STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
The Honorable Shirley C. Robinson, Administrative Law Court Judge
Court Case No. 18-ALJ-15-0003-AP

Appellate Case No. 2018-000183

CHARLTON DAVIS, #231377.....APPELLANT

v.

S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

RESPONDENT'S INITIAL BRIEF

Tommy Evans, Jr.
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ATTORNEY FOR RESPONDENT

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1. **Did the Parole Board abrogated the Appellant's parole eligibility status when the chairman or secretary for the Board stated, "In 1993 who do you think you were out there running around rapeing women?"**

2. **Did the Appellant's notice of appeal deemed filed for purposes of 30 day time frame period governing the appeal when it is delivered to and received by the Administrative Law Court Clerk?**

3. **Did the Parole Officials provide an audio CD to the Appellant of his parole hearing for the record on appeal distorted and inaudible?**

4. **Did the ALC judge was incorrect in determining that the Appellant did not file his notice of appeal with the court in a timely fashion?**

5. **Does the Appellant's $100.00 filing fee should be reimbursed to him after this appeal has been adjudicated on the merits?**

STATEMENT OF THE CASE

On June 19, 1994, the Appellant broke into the home of the victim while armed with a knife. He went to the victim and begin fondling her trying to force her to have sexual intercourse. She resisted, so he stopped the attack. He then stole two hundred dollars in cash and left the residence. The Appellant was later arrested and charged with the offenses of armed robbery, assault with intent to commit criminal sexual conduct in the first degree (assault w/CSC 1st), and burglary in the first degree (burglary 1st).

On February 1, 1996, the Appellant appeared before the Honorable R. Markley Dennis for each of these offenses. The Appellant received a sentence of twenty-five years for armed robbery; fifteen years for assault w/CSC 1st, and forty years for burglary 1st. The Court ordered that each of these offenses were to be served consecutively.[1] At the time the Appellant committed this offense South Carolina law allowed an individual serving a sentence for a violent offense parole eligibility upon the service of one-third of their sentence.[2]

The Appellant initially became eligible for parole on July 28, 2004. The Appellant waived his first two hearings, and did not appear before the Board until June 22, 2011. Upon the conclusion of this hearing parole was denied. Since this hearing the Appellant has appeared before the Board an additional three times each resulting in a denial of parole. The Appellant's most recent hearing occurred on November 16, 2017. The Board decided to deny parole due to: 1) nature and seriousness of the current offense; 2) an indication of violence in this or a previous offense; 3) a use of a deadly weapon in this or a previous offense; 4) a criminal record indicating poor

[1] The Appellant completed his offense for burglary 1st on July 29, 2016.

[2] For purposes of definition under South Carolina law a violent crime includes the offenses of assault with intent to commit criminal sexual conduct, first and second degree (Section 16-3-656); armed robbery (Section 16-11-330(A)); burglary in the first degree (Section 16-11-311) S.C. Code Ann. §16-1-60 (Supp. 1996).

community adjustment; and, 5) a failure to successfully complete a community supervision program.

Upon being denied parole the Appellant filed a notice of appeal before the Administrative Law Court (ALC). Within this appeal the Appellant argued that a Board member made an inappropriate comment during his hearing, which made the decision arbitrary and capricious. He also argued that he was deprived a state created liberty interest in violation of due process. On January 29, 2018, the Honorable Shirley C. Robinson, Administrative Law Court Judge issued an order of dismissal. The ALC decided that the Appellant failed to file his notice of appeal within the time allotted pursuant to the rules of the ALC.

The Appellant has now filed this notice of appeal before this Honorable Court. Within this appeal the Appellant alleges, that due to comments made by a Board member, parole eligibility was abrogated; that his notice of appeal was received by the ALC within the time allowed under the rules; that the Board provided him an audio recording of his hearing that was distorted and inaudible; and, the one hundred dollar filing fee should be reimbursed after his appeal is adjudicated.

The Respondent argues that the ALC was correct in dismissing this appeal. Pursuant to the rules of the ALC, an appeal can be dismissed sua sponte if the Appellant fails to file the notice of appeal within the thirty day limit imposed under the rules. The brief of the Respondent supporting this argument follows.

ARGUMENT

1. **The Appellant failed to abide to the rules of the Administrative Law Court, so the decision to dismiss this appeal was proper.**

The ALC's jurisdiction to review a final decision of the Parole Board was derived from the South Carolina Supreme Court decisions of *Al-Shabbaz v. State,* 338 S.C. 334, 537 S.E.2d 724

(2000), and *Furtick v. S.C. Dept. of Probation, Parole and Pardon Services,* 352 S.C. 594, 576 S.E.2d 146 (2002). In *Al-Shabbaz,* the South Carolina Supreme Court created a new avenue by which an inmate could seek review of a final decision of a state agency in a "non-collateral" matter related to a conviction or sentence. The Court held that inmates could appeal those final agency decisions to the ALC, and ultimately to the Court of Appeals pursuant to the Administrative Procedures Act. *Al-Shabbaz,* at 376. In *Al-Shabbaz,* the Court recognized that "these administrative matters typically arise in two ways: (1) when an inmate is disciplined and punishment is imposed; and (2) when an inmate believes prison officials have erroneously calculated his sentence; sentence related credits or custody status. *Id.*, at 369.

The Court noted that the appealable final decision in *Furtick* arises in the latter matter, where an inmate alleges that the Department erroneously determined he was not eligible for parole. The review by the ALC under the procedures set forth in *Al-Shabbaz* is necessary to determine whether the inmate has a liberty interest in gaining access to the Parole Board. *Furtick* at 149. The Court determined that the permanent denial of parole implicates a liberty interest sufficient to require at least minimal due process. *Id.*

In *Cooper v. S.C. Dept. of Probation, Parole and Pardon Services,* 377 S.C. 489, 661 S.E.2d 106 (2008), the ALC was given the very narrow ability to review if the Board applied the mandatory criteria prior to the final decision. If it is shown that the Board considered the mandatory criteria, and risk assessment the final decision stands. The ALC would have no ability to rule on the outcome. If it is found that the Board in some way failed to abide to the mandatory criteria, or risk assessment, they can order the case remanded for a new hearing.

The decision of the Parole Board as to the denial of the Appellant's parole was made on November 16, 2017. Within his notice of appeal the Appellant specifically stated that he received

this denial on November 29, 2017. Pursuant to the rules of the Administrative Law Court, the notice of appeal from the final decision of an agency shall be filed with the Court and a copy served on each party and the agency whose final decision is the subject of the appeal within thirty (30) days of receipt of the decision from which the appeal is taken. Rule 59 SCRALC.

The Appellant argues that the ALC should have not dismissed his appeal due to the fact he delivered the appeal to the prison mail room before the time expired. He argues that the Court should have given him leniency since he was an inmate pro se litigator. The Appellant cites the United States Supreme Court case of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). In *Lack*, the Supreme Court decided that under the appellate rule requiring habeas corpus appeals to be filed within thirty days, a pro se prisoner notice of appeal was filed at the moment of delivery to the prison authorities for forwarding to the District Court. *Lack* at 266. However in *Gary v. State,* 347 S.C. 627, 557 S.E.2d 662 (2001) the South Carolina Supreme Court decided that when the statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer. *Gary*, at 629. Within the rules of the Administrative Law Court it is clear that the notice of appeal must be filed with the Court and a copy served on each party within thirty days from the receipt of the final decision. The Appellant received the final decision on November 29, 2017. According to the order of the ALC they did not receive the notice of appeal until January 8, 2018. Pursuant to *Gary,* the filing of the notice of appeal did not occur until January 8, some thirty-nine days after the Appellant received the order of denial. This is well beyond the time limit imposed under the rules; therefore, the ALC was correct in dismissing this appeal.

The Appellant seeks reversal and remand of his cause of action. This court can only reverse this decision if substantial evidence reveals there exist an error of law. In determining whether the

ALC's decision was supported by substantial evidence, the Court of Appeals need only find, looking at the entire record on appeal evidence from which reasonable minds could reach the same conclusion as the ALC; still, the Court of Appeals may reverse the decision of the ALC if it is based on an error of law or in violation of a statutory provision. *Bruning v. SCDHEC,* 418 S.C. 537, 795 S.E.2d 290 (S.C. App. 2016). Substantial evidence 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, 276 S.E.2d 304 (1981). The Appellant has failed to present evidence revealing that the decision of the ALC to dismiss this appeal was unreasonable. Although the reviewing Court shall not substitute its judgment for that of the Administrative Law Court as to findings of fact, the reviewing Court may reverse or modify decisions that are controlled by an error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. *ESA Services, LLC. v. South Carolina Department of Revenue,* 392 S.C. 11, 707 S.E.2d 431 (S.C. App. 2011).

It is obvious that the Appellant filed his notice of appeal well beyond the statutory time limits. The ALC had the authority to dismiss this appeal sua sponte as soon as they failed to receive the notice of appeal within the time limits. Upon motion of any party, or **on its own motion**, an Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section (V), or for the failure to provide a factual basis for each expressly and specifically asserted constitutional violation as prescribed by Rule 59(B). Rule 62 SCRALC. (emphasis added).

In order to reverse a decision of the ALC the Appellant must raise sufficient substantial evidence revealing that the decision was an error of law. Substantial evidence only revealed that

the Appellant failed to file his notice of appeal within the time limit found within the rules. If this is done the ALC has the ability to dismiss. Within a well written order the ALC presented her reasoning for dismissal. This includes an explanation as to the fact where the Appellant failed to file an appeal within the time allotted.

The Appellant argues that there were circumstances beyond his control as to why the notice of appeal got to the ALC beyond the time allotted under the rules. The Appellant stated within his brief that he had no control of when prison officials picked up the mail, the institutional holiday schedule, nor the lockdown due to a shortage of security staff. However, the Appellant waited until the last possible day to mail the notice of appeal. The Appellant had spent twenty-three years in prison so he should have been aware of the prison mail system during the holidays and mailed the appeal to assure its arrival prior to the expiration under the rules. According to the *Gary* decision, filing is done at the time received by the Court and not when mailed. It was received after the thirty day time limit; therefore, the ALC was correct in dismissing this appeal.

Substantial evidence was presented revealing that the Appellant failed to abide to the rules so there exist no error in law. The ALC's decision should be upheld by the Court. In determining whether the decision of the ALC was supported by substantial evidence, the Supreme Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached. *Barton v. S.C. Dept. of Probation, Parole and Pardon Services,* 404 S.C. 395, 745 S.E.2d 110 (2013).

CONCLUSION

Based on the foregoing reasons the Respondent respectfully requests the final decision of the Administrative Law Court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
March 30, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appellate Case No. 2018-000183

CHARLTON DAVIS, #231377.....APPELLANT

v.

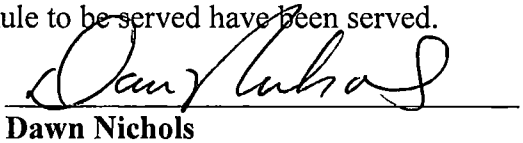
S.C. DEPARTMENT OF PROBATION, PAROLE AND
PARDON SERVICES,.....RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Assistant to counsel for Respondent, certify that I have served the within Initial Brief and Designation of Matter dated March 30, 2018, on Appellant this 30th day of March, 2018, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Charlton Davis, #231377
Kershaw Correctional Institution
4848 Goldmine highway
Kershaw, S.C. 29067

I further certify that all parties required by Rule to be served have been served.



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March 30, 2018

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: Charlton Davis v SCDPPPS

Dear Ms. Kitchings:

Please find enclosed the Initial Brief of Respondent and Designation of Matter dated March 30, 2018, along with proof of service in the above referenced case.

Sincerely,

Tommy Evans, Jr.
Assistant General Counsel
TE:dn

Enclosures

cc: Charlton Davis, #231377

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