

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT

OCT 29 2019

H.W. Funderburk, Jr., *Administrative Law Judge*

SC Court of Appeals

ALC Case No. 18-ALJ-04-0438-AP
Appellate Case No. 2019-001291

Terry Bo Smith, #160785.....Appellant,

v.

South Carolina Department of Corrections.....Respondent

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

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STATEMENT OF THE 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 comes before the Court pursuant to the appeal of Terry Bo Smith (“Appellant”), an inmate in the custody of the South Carolina Department of Corrections (“SCDC” or “Respondent”). On May 26, 2017, Appellant submitted a Step One Grievance challenging the Department’s calculation of his sentence. See Appellant’s Step One Grievance. The Warden responded on August 17, 2017. Id. Thereafter on October 17, 2017, Appellant filed a Step Two Grievance in which he again challenged the Department’s calculation of his sentence. See Appellant’s Step Two Grievance. On August 24, 2018 Appellant’s Step Two Grievance was denied. Id. Appellant subsequently filed a Notice of Appeal to the Administrative Law Court. After considering initial briefs and reply filings from both parties, the Honorable H.W. Funderburk, Jr. entered an order affirming SCDC’s final agency decision on July 22, 2019. See July 22, 2019 ALC Order. 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.

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 and Appellant has failed to show that the Department of Corrections committed any error with respect to calculation of his sentence. On April 27, 1994, Appellant received a ten-year sentence for Assault and Battery of a High and Aggravated Nature (ABHAN). See sentencing sheet for indictment number 1994GS11132. Then on August 9, 1994 he received a ten-year sentence for Crack Distribution which was

to run consecutively to his ABHAN sentence. See sentencing sheet for indictment number 1994GS11949. Appellant was entitled to 103 days of jail time credit on his sentence for Assault and Battery of a High and Aggravated Nature. SCDC gave Appellant that credit by backdating his sentence start date to January 14, 1994 which is 103 days prior to his April 27, 1994 sentencing. See Completed SCDC Priors. Appellant completed that sentence on August 14, 1999 and then began his Crack Distribution sentence. See Completed SCDC Priors.

Appellant had served just under a year of his Crack Distribution sentence when, on August 2, 2000, Appellant was released on parole. See Appellant's Transfer History, p. 4. On May 2, 2002, Appellant absconded from parole supervision and a warrant was issued for his arrest. See Appellant's Transfer History, p. 3 & Spartanburg County arrest warrant number W-42-02-0458. Appellant was arrested January 17, 2004. See Jail Time Report for SCDC Transfer from Spartanburg County dated March 3, 2004. Appellant's parole was officially revoked on March 1, 2004. See parole revocation order.

On March 3, 2004, he returned to SCDC custody to complete the remaining portion of his 1994 sentence for Crack Distribution. See Appellant's Transfer History, p.3 & Jail Time Report for SCDC Transfer from Spartanburg County dated March 3, 2004. Appellant was on parole in South Carolina from August 2, 2000 until May 1, 2002, a total of 638 days. Appellant was given day for day credit on for this time pursuant to S.C. Code Ann. § 24-21-670. See SAS System Calculation for conviction S00008. From May 2, 2002 until his arrest on January 17, 2004, Appellant was not abiding by the terms of his parole. Thus S.C. Code Ann. § 24-21-670 does not entitle him to credit for this time period. In fact,

South Carolina law prohibits Appellant from receiving credit for this period of time. See State v. Hackett, 363 S.C. 177, 182, 609 S.E.2d 553, 555–56 (Ct. App. 2005) (Hackett was not entitled to credit for “time between the issuance of the probation arrest warrant . . . and the time Hackett actually appeared before the court” because to do otherwise would “lead to an absurd result.”); State v. Miller, 404 S.C. 29, 37, 744 S.E.2d 532, 537 (2013) (“the tolling of probation must be premised on a violation of a condition of probation or a statutory directive.”).

Appellant spent some time incarcerated in New York between May 2, 2002, when his parole violation warrant was issued, and his January 17, 2004 arrest. See Appellant’s Transfer History, p.3. Appellant argues he should get jail time credit on his Crack Distribution sentence for this time. See Appellant’s Initial Brief, p. 3. However, as discussed above, Appellant cannot get credit for time when he was ordered to be on parole but had absconded from supervision. Hackett at 182, 609 S.E.2d at 555–56 (Ct. App. 2005).

Appellant completed his Crack Distribution sentence and was released from SCDC custody on June 1, 2006.¹ See Appellant’s Transfer History, p.1. Appellant ultimately served just over 10 years and four months of the possible 20 years imposed by his 1994 consecutive sentences. This includes the time he was incarcerated prior to parole, May 5, 1994 to August 2, 2000, the time he was on parole prior to his violating the terms, August

¹ Appellant’s Completed SCDC Priors indicates that this sentence, offense S00008, would be completed on June 5, 2006 but Appellant was actually released on June 1, 2006 pursuant to Proviso 37.26 to the 2005-2006 Appropriations Act which states, in relevant part, “The Director of the Department of Corrections . . . shall release such prisoners on the first day of the month in which their sentence expires, and if the first day of the month falls on a Saturday, Sunday, or a legal holiday, such prisoners may be released on the last weekday prior to the first of the month which is not a holiday, Saturday or Sunday.”

3, 2000 to May 2, 2002, and the time he was incarcerated after his parole was revoked, January 17, 2004 to June 1, 2006.

On October 16, 2006, Appellant was sentenced to 15 years for Common Law Robbery, 10 years for Assault and Battery of a High and Aggravated Nature, 23 years for Armed Robbery, 23 years for Kidnapping, and 20 years for Carjacking with Bodily Injury. See Sentencing Sheets for indictment numbers 2006GS423933, 2006GS423932, 2004GS422037, and 2004GS422036, respectively. On these sentences, Appellant is entitled to 189 days of jail time credit: 46 days from January 17, 2004 to March 3, 2004 and 143 days from May 25, 2006 to October 16, 2006. See Jail Time Report for SCDC Transfer from Spartanburg County dated October 17, 2006. SCDC credited Appellant with 189 days of jail time credit on all of his October 16, 2006 sentences by recording his sentence start date as April 10, 2006; which is 189 days prior to his sentencing date of October 16, 2006. See Conviction Summary.

As discussed above, Appellant was entitled to jail time credit derived from two separate periods of time. SCDC applied these jail time credits to his sentence by utilizing an administrative “fiction” or management tool and entering his sentence start date as April 10, 2006. Because Appellant’s sentence start date was recorded as April 10, 2006, it may at first glance appear that Appellant’s current sentences were imposed before he completed his 1994 sentences on June 1, 2006. In fact, Appellant argues that this is the case stating that SCDC calculated the start date of his current sentences based on the calculation of his 1994 sentences. See Appellant’s Initial Brief, p. 2. However, this is not the case. As discussed previously, Appellant completed his 1994 sentences on June 1, 2006 and his

current sentences were not imposed until a month and a half later on October 16, 2006. As such, the end date of Appellant's 1994 sentences has no bearing on the calculation of the sentences he is currently serving.

Appellant's sentences for Common Law Robbery and Assault and Battery of a High and Aggravated Nature were both completed prior to his initiating this appeals process; on March 10, 2014 and August 5, 2011, respectively. See Conviction Summary. Appellant is currently serving his sentences for Armed Robbery, Kidnapping, and Carjacking with Bodily Injury. Id. His current projected completion date for the Carjacking with Bodily Injury sentence is April 6, 2023. Id. His current projected completion date for both his Armed Robbery and Kidnapping sentences is October 22, 2025. Id.

Both Armed Robbery and Kidnapping are no parole offenses. S.C. Code Ann. § 24-13-100 defines a no parole offenses as, in relevant part, "an offense exempt from classification as enumerated in Section 16-1-10(d)." Both Armed Robbery and Kidnapping are included in the list of offenses in S.C. Code Ann. § 16-1-10(d). Because these sentences are for no parole offenses, they are subject to the mandatory service requirement imposed by S.C. Code Ann. § 24-13-150(A). This statute states, in relevant part,

an inmate convicted of a no parole offense . . . is not eligible for early release, discharge, or community supervision . . . until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed . . . calculated without the application of earned work credits, education credits, or good conduct credits[.]

Appellant received 23-year sentences for both of these offenses so Appellant has a mandatory service requirement of 19 years, six months, and 18 days on both sentences. Appellant's projected max out date on these sentences, October 22, 2025, is approximately

19 years, six months, and 18 days from April 10, 2006, his sentence start date. Thus, Appellant's current projected max out date is the earliest possible max out date available to him under South Carolina law.

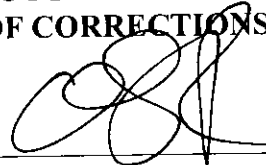
Because Appellant has not carried his burden to demonstrate SCDC is incorrectly calculating his sentence, Judge Funderburk was correct to affirm SCDC's final agency decision. Therefore, Respondent respectfully requests that the order of the Administrative Law Court be upheld.

CONCLUSION

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

Respectfully submitted,

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**



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October 28, 2019
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., *Administrative Law Judge*

ALC Case No. 18-ALJ-04-01291-AP
Appellate Case No. 2019-001291

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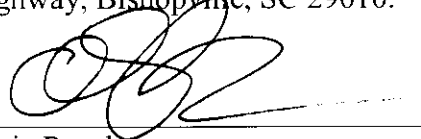
Terry Bo Smith, #160785.....Appellant,

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: Terry Bo Smith, Dorm-Room-Bunk: F4-1243-T, Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010.



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October 28, 2019



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Safety, Service, and Stewardship

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

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The Honorable Jenny Abbott Kitchings
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Reference: App. Case No.: 2019-001291 (*Terry Bo Smith, #160785*
v. South Carolina Department of Corrections)

Dear Madam Clerk:

Enclosed, please find the Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal. Thank you.

Sincerely,


Annie Laurie Rumler, Esquire

Enclosure

cc: Terry Bo Smith, #160785



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