

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge Deborah Brooks Durden

ALC Case No. 18-ALJ-04-0206-AP
Appellate Case No. 2018-002139

RECEIVED
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SC Court of Appeals

JEFFREY MCCOY, #355188,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Kensey E. Barrett
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ATTORNEY FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT'S CALCULATION OF HIS SENTENCE WAS INCORRECT.

STATEMENT OF THE CASE

This matter is comes before the Court pursuant to the appeal of Jeffrey McCoy, an inmate incarcerated with the Department of Corrections. Appellant filed a Step One Grievance on January 9, 2018, claiming his sentence was calculated incorrectly. This grievance was investigated and denied when it was determined that SCDC has properly calculated Appellant's sentence. Appellant filed a Step Two Grievance on February 7, 2018. This grievance was also investigated and denied. Appellant filed a Notice of Appeal in the Administrative Law Court on May 2, 2018. Thereafter, on November 5, 2018, the Honorable Deborah Brooks Durden 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.

ARGUMENT

THE ADMINISTRATIVE LAW COURT PROPERLY AFFIRMED THE DECISION OF THE DEPARTMENT OF CORRECTIONS WHERE APPELLANT FAILED TO SHOW THE DEPARTMENT'S CALCULATION OF HIS SENTENCE WAS INCORRECT.

In this case, the Administrative Law Court properly affirmed the decision of the Department of Corrections, and Appellant has failed to show that the Department of Corrections committed any error with respect to the calculation of his sentence. On April 24, 2013, Appellant was sentenced for ten convictions. He received 30 day sentences for two counts of Simple Larceny in violation of S.C. Code § 16-13-30(A). *See* Order, page 1 of 5; *see also* Sentencing Sheets for Indictments 12GS360879 and 12GS360880. His sentence start date for these sentences was March 25, 2013 and they were completed on April 24, 2013. *See* Order, page 1 of 5; *see also* SCDC Conviction Summary. Appellant received two five-year sentences for Grand Larceny in violation of S.C. Code § 16-13-30(B)(2) and Possession of Tools Capable of Being Used in Crime in violation of S.C. Code § 16-11-20. *See* Order, page 1 of 5; *see also* Sentencing Sheets for Indictments 12GS360884 and 12GS360881. His sentence start date for these sentences was May 27, 2012 and they were completed on March 31, 2015. *See* Order, page 1 of 5; *see also* SCDC Conviction Summary.

Appellant also received a fifteen year sentence for Burglary/Safecracking in violation of S.C. Code § 16-11-390. *See* Order, page 1 of 5; *see also* Sentencing Sheet for Indictment 12GS360872. Lastly, he received ten year sentences for each of five counts of Second Degree Burglary in violation of S.C. Code § 16-11-312(B). *See* Order, page 1 of 5; *see also* Sentencing Sheets for Indictments 12GS360874, 12GS360877, 12GS360878, 12GS360882,

and 12GS360883. The Second Degree Burglary sentences were ordered to run consecutively to the Burglary/Safecracking sentence. *See* Order, pages 1-2 of 5; *see also* Sentencing Sheets for Indictments 12GS360874, 12GS360877, 12GS360878, 12GS360882, and 12GS360883. Appellant argues that SCDC has incorrectly calculated his fifteen year sentence for Burglary/Safecracking in violation of S.C. Code § 16-11-390. *See* App. Brief. Thus, this is the sentence that is at issue in this case.

S.C. Code Ann. § 24-13-40 requires that inmates be given credit for time served prior to trial and sentencing. Appellant was arrested on the offense in question on May 28, 2012 and remained in the custody of Newberry County until he was sentenced on April 24, 2013 giving Appellant 332 days of jail time credit. *See* Jail Time Report for SCDC Transfer. SCDC has given Appellant full credit for the 332 days he served in jail prior to trial and sentencing by back dating the sentence start date of his Burglary/Safecracking sentence to May 27, 2018 and recording 332 days of jail time credit on Appellant's Commitment Application screen. *See* SCDC Conviction Summary, and Commitment Application Inquiry for this offense.

Appellant's Burglary/Safecracking sentence in violation of S.C. Code § 16-11-390 is a no parole offense. S.C. Code § 24-13-100 defines a no parole offense as, in relevant part, "a class A, B, or C felony . . . which is punishable by a maximum term of imprisonment for twenty years or more." S.C. Code § 16-1-20 defines a Class A felony as a felony which carries a potential sentence of "not more than thirty years." Burglary/Safecracking in violation of S.C. Code § 16-11-390 is a felony punishable by a sentence of up to thirty years and thus is a Class A felony. Since Appellant's Burglary/Safecracking sentence is Class A

felony and is punishable by a maximum term of not more than thirty years, it is a no parole offenses as defined in S.C. Code § 24-13-100. *See* Order, pages 3-4 of 5.

S.C. Code § 24-13-150 requires that any person convicted of a no parole offense serve at least 85% of their sentence. *See* Order, page 4 of 5. Thus, Appellant must serve at least 85% of his Burglary/Safecracking sentence. Appellant's mandatory service requirement for this sentence, 85% of his 15 years, is 12 years and nine months. *See* Commitment Application Inquiry for this offense. Appellant's sentence start date is May 27, 2012. *See* SCDC Conviction Summary. Appellant's current projected completion date for this sentence is February 21, 2025. *Id.*

Appellant argues that S.C. Code Ann. § 24-13-100 was repealed by *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 781 S.E.2d 914, (Ct. App. 2016), *reh'g denied* (Feb. 24, 2016). *See* App. Brief. However this is not correct. *Bolin* affected only drug distribution, manufacturing, and possession with intent to distribute charges for second or subsequent offenses. *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 781 S.E.2d 914, (Ct. App. 2016), *reh'g denied* (Feb. 24, 2016). Appellant's Burglary/Safecracking charge, and its classification as a no parole offense, was in no way affected by *Bolin*. *See* Order, page 4 of 5.

Appellant raised, for the first time on appeal to the Administrative Law Court, that the application of Sections 24-13-100 and -150, as applied to the crime of safecracking, was unconstitutional. *See* Order, page 4 of 5. Therefore, it was not preserved for appeal to the Administrative Law Court and is still not preserved for appeal, as SCDC has not had the opportunity to render a final agency decision on the matter. S.C. Code Ann. §1-23-380; *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642,

644 (2000); *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) (“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.”); see Order, page 4 of 5.

When calculating an inmate’s projected max out date, SCDC assumes the inmate will earn work credits at his current earning rate and will not lose any good time credit for disciplinary infractions. Using this method, SCDC has projected that Appellant’s final max out date for all sentences is March 4, 2030.¹

The record conclusively establishes that the “substantial evidence on the whole record” supports the Department’s final agency decision. See Order, page 4 of 5. Appellant has the burden of proving that the decision of the Department is clearly erroneous, or arbitrary or capricious, or an abuse of discretion. See *Porter v. Public Service Comm’n*, 333 S.C. 12, 507 S.E.2d 328 (1998). Appellant has not met this burden and his claim should be dismissed with prejudice. Appellant has failed to show that the Department’s calculation is incorrect in any way. Therefore, Respondent respectfully requests that the order of the Administrative Law Judge be upheld.

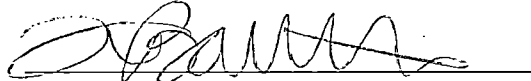
CONCLUSION

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

¹ Appellant’s earned work credits changed in the time between the Administrative Law Court appeal and this appeal. The updated max out date is included in this brief.

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

A handwritten signature in black ink, appearing to read 'Kensey E. Barrett', is written over a horizontal line.

KENSEY E. BARRETT

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February 19, 2019

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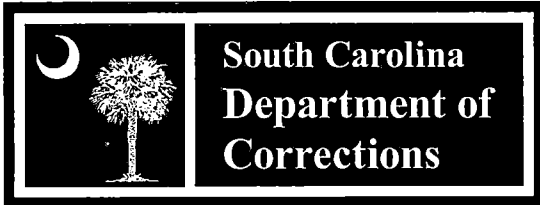
CERTIFICATE OF SERVICE

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: Jeffery McCoy, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, GPH-0117-A.



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February 19, 2019



South Carolina
Department of
Corrections

OFFICE OF GENERAL COUNSEL

HENRY McMASTER, Governor

BRYAN P. STIRLING, Director

February 19, 2019

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
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RE: Jeffrey McCoy, #355188, v. South Carolina Department of Corrections
Appellate Case No. 2018-002139

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 Barrett
Deputy General Counsel
South Carolina Department of Corrections

cc: Jeffrey McCoy
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GPH-0117-A