

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from the Administrative Law Court
Honorable Ralph King Anderson III, Administrative Law Judge
Docket No.: 18-ALJ-04-0110-AP

Perry Gilmore, #344879, Appellant,

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JAN 18 2019

SC Court of Appeals

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2018-001950

INITIAL BRIEF OF APPELLANT

January 14, 2019
Ridgeville, South Carolina

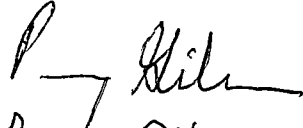

Perry Gilmore #344879
P.O. Box 205
Ridgeville, SC 29472
(APPELLANT) (PRO SE)

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STATUTES

<u>S.C. Code Ann. §1-23-380(A)(5)</u>	3,4,5
<u>S.C. Code Ann. §1-23-600(E) (Supp. 2017)</u>	3,4,5

STATEMENT OF ISSUE ON APPEAL

1. Whether the Administrative Law Court committed an error of law where it ruled Appellant was required by caselaw to state in his prison grievance the legal doctrine supporting the issue he raised on appeal in the Administrative Law Court in order to "preserve it for review" where there is no law which requires such and a "prison" is obviously not a "trial Court".
2. Whether the lower court erred where it concluded Appellant was afforded minimum due process where Appellant was not afforded his due process rights ~~to privacy and to not be punished for exercising same, and, to not have the fruits of an illegal search used to convict him.~~ to privacy and to not be punished for exercising same, and, to not have the fruits of an illegal search used to convict him.

STATEMENT OF THE CASE

Appellant, on January 31, 2018, was sanctioned with a revocation of 20 days good-time credits for disciplinary offense 854 Exhibitionism and Public Masturbation, see Disciplinary Report and Hearing Record, even though he was reported to have been observed masturbating in a "bathroom." See Incident Report.

Appellant filed his Step 1 Grievance arguing he was in a bathroom and it's not a public setting on February 5, 2018 and it was denied. Appellant then filed a Step 2 Grievance, but it too was denied.

On March 19, 2018 Appellant filed a notice of appeal with the Administrative Law Court and on April 5, 2018 a Notice of Assignment was filed. Appellant filed his brief on April 17, 2018 contending he is judicially protected from being observed by female staff while he is in a state of undress in a bathroom under Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981).

On June 14, 2018 the Record on Appeal was filed. On July 19, 2018 the Department filed its brief arguing Appellant received minimum due process. On July 31, 2018, Appellant filed a reply brief, and on August 14, 2018 he filed a demand for judgment. On October 04, 2018 Appellant received the order of the court affirming the Department's decision and stating Appellant failed to preserve his issue for review and that he received minimum due process. Appellant then filed a Notice of appeal with this court on or about October 15, 2018, and notice of assignment was filed shortly thereafter.

STANDARD OF REVIEW

"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 provisions;

...

...

(d) affected by other error of law."

S.C. Code Ann. §1-23-380(A)(5) (Supp. 2017); S.C. Code Ann. §1-23-600(E) (citation omitted).

ARGUMENT

1. The Administrative Law Court committed an error of law where it ruled Appellant was required by caselaw to state in his prison grievance the legal doctrine supporting the issue he raised on appeal in the Administrative Law Court in order to preserve it for review where there is no law which requires such and a "prison" is obviously not a "trial court".

The Administrative Law Court committed an "error of law," S.C. Code Ann. §1-23-380 (A) (5)(d) (Supp. 2017), S.C. Code Ann. §1-23-600(E) (d), where it ruled Appellant was required by caselaw to state in his prison grievance the legal doctrine supporting the issue he raised on appeal in the Administrative Law Court in order to "preserve it for review;" see Order dated October 4, 2018 affirming the decision of the Department of Corrections, p. 3, 2nd paragraph, where there is no law which requires such and a "prison" is not a "trial court." Moreover, even if Appellant was required to do such, the lower court should have reviewed the issue where it was "reasonably clear;" Herron v. Century BMW, 345 S.C. 461, HN 8 (2011), Appellant was arguing he had a right to privacy from observation by females while he was in a state of undress in a bathroom where the incident report showed the observer was a female, see Incident Report (stating the observer's name was "Heather") and he stated in his grievance that he was in a "bathroom" and it was "not a public setting." See Step 1 Grievance argument "(4)."

2. The lower court erred where it concluded Appellant was afforded minimum due process where Appellant was not afforded his due process rights to privacy and to not be punished for exercising same, and, to not have the fruits of an illegal search used to convict him.

The lower court erred where it concluded "Appellant was afforded minimum due process," Order dated October 4, 2018 affirming the decision of the Dept. of Corr.s, p. 4, paragraph 2, where Appellant was not afforded his due process rights to privacy,¹ see Incident Report (stating a female named "Heather" observed Appellant while he was in a state of undress in a bathroom), and to not be punished for exercising same,² see Disciplinary Report and Hearing Record (showing Appellant was sanctioned with a revocation of earned goodtime credits as the result of said incident report), and, to not have fruits of an illegal search used to convict him, Nardone v. United States, — U.S. — (1939). This court has authority to reverse the decision for the foregoing reasons. See S.C. Code Ann. § 1-23-380(A)(5), (a), (d); S.C. Code Ann. § 1-23-600(E)(a), (d), to include violations of 14th Amendment due process of 4th Amendment derived "Fruit of the Poisonous Tree Doctrine" law. Nardone, supra.

¹ See Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) (indicating male prisoners have a due process right not to be observed by female staff while in a state of undress in a bathroom).

² See Lawrence v. Texas, — U.S. — (2003) (holding persons have a due process right to not be punished for exercising their right to privacy).

CONCLUSION

For the foregoing reasons, Appellant requests the decision be reversed and remanded with a holding stating: (1) "Prisoners do not have to cite law in any prison proceedings in order to preserve issues for review;" and (2) "Prisoners cannot be punished for being observed masturbating by the opposite sex when the prisoner is in an enclosed area where there is a showerhead or toilet." Also, Appellant requests all contrary holdings Respondent cites or does not be overruled.

And finally, I request that if I am released, the above be granted in the interest of "judicial economy"¹ so that prisoners will not continue to be punished for being "peeked at" by "Peeping Toms" who really only write inmates up after the fact to "cover up" and/or "throw others off" as to what they are really doing: peeking at people while they are engaged in private acts where Lee has held they have a right to privacy (i.e. in showers, at toilets, etc), including male staff doing such to female prisoners while they are on the toilet or in the shower. I oppose any motions to dismiss offering to reverse the decision so the case can be dismissed as moot.

January 14, 2019
Ridgeville, South Carolina

Respectfully,

Perry Gilmore

Perry Gilmore #344879

P.O. Box 205

Ridgeville, SC 29472

(APPELLANT) (PRO SE)

¹ Jeter v. S.C. Dept. of Transp., 369 S.C. 433, 441, n.6 (2008) (holding regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy).

STATE OF SOUTH CAROLINA
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Appeal from the Administrative Law Court
Honorable Ralph King Anderson, III, Administrative Law Judge

Docket No. 18-ALT-04-0110-AP

Penny Gilmore, #344879, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appellate Case No. 2018-001950

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PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Kersey Barrett at 4444 Broad River Rd., Columbia, SC 29221, by mail with postage paid on this 14th day of January 2019.

January 14, 2019
Ridgeway, South Carolina

Sworn before me this 14th day
of JANUARY, 2019

Lida H. Bunn
Notary Public for South Carolina

My Commission Expires: 6-20-26

P. J. Hill
Penny Gilmore #344879
P.O. Box 205
Ridgeway, SC 29472
(APPELLANT) (PRO SE)

RE: Gilmore v. S.C. Dept. of Corrs, Appellate Case No. 2018-001950

Dear Clerk:

Please find enclosed for filing in the above-referenced case my Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal. Please time-date-stamp it and return a copy to me, in the enclosed self-addressed stamped envelope.

Thank you! 😊

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SC Court of Appeals

Respectfully,

January 14, 2019
Ridgeville, South Carolina

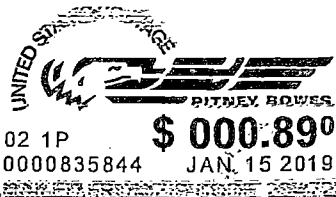
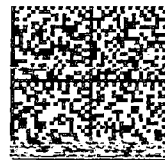
P. Gil
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CC: Kersey Barrett, Staff Attorney for Respondent.

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