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-04-0095-AP
Appellate Case No. 2018-001981

DAMON BROWN, #357300,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Kensey E. Barrett
Deputy General Counsel
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITY

STATEMENT OF ISSUES ON APPEAL

I. 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.

II. APPELLANT'S CONSTITUTIONAL ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

STATEMENT OF THE CASE

This matter is comes before the Court pursuant to the appeal of Damon Brown, an inmate incarcerated with the Department of Corrections. Appellant filed a Step One Grievance on January 3, 2017, claiming his projected max out date was not being calculated properly. 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 November 3, 2017. This grievance was also investigated and denied. Appellant filed a Notice of Appeal in the Administrative Law Court on March 9, 2018. Thereafter, on October 18, 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:
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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;
>
> (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

I. 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 October 3, 2013, Appellant was sentencing to fourteen years for Trafficking in Cocaine Base/ Meth 10 – 28 grams, second offense, in accordance with S.C. Code § 44-53-375(c)(1)(b). *See* Sentencing Sheet for Indictment Number 2012-GS-08-1108. Appellant was also sentenced to fourteen years for Distribution of Cocaine, second offense, pursuant to S.C. Code § 44-53-370(b)(1) on October 3, 2013. *See* Sentencing Sheet for Indictment Number 2012-GS-08-1107. Appellant's Trafficking conviction is his controlling sentence for determining his maxout date and non-eligibility for parole. Appellant argues that Respondent is incorrectly applying S.C. Code § 24-13-100 to his sentence. *See* App. Initial Brief, p. 2. This is not correct.

On June 2, 2010, the Omnibus Crime Reduction and Sentencing Reform Act of 2010 went into effect. The Act amended portions of S.C. Code § 44-53-370 and § 44-53-375 by adding the following language to certain subsections dealing with manufacturing/distribution-level drug offenses:

> Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A), may have the sentence suspended and probation

> granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence must not be suspended nor probation granted.

This language was **not** added to any of the subsections dealing with trafficking-level offenses. *See* S.C. Code § 44-53-370(e) and S.C. Code § 44-53-375(C).

The case of *Bolin v. S.C. Dep't of Corr.*, 415 S.C. 276, 282, 781 S.E.2d 914, 917 (Ct. App. 2016), *reh'g denied* (Feb. 24, 2016), held that the addition of the above-quoted language to the manufacturing/distribution-level subsections signaled the legislature's intent to repeal S.C. Code § 24-13-100 (the "85% law") to the extent it conflicted with the amended portions of S.C. Code § 44-53-370 and -375. Accordingly, the *Bolin* court found that these specific offenses were no longer to be considered to be 85%, "no-parole" offenses. However, since the language discussed in *Bolin* was **not** added to the trafficking subsections of the drug statutes, *Bolin* has no application to convictions for trafficking. *See* ALC Order, p. 4 of 5.

Appellant's trafficking conviction falls under the 85% "no parole" statute because the offense is a Class A felony, which carries a maximum sentence of thirty years. *See* S.C. Code § 44-53-375(c)(1)(b) (stating that second-offense trafficking in cocaine base/ meth, 10-28 grams, carries a sentence of five to thirty years); S.C. Code § 24-13-100 and -150 (generally, stating that offenses carrying twenty years or more are 85% no-parole offenses) and S.C. Code § 16-1-20(A)(1) ("A person convicted of classified offenses, must be imprisoned as follows: (1) for a Class A felony, not more than thirty years."); *See also* ALC Order, pp. 3-4 of 5.

Appellant argues that the following language contained in subsection F of S.C. Code § 44-53-375 requires that he be eligible for parole, extended work release, or supervised furlough:

> Sentences for violation of the provisions of subsections (C) or (E) may not be

> suspended and probation may not be granted. A person convicted and sentenced under subsection (C) or (E) to a mandatory term of imprisonment of twenty-five years, a mandatory minimum term of imprisonment of twenty-five years, or a mandatory minimum term of imprisonment of not less than twenty-five years nor more than thirty years is not eligible for parole, extended work release as provided in Section 24-13-610, or supervised furlough as provided in Section 24-13-710.

Initially, this language has no application to Appellant's conviction since he did not receive a "mandatory" or "mandatory minimum" term of imprisonment of twenty-five to thirty years. More importantly, this language (which, notably, was never mentioned or discussed in the *Bolin* case), does not repeal, implicitly or otherwise, the 85% provisions as applied to Appellant's drug trafficking offense. *See* ALC Order, p. 4 of 5. The above language became effective on January 12, 1995. *See* S.C. Code § 44-53-375(f) (Supp. 1995). At that time, there was no law requiring an inmate to serve an 85%, no-parole term, so the provision prohibiting parole for certain serious drug trafficking offenses had meaning. However, subsequently, on January 1, 1996, the 85% "no-parole" statutes were enacted. *See* S.C. Code § 24-13-100 and -150 (Supp. 1996). These broader statutes require 85%, no-parole terms for **all** sentences for class A, B, or C felonies or those exempt from classification but carrying a possible penalty of twenty years or more. *See* S.C. Code § 24-13-100 and -150 (Supp. 1996).

Additionally, as a part of the January 1, 1996 enactments, S.C. Code § 24-21-560 was added, which requires that all inmates sentenced for 85%, "no parole" offenses must be released directly to a community supervision program under the supervision of the Department of Probation, Parole, and Pardon Services for a period not to exceed two years. *See* S.C. Code § 24-21-560(A) & (B). All of this subsequent legislation - including S.C. Code § 24-13-100, § 24-13-150, and § 24-21-560 - to the extent it conflicts with the language in S.C. Code § 44-53-375(f), supersedes -375(f). *See, e.g., Williams v. Town of Hilton Head Island*, S.C., 311 S.C.

417, 421, 429 S.E.2d 802, 804 (1993) (in instances where it is not possible to harmonize two sections of a statute, a later legislation supersedes an earlier enactment); *State v. Brown*, 317 S.C. 55, 58, 451 S.E.2d 888, 891 (1994) ("More recent and specific legislation supersedes prior general law.").

Therefore, Appellant must be incarcerated for at least 85% of his sentence. *See* S.C. Code Ann. § 24-13-150(A); *see also* ALC Order, p. 5 of 5. Appellant's sentence start date is October 3, 2013. *See* Conviction Summary printout from SCDC's Offender Management System. Eighty-five percent of Appellant's fourteen year sentence is approximately eleven years, ten months, and twenty-four days. Appellant's current projected maxout date is August 24, 2025, which is approximately eleven years, ten months, and twenty-two days from his sentence start date. 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.

II. APPELLANT'S CONSTITUTIONAL ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW.

Appellant argues that the application of S.C. Code § 24-13-100 and 24-13-150 violate the due process clause under the Fourteenth Amendment. However, these issues were not preserved for the ALC to review and are not preserved for appellate review because Appellant failed to raise them at his earliest opportunity. *See* ALC Order, p. 5 of 5.

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).

Here, Appellant did not raise the Fourteenth Amendment issue in his Step 1 or Step 2 grievances. Therefore, this issue is not preserved for appellate review. *See* ALC Order, p. 5 of 5.

CONCLUSION

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

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

KENSEY E. BARRETT
Deputy General Counsel
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

March 27, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

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DAMON BROWN, #357300,

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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: **Damon Brown**, 357300, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, B2-0011-A.

Kensey E. Barrett
Deputy General Counsel
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, S. C. 29221
(803) 896-8508

March 27, 2019

SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Safety, Service, and Stewardship

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

OFFICE OF GENERAL COUNSEL

March 27, 2019

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Damon Brown, #357300, v. South Carolina Department of Corrections
Appellate Case No. 2018-001981

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**.

Additionally, please include the undersigned as counsel of record on this matter.

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: Damon Brown, 357300
Kirkland Correctional Institution
4344 Broad River Road
Columbia, SC 29210
B2-0011-A