

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Damon Brown, #357300,

Appellant,

vs.

South Carolina Department of Corrections,

Respondent.

Docket No. 18-ALJ-04-0095-AP  
Grievance No. KCI 0009-17

ORDER **RECEIVED**

NOV 06 2018

SC Court of Appeals

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) pursuant to a Notice of Appeal filed on March 12, 2018, by Damon Brown (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). Appellant argues that the Department miscalculated his release date. Upon careful consideration of the record on appeal, the parties' briefs, and a review of the applicable law, the Department's decision is affirmed.

BACKGROUND

Appellant is serving two concurrent sentences for drug related offenses. On October 3, 2013, Appellant was sentenced to fourteen years for Trafficking in Cocaine Base/Meth. 10 – 28 grams, 2<sup>nd</sup> offense in violation of Section 44-53-375(C)(1)(b), the most serious offense and the offense which determines Appellant's parole eligibility. S.C. Code Ann. § 44-53-375 (Supp. 2012). Appellant was also sentenced on October 3, 2013, to fourteen years for Distribution of Cocaine, 2<sup>nd</sup> offense, in violation of Section 44-53-370(b)(1). S.C. Code Ann. § 44-53-370 (Supp. 2012).

On January 3, 2017, Appellant filed a Step 1 grievance stating that the Department incorrectly calculated his projected release date thereby increasing the time he must serve on his sentence. Appellant maintains that since he was sentenced to less than the mandatory sentence of twenty-five years, he is eligible for parole, extended work release, and supervised furlough. Appellant's Step 1 grievance was denied on the basis that Appellant's violation of Section 44-53-375 was violent and thus, Appellant had to serve at least eighty-five percent of his sentence. On November 3, 2017, Appellant filed a Step 2 grievance which was denied for the same reason.

**FILED**

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SC ADMIN. LAW COURT

## ISSUE

Whether the Department properly classified Appellant as an offender who must serve eighty-five percent of his sentence.

## 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 Court's appellate jurisdiction in inmate appeals is limited to state created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. Id.

When reviewing the Department's decisions in inmate grievance matters, the court sits in an appellate capacity. Id. at 377; 527 S.E.2d at 754; see also S.C. Code Ann. § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in Section 1-23-380 of the South Carolina Code): Section 1-23-380(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. 2017).

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." S.C. Code Ann. § 1-23-380(5) (Supp. 2017). Furthermore, an administrative 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. S.C. Code Ann. § 1-23-380(5) (Supp. 2017); 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 County Sch. Dist. No. 1, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two (2) 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).

#### LAW/ANALYSIS

On October 3, 2013, Appellant pled guilty and was sentenced to fourteen years for Distribution of Cocaine, 2<sup>nd</sup> offense, in violation of Section 44-53-370(b)(1). Also, on October 3, 2013, Appellant pled guilty and was sentenced to fourteen years for Trafficking in Cocaine Base/Meth. 10 – 28 grams, 2<sup>nd</sup> offense in violation of Section 44-53-375(C)(1)(b). The sentences were ordered to run concurrently.

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.”). Here, the sentencing sheets for Appellant’s October 3, 2013 convictions are unambiguous, and the Department was required to calculate Appellant’s sentence according to those sheets.

Section 44-53-375(C)(1)(b) provides that a person convicted of a second offense of “trafficking in methamphetamine or cocaine base,” in a quantity of ten grams but less than twenty-

eight grams is guilty of a felony and must serve “a term of imprisonment of not less than five years nor more than thirty years, no part of which may be suspended nor probation granted[.]” The offense is classified as a Class A felony under Section 16-1-90(A). S.C. Code Ann. § 16-1-90 (Supp. 2017). “[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, Section 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 . . .

(Emphasis added). S.C. Code Ann. § 24-13-150(A) (Supp. 2017). Because Appellant’s second offense is a Class A felony, it is a “no parole defense,” generally requiring a service of eighty-five percent of the sentence.

On June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 became effective. As the Court of Appeals discussed in Bolin v. S.C. Dep’t of Corr., 415 S.C. 276, 781 S.E. 2d 914 (Ct. App. 2016), the Act did not amend the definition of a “no parole offense” but in its amendments to Section 44-53-375 (and -370), the legislature used the phrase, “Notwithstanding any other provision of law,” signaling its intent to repeal Section 24-13-100 to the extent it conflicts with amendments to Sections 44-53-375 and -370.” Bolin, 415 S.C. at 282, 781 S.E. 2d at 917.

The 2010 Omnibus Crime Reduction and Sentencing Reform Act only amended Section 44-54-375(B), which relates to those convicted of drug distribution, manufacturing, and possession with the intent to distribute charges. The Act did not amend any of the other subsections of the statute including the drug trafficking statutes contained in Section 44-53-375(C). Thus, neither Bolin nor the Act repeal Section 24-13-100 as it pertains to Appellant’s conviction for drug trafficking under Section 44-54-375(C)(1)(b).

Appellant also argues that he is entitled to parole eligibility under Section 44-53-375(F) because he was not sentenced “to a mandatory term of imprisonment of twenty-five years, a

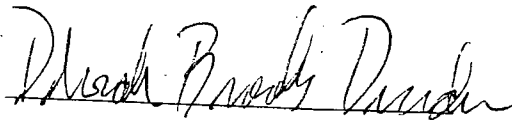
mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years ...” The Court disagrees. As discussed above, Section 24-13-150 requires an inmate convicted of a no-parole offense to serve at least eighty-five percent of his sentence before he is eligible for early release, discharge, or community supervision. Section 24-13-100 defines the term “no-parole offense,” in pertinent part, as “a class A, B, or C felony.” Whether a felony is a Class A, B, or C felony depends on the maximum sentence for the felony--a Class A felony is a felony punishable by not more than thirty years. S.C. Code Ann. § 16-1-20 (2015). See also S.C. Code Ann. § 16-1-30 (2015) (“All criminal offenses created by statute after July 1, 1993, must be classified according to the maximum term of imprisonment provided in the statute and pursuant to Sections 16-1-10 and 16-1-20, except as provided in Section 16-1-10(D).”); S.C. Code Ann. § 16-1-10(D) (Supp. 2017) (listing offenses that are exempt from classification). It matters not that Appellant was only sentenced to serve fourteen years, but rather, that the maximum allowable sentence for the type of crime and its felony classification. Based on the foregoing, Appellant is properly classified as an eighty-five percent offender.

For the first time on appeal, Appellant argues that the application of Sections 24-13-100 and 24-13-150 as applied, violate the due process clause under the Fourteenth Amendment. This issue is not preserved for appellate review. “It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912 (Ct. App. 2004) (quoting Wilder Corp. v. Wilkè, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). As Appellant failed to raise this issue in his Step 1 or 2 grievances, the issue is not preserved for appellate review.

**ORDER**

**IT IS THEREFORE ORDERED** that the South Carolina Department of Corrections' decision is **AFFIRMED**.

**AND IT IS SO ORDERED.**



Deborah Brooks Durden, Judge  
S.C. Administrative Law Court

October 19, 2018  
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 this cause by depositing a copy thereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 19th day of October 2018  
By: [Signature]  
Judicial Law Clerk

**FILED**

OCT 18 2018

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