

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph King Anderson, III

ALC Case No. 18-ALJ-04-0110-AP
Appellate Case No. 2018-001950

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SC Court of Appeals

PERRY GILMORE, # 344879,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT VIOLATED THE DUE PROCESS TO WHICH HE WAS ENTITLED OR LACKED SUBSTANTIAL EVIDENCE SUPPORTING HIS JANUARY 31, 2018 DISCIPLINARY CONVICTION.
2. THE ADMINISTRATIVE LAW COURT CORRECTLY RULED THAT APPELLANT HAD NOT PRESERVED HIS "RIGHT TO PRIVACY" ARGUMENT FOR REVIEW AND IT IS THEREFORE NOT PRESERVED FOR REVIEW AT THIS TIME.

STATEMENT OF THE CASE

This matter comes before the Court pursuant to the appeal of Perry Gilmore, who was previously an inmate in the custody of the South Carolina Department of Corrections. On January 31, 2018, Appellant submitted a Step One Grievance seeking reversal of his January 31, 2018 conviction on the basis of lack of due process and insufficient evidence. On February 7, 2018, SCDC denied the Step One Grievance. Thereafter, on February 12, 2018, Appellant filed a Step Two Grievance alleging, again, lack of due process and insufficient evidence. On March 13, 2018, SCDC denied the Step Two Grievance. Appellant filed a Notice of Appeal in the Administrative Law Court on March 19, 2018. On October 4, 2018, the Honorable Ralph King Anderson, III issued an order affirming the decision of the Department of Corrections. This appeal follows.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-610(B) provides the applicable standard of review:

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (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).

In an appeal of a final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B). "Substantial evidence" is evidence which, considering the record as a whole, would allow a reasonable mind to reach the same conclusion that administrative agency reached. Hendley v. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (Ct. App. 1996). A reviewing court shall not substitute its own judgment for that of the ALC as to findings of fact, but it may reverse or modify decisions that are controlled by errors of law or that are clearly erroneous in view of the substantial evidence on the record as a whole. Id.

ARGUMENTS

1. **THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT VIOLATED THE DUE PROCESS TO WHICH HE WAS ENTITLED OR LACKED SUBSTANTIAL EVIDENCE SUPPORTING HIS JANUARY 31, 2018 DISCIPLINARY CONVICTION.**

The jurisdiction of the Administrative Law Court (“ALC”) to hear this matter is derived entirely from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). When reviewing SCDC’s decisions in inmate grievance matters, the ALC sits in an appellate capacity. Id. at 377, 527 S.E.2d at 754. Subsequently, the Supreme Court clarified the ALC’s appellate jurisdiction over inmate appeals in Sullivan v. S.C. Dep’t of Corr., 355 S.C. 437, 586 S.E.2d 124 (2003). In affirming, as modified, the ALC’s *en banc* decision of McNeil v. S.C. Dep’t of Corr., 02-ALJ-04-00336-AP (September 5, 2001), the Supreme Court held the ALC’s jurisdiction was limited to (1) cases in which an inmate contends prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; (2) cases in which SCDC has taken an inmate’s state-created liberty interest in major disciplinary hearings; and (3) cases in which an inmate’s confinement implicates a state-created liberty interest. See Sullivan, 355 S.C. at 443, 586 S.E.2d at 127 (emphasis added).

In this case, the Administrative Law Court properly affirmed the decision of the Department of Corrections. Prison disciplinary cases are not criminal trials in federal or state courts; they are administrative hearings in an institutional setting. Therefore, due process in prison disciplinary hearings is substantially less than in a trial before a court. Due process, as

the United States Supreme Court noted in Wolff v. McDonnell, requires the following in prison disciplinary cases:

- a) notice of charges;
- b) disclosure of evidence against defendant (may be limited);
- c) opportunity to be heard;
- d) no right to confront and cross-examine adverse witnesses;
- e) neutral and detached hearing body;
- f) aid of counsel substitute or other substitute aid where inmate is illiterate or complex case (not attorney);
- g) written statement by the fact-finder as to the evidence relied upon.

418 U.S. 539, 566 (1974). SCDC complied with these requirements in the administrative hearing about which Appellant has filed the present appeal.

Here, the ALC found that Appellant had notice of the charges. See Order, page 4 of 4. Appellant was served with this notice on January 26, 2018. See Transcript, page 1. The ALC further found that Appellant's hearing was before an "impartial Disciplinary Hearing Officer, and Appellant was given opportunity to call witnesses." Order, page 4 of 4. The hearing officer provided a written statement of the findings and evidence so that Appellant could make an appeal. Id. Appellant was not entitled to counsel substitute as he is not illiterate and this was not a complex case. Id. There is nothing in the record to show that Appellant was not afforded the due process to which he was entitled.

Additionally, the Honorable Judge Anderson ruled that there was substantial evidence to support Appellant's conviction for Exhibitionism and Public Masturbation. See Order, page 4 of 4. The hearing officer, DHO James, received testimony from Appellant and heard from the charging officer, Ms. Francis, via her Incident Report as well as testimony. Ms. Francis reported that on January 23, 2018, she observed Appellant masturbating in a

bathroom. See Order, page 1 of 4; see also Transcript, page 2. Ms. Francis reported and testified that she recognized the inmate as Appellant, Perry Gilmore #344879, and that she was certain it was him. Transcript, page 2, 11. SCDC Policy OP 22.14 clearly defines offense 854 Exhibitionism and Public Masturbation as “(1) Engaging in acts of indecent and/or unnecessary exposure of genitals or other private body parts to a staff member or other person; or (2) engaging in acts of masturbation or any manual stimulation of one's exposed or unexposed genitals in a public setting, or in the view of a staff member or other person.”

Appellant has failed to show that the Department’s decision was not supported by substantial evidence or that his due process rights were violated in any way. Therefore, Respondent respectfully requests that the order of the Administrative Law Judge be upheld.

2. THE ADMINISTRATIVE LAW COURT CORRECTLY RULED THAT APPELLANT HAD NOT PRESERVED HIS “RIGHT TO PRIVACY” ARGUMENT FOR REVIEW AND IT IS THEREFORE NOT PRESERVED FOR REVIEW AT THIS TIME.

Appellant claimed in his brief to the Administrative Law Court that he should not have been found guilty of the disciplinary offense of Exhibitionism and Public Masturbation and cites to Lee v. Downs, 641 F.2d 1117 (4th Cir. 1981) as the controlling authority. App. Brief to ALC. The Court in Lee v. Downs considered a Section 1983 issue in which a female inmate was held down in a state of undress by male officers while a female correctional employee searched the inmate’s vagina for matches. Id. at 1119. The Court did state that male and female inmates’ privacy should be afforded some level of protection while undressing or using the toilet; however, it did not contemplate an inmate masturbating, which is the issue in this appeal. This distinction between the facts in Lee and those at hand are so

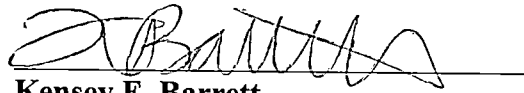
great that the logic of the Lee court is not applicable to this appeal. Furthermore, as the ALC found, Appellant did not raise this issue with specificity in his Step One or Step Two Grievances and therefore did not preserve it for appeal. See Order, page 3 of 4; Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.”) In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). When a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (“A defendant must object at his first opportunity to preserve an issue for appellate review.”). “If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). Appellant failed to raise this issue during the grievance process and therefore did not preserve it for appeal to the ALC or to this Court.

CONCLUSION

For the foregoing reasons, the Court should affirm the Administrative Law Court’s decision below.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

A handwritten signature in black ink, appearing to read "K. Barrett", written over a horizontal line.

Kensey E. Barrett

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February 7, 2019

STATE OF SOUTH CAROLINA
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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Ralph King Anderson, III

ALC Case No. 18-ALJ-04-0110-AP
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PERRY GILMORE, # 344879,

APPELLANT,

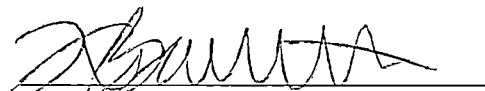
v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on today's date she mailed a copy of the **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal** to Appellant, addressed as follows: Perry Gilmore, 2815 Shadblow Lane, Apartment 15-21, West Columbia, SC 29170.



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February 7, 2019



South Carolina
Department of
Corrections

OFFICE OF GENERAL COUNSEL

HENRY McMASTER, Governor

BRYAN P. STIRLING, Director

February 7, 2019

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
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SC Court of Appeals

RE: Perry Gilmore, #344879, v. South Carolina Department of Corrections
Appellate Case No. 2018-001950

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal** in the above captioned appeal, along with **Proof of Service**.

Thank you for your attention to this matter, and please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

Kensey E. Barrett
Deputy General Counsel
South Carolina Department of Corrections

cc: Perry Gilmore
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