ADMINISTRATIVE LAW COURT

Jeffrey McCoy, #355188, Appellant, vs. South Carolina Department of Corrections, Respondent.	Docket No. 18-ALJ-04-0206-AP Grievance No. KCI 0025-18 **ORDER**

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 May 3, 2018, by Jeffrey McCoy (Appellant), an inmate incarcerated with the South Carolina Department of Corrections (Department). In this appeal, Appellant argues that the Department has miscalculated his prison sentence. 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

According to Appellant's sentencing sheets, on April 24, 2013, he received sentences for ten convictions. Appellant was convicted of two counts of simple larceny in violation of Section 16-13-30(A). S.C. Code Ann. § 16-13-30 (2015). He was sentenced to thirty days for each count and given credit for time previously served. The start date for these two convictions was retroactive to March 25, 2013, and the sentences were completed on April 24, 2013.

Appellant was also convicted of and sentenced to five years for the possession of tools being capable of being used in a crime in violation of Section 16-11-20, and five years for grand larceny in violation of Section 16-13-30(B)(2). S.C. Code Ann. §§ 16-11-20 and 16-13-30 (2015). Appellant was given credit for time previously served retroactive to May 27, 2012, and these sentences were completed on March 31, 2013. The judge ordered both sentences to run concurrently with Appellant's conviction and sentence for safecracking.

Additionally, Appellant was convicted of safecracking in violation of Section 16-11-390 and sentenced to fifteen years. S.C. Code Ann. § 16-11-390 (2015). Appellant was given credit for time previously served retroactive to May 27, 2012. Lastly, Appellant was sentenced to ten years for each of five counts of second degree burglary in violation of Section 16-11-312(B). S.C. Code Ann. § 16-11-312 (2015). All five second degree burglary sentences were ordered to

concurrently as to each other, but consecutively to the safecracking sentence. The trial judge stated that the indictment for the safecracking was to serve as "the lead indictment" and that all other active sentences are consecutive to the safecracking indictment. It is the fifteen-year sentence for safecracking with which Appellant takes issue.

On January 17, 2018, Appellant filed a Step 1 grievance stating that he did not believe he was required to serve eighty-five percent of his fifteen-year sentence for safecracking on the basis that the conviction was not classified as a violent crime. On February 1, 2018, the warden denied Appellant's grievance stating that safecracking constituted a violent offense for which Appellant must serve eighty-five percent of his sentence. On February 7, 2018, Appellant filed a Step 2 grievance which was denied on April 5, 2018. In its denial, the Department conceded that the safecracking offense was non-violent but stated that South Carolina law mandated that eighty-five percent of the sentence from his no parole safecracking conviction must be served. This appeal followed.

ISSUE ON APPEAL

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 Al-Shabazz decision explained that "procedural due process is guaranteed when an inmate is deprived of an interest encompassed by the Fourteenth Amendment's protection of liberty and property." Wicker v. S.C. Dept. of Corr., 360 S.C. 421, 424, 602 S.E.2d 56, 58 (2004) (citation omitted). Such as a liberty interest is at stake in the calculation of an inmate's sentence. Tant v. S.C. Dept. of Corr., 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) (citation omitted) ("There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest."); see also Sullivan v. S.C. Dept. of Corr., 355 S.C. 437, 441–42, 586 S.E.2d 124, 126 (2003) (quoting Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750) (recognizing that Al-Shabazz created review in the ALC for sentence calculation cases).

Furthermore, 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:
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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).

LAW/ANALYSIS

On appeal, Appellant argues that the Department erred in classifying him as a felon who must serve eighty-five percent of his sentence. He argues that Sections 24-13-100 and 24-13-150(A)[1] were determined to be unconstitutional by the South Carolina Supreme Court in Bolin v. S.C. Dept. of Corr., 415 S.C. 276,781 S.E.2d 914, (Ct. App. 2016), reh'g denied (Feb. 24, 2016). The Court disagrees.

Section 24-13-100 defines a "no parole" offense" in part as "a class A, B, or C felony ... punishable by a maximum term of imprisonment for twenty years or more." S.C. Code Ann. § 24-13-100 (2007). Section 16-1-20 of the South Carolina Code defines a Class A felony as one for which an individual must be imprisoned "not more than thirty years." S.C. Code Ann. § 16-1-20 (2015). Section 16-11-390 provides that a person convicted of safecracking is guilty of a felony punishable up to thirty years in prison. Accordingly, Appellant's conviction for safecracking in violation of Section 16-11-390 is a no parole offense as it is a Class A felony because it carries a sentence of up to thirty years. It is inconsequential that Appellant was sentenced to serve only fifteen years; the maximum allowable sentence for the type of crime and its felony classification are the deciding factors. See S.C. Code Ann. § 16–1–30 (2015) ("All criminal offenses created by

[1] S.C. Code Ann. § 24-13-150 (Supp. 2017).

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) (2015 and Supp. 2017) (listing offenses that are exempt from classification).[2]

Appellant argues that Sections 24-13-100 and 24-13-150(A) were repealed by Bolin. This is incorrect. On June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 became effective. The holding in Bolin is very specific and does not repeal the eighty-five percent rule with regard to all offenses contained in the statutory sections amended by the legislature. Bolin only affected those offenses relating to drug distribution, manufacturing, and possession with intent to distribute charges for second or subsequent offenses. Appellant's conviction and sentence for safecracking, along with its classification as a no parole offense, was not affected by Bolin.

For the first time on appeal, Appellant argues that the application of Sections 24-13-100 and 24-13-150 as applied to the crime of safecracking, is unconstitutional. 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. Wilke, 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.

In conclusion, as Section 24-13-150 of the Code mandates that any person convicted of a no parole offense must serve at least eighty-five percent of his sentence, Appellant must serve eighty-five percent of his fifteen-year sentence for safecracking with credit being given to him for time served prior to his sentencing (retroactive to May 27, 2012) pursuant to Section 24-13-40. S.C. Code Ann. § 24-13-40 (Supp. 2011) (provides that subject to certain exceptions, when computing time served, prisoners shall be given full credit against the sentence for time served prior to trial and sentencing). Additionally, a review of the record establishes that substantial evidence exists on the whole record to support the Department's decision, which was not made upon unlawful procedure, affected by error of law, clearly erroneous in view of the entire record, or arbitrary.

[2] Appellant's conviction under Section 16-11-390 is not listed as being exempt from classification.

ORDER

IT IS THEREFORE ORDERED that the Final Decision of the South Carolina Department of Corrections is **AFFIRMED.**

AND IT IS SO ORDERED.

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

November 5, 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 5th day of November 2018

By: R.E. Cole
Judicial Law Clerk