STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Luther Brian Marcus, # 218408,	)	Docket No. 18-ALJ-04-0293-AP
	)	[Grievance No.: LCI 0154-18]
Appellant,	)	
	)	
vs.	)	**ORDER**
	)	
South Carolina Department of Corrections,	)	
	)	
Respondent.	)	

This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Luther Brian Marcus (Appellant), an inmate incarcerated by the South Carolina Department of Corrections (Department or SCDC).

FACTS/PROCEDURAL HISTORY

On March 16, 2010, Appellant was sentenced in Pickens County to fifteen (15) years on indictment number 2010-GS-39-0445, Burglary, 2nd Degree, none of this sentence was suspended. Other sentences imposed on this date have no bearing on the issues in this case.

On April 27, 2010, Appellant was sentenced in Oconee County on additional indictments. Numbers 2009-GS-37-1190, -1192, and -1196, for counts of Burglary, 2nd Degree, for each of which he was sentenced to fifteen (15) years, suspended upon service of seven (7) years of incarceration plus probation for five (5) years. He was also sentenced to seven (7) years on indictment number 2009-GS-37-1191, for four (4) counts of Burglary/Safecracking, and to five (5) years on indictment number 2009-37-1193, for four (4) counts of Larceny/Grand Larceny. All of these sentences were to run concurrently with each other and with the fifteen-year sentence he received on March 16, 2010, with credit for 562 days of time served. The start dates for these sentences were backdated to December 17, 2008.

Appellant completed the seven-year incarceration portion of one of his April 27, 2010 sentences on October 12, 2012, and the other two on December 14, 2012.[1] The parties agree that Appellant

[1] Appellant in his reply brief and Respondent in a subsequent filing call attention to an erroneous reference to 2018 as the completion date of the latter two of these sentences.

was released from SCDC custody on September 30, 2016, and began serving the probation portion of his split sentences.

On or about December 15, 2016, Appellant was arrested for Indecent Exposure. On December 12, 2017, Appellant was convicted of that charge, (indictment number 2017-GS-39-0183) and sentenced to three (3) years reduced by credit for 363 days of time served. Also, on December 12, 2017, Appellant's probation was revoked on his April 27, 2010, sentences on indictment numbers 2009-GS-37-1190, -1192, and -1196, and Appellant was required to serve the remaining eight (8) years of his concurrent fifteen-year sentences.[2]

Appellant filed a Step 1 Grievance on April 2, 2018, challenging the Department's sentencing calculation. Appellant argued that he was entitled to credit for 1805 days of time served on the "8 years' probation violation sentence [he is] now serving." He stated that on March 16, 2010, he was sentenced in Pickens County to fifteen (15) year backdated to November 5, 2008. He also stated that on April 27, 2010, he was sentenced in Oconee County to fifteen (15) years, suspended to seven (7) years, five (5) years' probation, also backdated to November 5, 2008, and to run concurrently with the prior (Pickens County) sentence. He then asserted that the "[t]he 15 years/years suspended [sentence] would of [sic] max[ed]-out in May 2012," but he was still incarcerated on the prior fifteen-year sentence because his second "sentence probation was never toll[ed]." Appellant calculated that he was owed 1580 days of time served,[3] plus 75 days that he was "out under supervision from Sept 30, 2016 to Dec 15, 2016 [and] another 150 days from Dec 15, 2016 to May 26, 2017," when he was awaiting trial still under supervision." The total requested credit is for 1805 days of time served.

On April 19, 2018, the Warden denied Appellant's Step 1 Grievance, noting that Central Classification "stated that when you are released from SCDC and then return to SCDC, your jail

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[2] Curiously, the Record includes two orders of revocation issued on the same day for indictment numbers 2009-GS-37-1190 and -1192. These orders contain a line through the number "8" in reference to the number of years remaining on Appellant's sentence and has a handwritten "15" beside the lined-through "8" with what appear to be initials handwritten beside the "15." Each of these sentencing forms also refers to the fact that Appellant has served seven (7) of the fifteen (15) years to which he was originally sentenced. Therefore, Appellant had only eight (8) years remaining to serve. The "8" was not stricken-through on the probation revocation order for indictment number 2009-GS-37-1196.

[3] In his brief, Appellant refers to being owed approximately "1508" days for incarceration between June 2012 and September 30, 2016, when he was released on probation. However, based on his Step 1 Grievance and the approximate amount of time in that date range, the Court will interpret his brief as intending to state "1580" days.

credits from your previous convictions are gone." The Warden also noted that Appellant's sentencing sheet dated December 12, 2017, reflects that he was given 363 days of jail credit, and that he has a max-out date of July 14, 2021.

Appellant subsequently filed a Step 2 Grievance, in which he argued that the jail credit for the Indecent Exposure conviction was not at issue, but that it was instead about the time served on his "probation violation where [he] wasn't given full time served credit on that sentence. It was concurrent with" his first sentence. He again asserted that he was owed 1805 days of credit for time served and again noted that his "probation was never tolled."

In denying Appellant's Step 2 Grievance, the Responsible Official summed up Appellant's argument as seeking 1805 days of time served to be applied to his sentence and "the same to be applied toward the eight (8) years of probation violation sentence from the 15-year sentence from March 16, 2010[, that he] would like jail credits from a previous incarceration to be given." The official then noted that he had been sentenced on December 12, 2017, for two counts of Offense 2221, Burglary – 2nd Degree, which is a violent offense; one count of Offense 2223, Burglary – 2nd Degree, which is a non-violent offense; and one count of Offense 3605, Indecent Exposure, which is non-violent offense. The official also noted that the 363 days for time served listed on his sentencing sheet date July 12, 2017, had been applied, and that his max-out date is July 14, 2021.

Appellant filed his Notice of Appeal on June 4, 2018, asserting that "1805 days of time served credit was not applied to his current eight-year sentence from a[n] ongoing 2010 concurrent suspended/split sentence ...."

Appellant filed a brief on June 27, 2018. The Department filed the Record on Appeal on August 20, 2018. Appellant filed a "Motion to Amend Brief" on August 23, 2018. On October 4, 2018, the Department filed its brief. On October 12, 2018, Appellant filed a reply brief. On October 22, 2018, the Department filed a Reply to Appellant's Reply.

ISSUE

Did the Department err in its sentence calculation by failing to give Appellant proper credit for time served?

STANDARD OF REVIEW

The Court's jurisdiction to hear this matter is derived from the decisions of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) and *Furtick v. S.C.*

Dep't of Prob., Parole and Pardon Servs., 352 S.C. 594, 576 S.E.2d 146 (2003). When reviewing the Department's decisions in inmate grievance matters, the ALC sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2017) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(A)(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:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> (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). *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 Cty. Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two 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).

DISCUSSION

As an initial matter, Appellant's Indecent Exposure charge is not at issue. The Record reflects that Appellant completed that sentence on September 10, 2018, and Appellant expressly stated in his Step 2 Grievance that "[his] grievance isn't about [his] jail credit for the indecent exposure

conviction[.]" Therefore, to the extent that Appellant argues in his brief that the sentence for his Indecent Exposure charge was miscalculated, this argument is not preserved on appeal. *See State v. Bryant*, 383 S.C. 410, 418, 680 S.E.2d 11, 15 (Ct. App. 2009) ("An issue must be raised and ruled upon [by the trier of fact] in order to be preserved for appellate review.").

Appellant's remaining argument alleges that the Department erred by not applying 1805 days of time served "to his current eight-year sentence from a[n] ongoing 2010 concurrent suspended/split sentence ...." Appellant asserts that he is entitled to time served between the completion of his seven-year period of incarceration on his April 27, 2010, split sentences for indictment numbers 2009-GS-37-1190, -1192, and -1196, and when he was released on probation on September 30, 2016, which Appellant calculates to be 1580 days. He also argues that he is entitled to seventy-five (75) days of credit for the period during which he was on probation, specifically between September 30, 2016, and December 15, 2016. Finally, he argues that he is entitled to 150 days of credit for the time he spent in the Pickens County Detention Center, between December 15, 2016, when he was arrested for Indecent Exposure, to May 26, 2017, when he was served the probation revocation warrant. In sum, Appellant argues he was entitled to a total of 1805 days of credit for time served.

Period between Completion of Seven Years on the Split Sentences and Start of Probation

Appellant first argues that he is entitled to 1580 days of time served for the period between the completion of seven (7) years of his sentence and his release on probation. There appears to be a disagreement between the parties as to when Appellant's seven-year period of incarceration on his April 27, 2010, split sentences ended, though both parties agree that Appellant's probation began on September 20, 2016. Appellant contends that he "max[ed]-out in May 2012." He bases this belief on the idea that offenses not classified as "no-parole" offenses only require service of 51% of the sentences imposed for those offenses. However, though Burglary, 2nd Degree is not a no-parole offense and therefore does not require the service of 85% of the sentence, Appellant has cited to no legal authority to support his contention that he only had to serve 51% of his sentence to receive, or be eligible to receive, probation. Moreover, the Department's record of completed prior offenses dated 06/29/18 shows that Appellant's completion date for indictment numbers 2009-GS-37-1190, -1192, and -1196 was October 12, 2012, for one and December 14, 2012, for the other two. Nevertheless, these completion dates are not relevant for calculating time served

because Appellant was still serving a straight fifteen-year sentence for indictment number 2010-GS-39-0445 until he was released on probation (September 20, 2016).

The statute governing time served, S.C. Code Ann. § 24-13-40 (Supp. 2017), provides:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

Appellant seeks credit for time served against the eight (8) years he was required to serve in prison following his probation revocation because he had been in prison beyond the service of the first seven (7) years' imprisonment required in the original split sentences prior to being released on probation. However, an inmate is not entitled to credit for time served following the expiration of the incarceration portion of split sentences while he is still serving a sentence for a separate offense. Appellant cannot get credit for time served while "serving a sentence for one offense and ... awaiting trial and sentence for a second offense." The language from the statute is clear and applies in this case.

Further, Appellant cannot get credit towards a sentence for an offense before he is charged with the offense and confined for it while awaiting trial and sentencing, or while serving time for a prior conviction. *Blakeney v. State*, 339 S.C. 86, 88, 529 S.E.2d 9, 10-11 (2000) (stating that the Court in *Crooks v. State*, 326 S.C. 171, 485 S.E.2d 374 (1997) "held 'time served' in § 24-13-40 means the time during which a defendant is in pre-trial confinement *and* charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)") (emphasis in original). Therefore, Appellant is not entitled to time served while still serving time for indictment number 2010-GS-39-0445 and prior to his probation revocation.

Probation Period

Appellant also argues that he is entitled to seventy-five (75) days of time served during the period that he was on probation, specifically between September 30, 2016, and December 15, 2016. However, as discussed earlier, Appellant cannot serve time towards a sentence for an offense prior to being charged with the offense and confined for it while awaiting trial. *Blakeney*, 339 S.C. at 88, 529 S.E.2d at 10-11. Appellant was not charged with an offense prior to his arrest for Indecent Exposure on December 15, 2016, and was not in pre-trial or pre-sentencing confinement.

Appellant argues that his probation is part of his "term of imprisonment" and, as such, he should be given credit for time served while on probation. He cites *Thompson v. S.C. Dep't of Pub. Safety*, 335 S.C. 52, 515 S.E.2d 761 (1999) and *State v. Ellis*, 397 S.C. 576, 726 S.E.2d 5 (2012). Appellant is correct that in both of these cases, the S.C. Supreme Court stated, "Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's 'term of imprisonment,' as is actual incarceration, parole, and the suspended portion of a sentence, or "supervised furlough." *Thompson*, 335 S.C. at 55-56, 515 S.E.2d at 763 (citation omitted); *Ellis*, 397 S.C. at 579, 726 S.E.2d at 7 (quoting *Thompson*, *supra*). However, as the Court also stated in *Ellis*, probation, unlike parole, is a "suspension of a part of the imprisonment," whereas "parole means a conditional release from imprisonment and *does not* suspend the running of the prisoner's sentence." *Ellis*, 397 S.C. at 579, 726 S.E.2d at 7 (citing *Crooks v. Sanders, Superintendent of State Penitentiary*, 123 S.C. 28, 34, 115 S.E. 760, 762 (1922) (emphasis in original). Because probation does not run parallel to the incarceration portion of inmate's sentence but is often different in time from the suspended portion of the sentence, probation cannot be treated as service of a sentence in the Department's custody; rather, probation is a suspension of (a release from) that custody. This differs from actual imprisonment or from parole, where "[a] prisoner upon release on parole continues to serve his sentence outside the prison walls. The word parole is used in contra-distinction to suspended sentence and means a leave of absence from prison during which the prisoner remains in legal custody until the expiration of his sentence." *Sanders v. McDougall*, 244 S.C. 160, 163, 135 S.E.2d 836, 837 (1964).[4]

[4] Calculation of credit for "time served" is not necessary for time spent on parole, as the inmate's service of his sentence continues unbroken while he or she is out on parole.

he was not charged with the offenses in question until May 26, 2017 when he was served with the probation revocation warrant.

The sentencing sheets which sentenced Appellant to eight years, the suspended portion of Appellant's split sentences, specifically state that the probation revocation warrant was served on May 26, 2017. *See* sentence reinstatement orders for indictment numbers 09-GS-37-1190, 09-GS-37-1192, and 09-GS-37-1196, Attachment p. 8, 9, & 10. Additionally, Appellant himself states that he was served with this warrant on this date. *See* Appellant's Brief, p. 3. To the extent that there is a dispute regarding this date, SCDC is confined to the face of the unambiguous sentencing sheets. *Tant v. S. Carolina Dep't of Corr.*, 408 S.C. 334, 337, 759 S.E.2d 398, 399 (2014), *reh'g denied* (July 10, 2014).

Appellant has Received All the Jail Time Credit to which He is Entitled

As discussed above, Appellant began pre-sentencing service of his current sentences on May 26, 2017. *See* sentence reinstatement orders for indictment numbers 09-GS-37-1190, 09-GS-37-1192, and 09-GS-37-1196, Attachment p. 8, 9, & 10. Thus, S.C. Code Ann. § 24-13-40 entitles him to jail time credit from May 26, 2017 until December 12, 2017, the date on which his current sentences were imposed. *Id.* 200 days elapsed between May 26, 2017 and December 12, 2017. Appellant has been given credit for 200 days of jail time. *See* SCDC Commitment Application Inquiries for offense numbers S00015, S00014, and S00013, Attachment p. 14, 15, & 16. Thus he has been given all of the jail time credit to which he is entitled.

II. SCDC IS CONFINED TO THE FACE OF THE SENTENCING SHEETS

Appellant argues that the sentencing sheets for his current sentences are incorrect. *See* Appellant's Brief, p. 3. Specifically, he argues that the portion of those sentencing sheets which records previous time served should state that Appellant previously served seven years and

Appellant was not in the legal custody of the Department while continuing to serve his sentence; indeed, his sentence was suspended during probation. While *Thompson* and *Ellis* include probation as part of a broad definition of "term of imprisonment," neither of these cases set forth a sweeping rule for probation revocation cases that credit for time served should be bestowed upon inmates for the time he or she spent on probation prior to revocation. Even in the context of imprisonment, credit for time served is not automatically granted; there are exceptions where inmates are not entitled to time served. The conditions and exceptions for the calculation of time served are specifically set forth in Section 24-13-40.

According to Section 24-13-40, "when ... (b) the commencement of the service of the sentence follows the revocation of probation, ... the computation of the time served must be calculated from the date of the commencement of the service of the sentence[,]" and "the commencement of the service of the sentence follows the revocation of probation[.]" The statute then provides that "[i]n every case in computing the time served by a prisoner, full credit against the sentence must be given **for time served prior to trial and sentencing, and may be given for any time spent under monitored house arrest**." (Emphasis added). These are the only two periods for which credit for time served may be given; and even then, there are two exceptions that would preclude credit for time served prior to trial and sentencing. To allow Appellant to get credit for time served for the period that he was on probation prior to revocation would contradict the logic of these provisions in Section 24-13-40 and create an absurd result.

Appellant also cites *Hayes v. State*, 413 S.C. 553, 777 S.E.2d 6 (Ct. App. 2015) to argue that Section 24-13-40 "does not make a distinction for split sentences[,]" that it is thus applicable to his probation revocation, and that he should receive time served credit in his case. However, though the Court agrees that an inmate can receive credit for time served against a reinstated sentence following a probation revocation, the inmate in *Hayes* received credit for "time served prior to trial[,]" or "pre-trial detention time[.]" *Id.* at 560, 777 S.E.2d at 10. The inmate in that case did not receive credit for time served for the time he spent on probation.

Therefore, Appellant is not entitled to time served for the period during which he was on probation.

Period between Arrest for Indecent Exposure and Trial and Probation Revocation

Appellant further argues that he is entitled to 150 days of credit for the time he spent in the Pickens County Detention Center, between December 15, 2016, when he was arrested for Indecent

Exposure, to May 26, 2017, when he was served the probation revocation warrant.[5] Appellant also made the same arguments discussed in the preceding section regarding the probation period. First, the Court notes that Appellant's calculation of days is incorrect, that there are 162 days between December 15, 2016 and May 26, 2017. The Department argues that he is not entitled to time served for this period "because he was not charged with the offenses in question until May 26, 2017[,] when he was served with the probation revocation warrant." I agree. Appellant cannot receive credit for time served during this period against the remaining eight (8) years of his concurrent sentences for indictment numbers 2009-GS-37-1190, -1192, and -1196 because he was not served the probation revocation warrant for these offenses and awaiting a subsequent revocation hearing until May 26, 2017. To reiterate, Appellant cannot serve time towards a sentence for an offense prior to being charged with the offense and confined for it while awaiting trial. *Blakeney*, 339 S.C. at 88, 529 S.E.2d at 10-11; *see also* S.C. Code Ann. 24-13-40 (Supp. 2017) (limiting credit for time served against a sentence to time served prior to trial and sentencing, with certain exceptions, and for any time spent under monitored house arrest).

In conclusion, substantial evidence supports the Department's calculations for Appellant's sentences, including its application of credit for time served.

ORDER

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

AND IT IS SO ORDERED.

H.W. Funderburk, Jr.
Administrative Law Judge

October 29, 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 hereof, in the United States mail, postage paid, or in the interagency Mail Service addressed to the party(ies) or their attorney(s)
this 29th day of October 2018
By: Judicial Law Clerk

FILED
OCT 29 2018
SC ADMIN. LAW COURT

[5] To the extent that Appellant argues in his brief that he was entitled to time served for the period between May 26, 2017, and December 12, 2017, the date of his sentence for Indecent Exposure and his probation revocation, Appellant did not raise that issue in his Step 1 and Step 2 Grievances, and therefore it is not preserved for review on appeal. *See State v. Bryant*, 383 S.C. at 418, 680 S.E.2d at 15. Also, the Department avers that it has already given Appellant 200 days of credit for time served for that period. Therefore, even if the issue was preserved on appeal, it would be moot.