STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge H.W. Funderburk, Jr.

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SC Court of Appeals

ALC Case No. 18-ALJ-04-0293-AP
Appellate Case No. 2018-002013

LUTHER BRIAN MARCUS, # 218408,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

FINAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

Christina Catoe Bigelow
Deputy General Counsel
Office of General Counsel
South Carolina Dept. of Corrections
Post Office Box 21787
Columbia, South Carolina 29221
(803) 896-8508

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

This case is before the Administrative Law Court (ALC) pursuant to the appeal of Luther Marcus, an inmate incarcerated with the South Carolina Department of Corrections (SCDC). Appellant filed a Step One Grievance on April 2, 2018, claiming his sentence calculation was not correct. 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 April 20, 2018. This grievance was also investigated and denied. Appellant subsequently appealed to the Administrative Law Court, and on October 29, 2018, Judge H.W. Funderburk, Jr., filed an Order affirming SCDC's final agency decision. 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 CONCLUDED THAT THE DEPARTMENT CORRECTLY CALCULATED APPELLANT'S SENTENCES.

Background

On March 16, 2010, Appellant received a fifteen-year sentence out of Pickens County for Burglary, 2nd degree. (See Am. R. p. 8). A little over a month later, on April 27, 2010, Appellant received three additional sentences out of Oconee County for three additional counts of Burglary, 2nd degree; all three sentences were fifteen years suspended to seven years of incarceration and five years of probation. (See Am. R. p. 5-7). These three sentences were to run concurrently with one another and with the fifteen-year sentence imposed on March 16, 2010. Appellant came to the South Carolina Department of Corrections to serve these sentences and completed the seven-year active portion of one of his split sentences on October 12, 2012 and the other two on December 14, 2018. (See Brief of Appellant, p. 2). However, he was not released to probation at that time because his fifteen-year sentence under indictment number 2010-GS-39-0445 had not yet been completed. Upon completion of this sentence on September 30, 2016, Appellant was released from SCDC custody and began the probationary portion of his split sentences. (See Brief of Appellant, p. 2).[1]

Subsequently, on December 15, 2016, Appellant was arrested for indecent exposure. (See Am. R. p. 16). On December 12, 2017, Appellant received a three-year sentence for this offense. (See Am. R. p. 9). On that same date, Appellant was ordered to serve the remaining eight years of

[1] The SCDC Completed Priors Screen for SCDC offense number S00004 indicates that Appellant's fifteen-year sentence for Burglary, 2nd degree ended on October 26, 2016. However, budget proviso 65.13 of the 2016-2017 Appropriations Act states that the Department of Corrections can release inmates on the first day of the month in which their sentence ends. Additionally, it states that if the first of the month falls on a weekend or holiday, they can be released on the last weekday which is not a holiday prior to the first of the month. October 1, 2016 was a Saturday. Consequently, Appellant was released on Friday, September 30, 2016.

his suspended sentences for Burglary, 2nd degree (all to run concurrently) due to violating his probation. (See Am. R. p. 11-13). Appellant completed his sentence for indecent exposure on September 10, 2018. (See Am. R. p. 17). His only current, active sentences are his three concurrent eight-year probation revocation sentences.

Argument

In his Brief to this Court, Appellant makes four distinct arguments. He first argues that his probation began while he was still in SCDC custody on his initial fifteen-year sentence, and that he is entitled to credit for "time served" for "the period between the completion of Oconee 7 years, to the completion of the Pickens 15 year sentence." (See Brief of Appellant, p. 5). It is undisputed that Appellant was released from SCDC custody on September 30, 2016, after completion of his fifteen-year sentence from Pickens County. His probation for his Oconee County sentences could not have begun until that date, because prior to that date, he was in the custody of SCDC and not available to be on probation in the community. Appellant produced no evidence to the ALC establishing that he was on probation any earlier than September 30, 2016. Furthermore, Appellant was not entitled to jail time credit for the time period in question because he was actually serving another sentence in SCDC custody during this time. S.C. Code § 24-13-40 states in relevant part:

> In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing . . . Provided, however, that credit for time served prior to trial and sentencing shall not be given: . . . (2) **when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense** in which case he **shall not** receive credit for time served prior to trial in a reduction of his sentence for the second offense. (emphasis added.)

During the time period at issue, Appellant was serving a fifteen-year sentence in SCDC out of Pickens County that was separate and distinct from his split sentences out of Oconee County.

Because he was serving time in SCDC for this sentence, S.C. Code Ann. § 24-13-40 specifically prohibits him from receiving jail time credit on another offense.

Appellant's second argument is that he is entitled to 76 days of jail time credit for the time period between September 30, 2016 (his date of release from SCDC) and December 15, 2016 (his date of arrest on the indecent exposure offense). Appellant is not entitled to jail time credit for this time period because he was not in jail. S.C. Code § 24-13-40 states, in pertinent part:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the sentence. However, when . . . the commencement of the service of the sentence follows the revocation of probation . . . the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, full credit against the sentence must be given for time served prior to trial and sentencing[.]

The term "time served" in this statute has been interpreted by courts of this state to mean time during which the inmate is in pre-sentencing confinement and has been charged with the offense for which he is later sentenced. Blakeney v. State, 339 S.C. 86, 88, 529 S.E.2d 9, 10 (2000). Plainly, Appellant cannot receive jail time credit for time he was out on probation.

Appellant's third argument before this Court is that he is entitled to 162 days of jail time credit for the time period between December 15, 2016 (his date of arrest on the indecent exposure offense) and May 26, 2017 (the date he was served with warrants for probation violations). Appellant is not entitled to jail time credit against his probation violation sentences because he was not charged with those offenses until May 26, 2017. See Blakeney, 339 S.C. at 88, 529 S.E.2d at 10. Prior to May 26, 2017, he was in jail *only* on the indecent exposure charge. Therefore, this argument is also without merit.

Appellant's fourth argument before this Court is that he is entitled to 562 days of time served credit for the jail time he was given back in April of 2010 against his initial seven-year split sentence. However, Appellant already received this jail time credit when he came to SCDC in April of 2010. On the sentence sheet for indictment number 2009-GS-37-01192, the judge indicated that Appellant was to receive credit for 562 days of time served. (See Am. R. p. 6). This credit was applied to that particular sentence to back up his sentence start date by 562 days, from April 27, 2010, to October 12, 2008. Appellant is not entitled to receive this credit **again** under Hayes v. State, 413 S.C. 553, 777 S.E.2d 6 (Ct. App. 2015), or any other case or statute. Accordingly, his argument on this ground is also without merit.

Appellant has received all of the jail time credit to which he is entitled on his current eight-year probation violation sentences. As indicated above, Appellant was charged with these probation violations on May 26, 2017. (See Am. R. p. 11-15). Under S.C. Code Ann. § 24-13-40, he is therefore entitled to jail time credit from May 26, 2017 until December 12, 2017, the date his current probation violations sentences were imposed. 200 days elapsed between May 26, 2017 and December 12, 2017. Appellant has been given credit for 200 days of jail time. (See Am. R. p. 18-20). Accordingly, Appellant has been given all of the jail time credit to which he is entitled for his current sentences, and his sentences have been correctly calculated.

CONCLUSION

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

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

BY: _____

CHRISTINA CATOE BIGELOW
Deputy General Counsel
Office of General Counsel
S. C. Department of Corrections
Post Office Box 21787
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(803) 896-8508

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Christina Catoe Bigelow
Deputy General Counsel
Office of General Counsel
S. C. Department of Corrections
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