #16-621103 dated 02-17-2016, but the DHO improperly denied Abdullah's witnesses to confirm that he was not present in the dorm to make the call pursuant to Wolff vs. McDonnell, 94 S.Ct. 2963, 2979(1974), in violation of his 14th Amendment rights under the U.S. Constitution. (See ROA at pg. 11 of 53, Brief of Appellate Abdullah.) Argued in Issue #1, Abdullah also directed the ALC's attention to his argument in Step One Grievance showing confusion when the incident date changed from January 27th, 2016 to January 28th, 2016, when the officials served the Second

Notice of charges in SCDC Form 19-16, which he refused to sign. (See ROA at pg. 11 of 53, Brief of Abdullah.) However, the ALC incorrectly stated that Abdullah states he refused to sign the Second Notice because it had a corrected date. (See ROA at pgs. 6 and 7 of 53, ALC's Order at pgs. 4 and 5, stating, ..."This is clearly a pointless act of defiance which not only has the potential to disrupt the prison environment, but prevents the Department from easily demonstrating compliance with Wolff factors.

Abdullah submits the record shows that he argued he was confused, not that the Department cited the correct date as the ALC concluded. Id. Additionally, Abdullah contends that this Court should reverse the ALC for the following reasons: 1.) The ALC has substituted the DHO explanation for refusal to call witnesses for "disrupt the prison environment" rather than the correct institutional safety or correctional goals." Id. Because this case doesn't appear to involve a confidential informant, Abdullah can think of no reason the DHO would have found calling Bernard McFadden, Officer Michaw, Officer Ellis, and Officer Sims hazardous to the institutional safety. 2.) The ALC did not consider Abdullah's qualification for a counsel substitute because of his educational level when waiving these federal rights without counsel substitute on a form that doesn't cite waiver of such rights. Although the ALC recognized certain circumstances like illiteracy or mental health problems in its order at pg. 5 (see ROA at pg. 7 of 53), it did not consider Abdullah's argument of his low 2.5 NMH score. (See Abdullah's Reply Brief, ROA at pg. 24 of 53.). The ALC did not consider this factor when finding Abdullah has knowingly and willfully relinquished his federal due process rights by refusing to sign a form that didn't cite such rights. 3.) The ALC didn't consider the circumstantial fact disputing non-waiver where prior to the hearing, Abdullah expressed his desire to call witnesses, review evidence and request presence of accuser when he entered his kiosk request for such in SCDC Kiosk system, Kiosk #16-021103 dated 02-17-2016, prior to his 02-22-2016 DHO hearing. (See ROA at pg. 11 of 53, Brief of Appellate Abdullah.)

Under these circumstances, this Court should find that the ALC did err and vacate its judgment.

Facts and Argument #3

Abdullah argued his due process rights under the 14th Amendment of the U.S. Constitution were violated when he was denied review of the data to the cellphone and wall phone (evidence) timely requested by him prior to his 02-22-2016 DHO hearing to contradict Price's claim that he used the phones. The DHO never recorded or documented the reasons for denying review on SCDC Form 19-69(A), (See ROA at pg. 26 of 53, Brief of Appellant Abdullah.)

Additionally, Abdullah argued his due process rights was violated when Mr. Armstrong, the DHO and Lt. Price all had reviewed the wall phone conversation outside the hearing room or outside of Abdullah's presence. (See ROA at pg. 12 of 53, Appellant Abdullah's Brief.) Abdullah believes data in the cellphone belonged to inmate Anthony Gordon #259798, and that Lt. Price concealed this fact in a scheme to retaliate against him. (See ROA at pg. 50 of 53, Declaration of Abdullah, stating "Gordon has just been caught leaving the Library with a cellphone on 10-27-2016, That the development of this new evidence and the fact that Gordon was present in the library on 01-27-2016 when the Burgundy Team found the cellphone support his theory that Price conspired with Gordon and others to frame him with the cellphone left by Gordon in the library on 01-27-2016.

However, The ALC incorrectly found because disclosure of the evidence is not a factor adopted in either Wolff or Shabazz, Appellant was not constitutionally entitled to an opportunity to review the evidence against him prior to the hearing. (See ROA at pg. 6 of 53, ALC's Order.) This ruling is inconsistent with Peggy vs. Cotton, 344 F.3d 674, 678 (U.S. App. 7th Cir. 2003) (Inmate has Due Process Rights to disclosure of material evidence in prison disciplinary hearing unless such disclosure would unduly threaten institutional concerns). Even where confidential informants are witnesses against a prisoner, prison officials must still provide an explanation on the record as to how producing the substance of informant's statements would be hazardous to institutional safety as in Sira vs. Morton, 380 F.3d 57, (U.S. App. 2d Cir. 2004). See also Howard vs. Bureau of Prison, 487 F.3d 808, 813 (U.S. App. 10th Cir. 2007) (Prison Officials refusal to produce and consider video tape, which prisoner contend would exonerate him as to disciplinary charges,

violated prisoner's due process right, where officials offered no reason that producing video tape would be hazardous to institutional safety, legal obligation of prison staff to tell the truth did not render video tape cumulative).

Therefore this Court should find the ALC did err when finding [sic] in Wolff, disclosure of evidence was not one of the factors deemed necessary to due process in an inmate disciplinary hearing. In contrast, countless case laws state the exact opposite.

Conclusion:

For the foregoing reasons, this Court should vacate the ALC's decision not to vacate the Department's decision.

Respectfully Submitted,

s/ *Albarr Ali Abdullah*

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Date: 03/01/2017

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Deborah Brooks Durden, Administrative Law Judge

Case No. 2016-002227

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Vs.
South Carolina Dept. of Corrections.....Respondent,

Certificate of Counsel

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

March 01st, 2017

s/ Albarr Ali Abdullah

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The undersigned hereby Certifies that a true Copy of the attached matter has been mailed to the person listed below by depositing a properly addressed Stamped envelope in the U.S. Mail this 01 day of March 2017; such matter being: Appellants (10) page Final Brief And Certificate of Counsel:

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Sworn And Subscribed Before Me
This 2nd day of March 2017

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My Commission Expires December 22, 2019

Alban Ali Abdullah

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