

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

Appeal from Administrative Law Court
Honorable HW Funderburk, Jr., Administrative Law Judge

Case No.: 18-ALJ-04-0050-AP
Appellate Case No. 2018-001456

Terry Smith 160785Appellant

v.

South Carolina Department of Corrections.....Respondent

Response to Motion to Dismiss as Premature

Statement of the Case

This matter is before the South Carolina Court of Appeals pursuant to the Notice of Appeal filed by Terry Smith (“Appellant”), an inmate incarcerated in the South Carolina Department of Corrections (“SCDC”). In the lower court, Appellant appealed SCDC’s Final Agency Response to Appellant’s original grievance of May 26, 2017, and the case was assigned to Judge HW Funderburk, Jr., of the South Carolina Administrative Law Court (“ALC”), on February 23, 2018. Judge HW Funderburk, Jr., issued his Final Order on July 3, 2018. In that Order, HW Funderburk, Jr., reversed and remanded SCDC’s prior Final Agency Response. SCDC has filed a Motion to Dismiss dated September 17, 2018.

In the interim of Appellant’s filing Notice of Appeal to this Court and SCDC’s instant Motion to Dismiss, SCDC filed a Final Agency Response on the remand Order of the ALC, reaching the identical,

erroneous conclusion previously reversed and remanded by that Order. Appellant filed a Motion to Join on September 6, 2018 in the ALC, to collect the matters that SCDC plainly hopes to sever for the purpose of delay.

Argument

SCDC motions to dismiss based upon the presumption that an Order on remand is not a Final Judgement, and is consequently not immediately appealable, following *Bone v US Food Service*, 404 SC 67, 744 SE 2d 552 (2013). Five matters indicate otherwise.

First, *Bone* deals with a worker compensation claim where relief was an absolute matter and the appellant sought higher review without awaiting resolution on remand. That court dismissed the interlocutory appeal because the remanded order promised the potential for relief without involving the higher court. *This* appeal involves claims insoluble in the lower court. *This* appeal clearly involves a matter lacking adequate remedy, and consequently is guided by *Hilton v Flakeboard*, 418 SC 245, 791 SE 2d 719 (2015?).

Second, even if this court did feel guided by *Bone*, this matter addressed in the remand has already received a Final Agency Order in response to the remand, and this prior to the instant Motion to Dismiss. Consequently, the appeal should proceed as a matter of judicial economy.

Third, this appeal clearly only involves the matters not decided by the ALC, and does not include the matters resolved by the ALC. If those matters emerge, they will emerge as a consequence of joining.

Fourth, the ultimate issue raised in this appeal is a constitutional question that can only be answered by the Court. “When an inmate challenges the constitutionality of a statute, Department and the ALJ must follow the statute and leave the question of whether it is constitutional to the courts.” See *Al-Shabazz v State*, 338 SC 354, 527 SE 2d 742 (2000).

Fifth, SCDC clung to its erroneous position even after a judicial order, and so the essence of the Respondent’s intention is mere delay. The ALC demonstrated the law controlling the question decided before that court and Ordered its specific application (that Appellant be granted credit for time served on parole, which is still time spent in custody—no matter what SCDC’s wishful thinking might otherwise

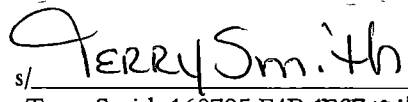
conclude. And yet SCDC refused to comply with that Order and labeled its refusal a Final Agency Decision, plainly hoping to create a bureaucratic back-and-forth of orders and refusals.¹ [See attached

"*mate Correspondence*" dated August 24, 2018.]

Conclusion

WHEREFORE, the Appellant respectfully requests that the Court deny SCDC's Motion to Dismiss Appeal as Premature. Appellant further requests that the Court permit no delay from the Respondent in filing briefs, since their acts here are taken for the purpose of delay.

September 25, 2018
Bishopville, SC

s/ 
Terry Smith 160785 F4B ~~1207~~ 1245
Lee Correctional Institution
990 Wisacky Highway
Bishopville SC 29010

¹ Ain't it amazing how often that works?

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
OFFICE OF GENERAL COUNSEL
INMATE CORRESPONDENCE

INMATE: Terry Smith, # 160785
INSTITUTION: Lee Correctional Institution
FROM: Office of General Counsel
SUBJECT: Order of Remand from Judge Funderburk
Docket No. 18-ALJ-04-0050-AP
DATE: August 24, 2018

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Dear Mr. Smith:

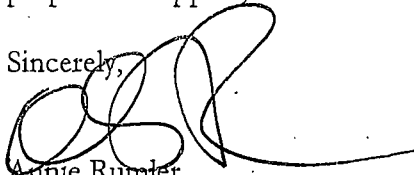
This letter is written in response to the July 3, 2018 order of Judge H.W. Funderburk, which remanded this matter to the Department of Corrections to revisit the calculation of your 1994 and 2006 sentences. The Office of General Counsel has collaborated with the Inmate Records Office and we have fully investigated the matter. We have reached the conclusion that all completion and start dates for all of your sentences are correctly entered in our system. Additionally, your current projected maxout date of 10/22/2025 is correct. These conclusions are supported by the attached documentation and the clarifications set forth below.

- (1) In 1994, you were given two consecutive 10-year sentences. Your 10-year sentence for distribution of crack cocaine was consecutive to your 10-year sentence for ABHAN. Therefore, your completion date of 6/05/2006 was correct based upon a total sentence of 20 years. Please note that your overall maxout date on these sentences was extended by approximately four months due to so-called "dead time," i.e., the time during which you absconded from parole supervision.
- (2) Your 1994 sentences are in no way connected to your 2006 sentences. The end date of the 1994 sentences does not affect the start date of your entirely separate 2006 sentences. The correct start date of your 2006 sentences is 4/10/2006. (Please note that this start date is before the completion date of the 1994 consecutive sentences.) The attached Memorandum from our Inmate Records Office explains why your current projected maxout date is correct.
- (3) Although you did not receive "jail time credit" (per S.C. Code § 24-13-40) for the time you spent on parole, you did receive day-for day credit for this time pursuant to S.C. Code § 24-21-670 upon your return to SCDC. Such credit is automatically calculated into your sentence by our computer program. You also received all jail time credit to which you were entitled under S.C. Code § 24-13-40. This statute states that jail time in South Carolina stops when you begin serving another sentence, so the time you spent serving a sentence in Canada

cannot be counted as "jail time" for purposes of your South Carolina sentences. However, you did receive jail time credit for time you were being detained in New York.

Again, it is the Department's conclusion that all of your sentences have been calculated correctly and that your current projected maxout date is correct. Please be advised that for purposes of appeal, this letter constitutes the agency's final decision on remand.

Sincerely,



Annie Rumler

Staff Attorney

Office of General Counsel

South Carolina Department of Corrections

4444 Broad River Road

P.O. Box 21787

Columbia, South Carolina 29221-1787

(803) 896-8505

cc: Terry Smith, # 160785
Administrative Law Court, Judge Funderburk

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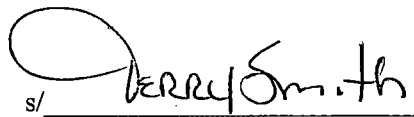
Certificate of Service

The undersigned hereby certifies that on September 25, 2018, true and correct copies of the Response to Motion to Dismiss as Premature were served by depositing the same in the prison mail system, postage prepaid, to the following addresses:

Dept of General Counsel
SC Dept of Corrections
PO Box 21787
Columbia SC 29221

The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

September 25, 2018
Bishopville, SC


s/ Terry Smith
Terry Smith 160785 F4B ~~1245~~ 1245
Lee Correctional Institution
990 Wisacky Highway
Bishopville SC 29010

Terry Smith, 169785, FAB, 745
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990 Wisacky Hwy
Bishopville SC 29010

626291-11262



The Honorable Jenny A. Kitchings
Clerk of Court, SC Ct of Appeals
PO Box 11629
Columbia SC 29211

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