

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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Administrative Law Judge H. W. Funderburk, Jr.

NOV 25 2019

ALC Case No. 18-ALJ-04-0547-AP
Appellate Case No. 2019-001410

SC Court of Appeals

GREGORY PENCILLE, # 312332,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

INITIAL BRIEF OF RESPONDENT

**SOUTH CAROLINA DEPARTMENT
OF CORRECTIONS**

Kensley Evans
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Post Office Box 21787
Columbia, South Carolina 29221
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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 comes before the Court pursuant to the appeal of Gregory Pencille, an inmate incarcerated with the Department of Corrections. Appellant filed a Step One Grievance on August 15, 2018, seeking a change to his sentence calculation. 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 August 30, 2018. This grievance was also investigated and denied. Appellant filed a Notice of Appeal in the Administrative Law Court on November 15, 2018. Thereafter, on July 24, 2019, the Honorable H. W. Funderburk, Jr. 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 August 9, 2010, Appellant was sentenced to thirty years for Criminal Sexual Conduct in the First Degree ("CSC").¹ *See* Sentencing Sheet for Indictment Number 2008-GS-26-04686. Appellant was sentenced under S.C. Code Ann. § 16-3-652, which "is a felony punishable by imprisonment for not more than thirty years, according to the discretion of the court." By definition, this meets the classification of a "no parole offense." *See* S.C. Code Ann. § 24-13-100 ("A 'no parole offense' means a class A, B, or C felony . . . which is punishable by a maximum term of imprisonment for twenty years or more."); § 24-13-150 (generally, stating that offenses carrying twenty years or more are 85% no-parole offenses); § 16-1-30 ("All criminal offenses created by statute after July 1, 1993, must be classified according to the maximum term of imprisonment provided in the statute and pursuant to Sections 16-1-10 and 16-1-20 . . ."); § 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."). Therefore, Appellant must be incarcerated at least 85% of his sentence.

¹ Appellant also has a conviction from Kidnapping, for which he was sentenced to twelve years' incarceration on November 7, 2005. *See* Sentencing Sheet for Indictment Number 2005-GS-26-2054. This sentence has already been completed.

Appellant argues that his CSC conviction start date should be November 7, 2005, based on his Kidnapping conviction. However, this is not correct. Appellant was credited 677 days of jail time credit for his CSC sentence. *See* Commitment Application Inquiry for Conviction Number 2. S.C. Code Ann. § 24-13-40 states:

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 imposition 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, and may be given for any time spent under monitored house arrest. **Provided, however, that credit for time served prior to trial and sentencing shall not be given:** (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (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). Therefore, Appellant is not entitled to jail time beginning November 7, 2005, as he was serving his Kidnapping conviction. *See* Sentencing Sheet for Indictment Number 2005-GS-26-2054 and the Conviction Summary sheet; *see also* ALC Order, p. 3.

SCDC is “confined to the face of the sentencing sheets in determining the length of a sentence [unless . . .] there is an ambiguity in the sentencing sheets.” *Tant v. S. Carolina Dep’t of Corr.*, 408 S.C. 334, 337, 759 S.E.2d 398, 399 (2014), *reh’g denied* (July 10, 2014); *see also* ALC Order, p. 3. Appellant’s sentencing sheet, is in no way ambiguous. Appellant’s CSC sentencing sheet was clear that he should be credited with jail time “since October 2008”. *See* Sentencing Sheet for Indictment Number 2008-GS-26-04686; *see also* ALC Order, p. 3.² Therefore, 677 days were added to his conviction as there are 677 days between October 1,

² To be clear, this is the only jail time to which Appellant is entitled on this conviction due to his previous conviction of Kidnapping for which he was already serving. This was explained in more details in the foregoing paragraphs.

2008 and August 9, 2010. Based on this jail time and his 85% sentence calculation, Appellant's max-out date is March 26, 2034.

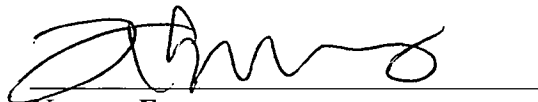
The record conclusively establishes that the "substantial evidence on the whole record" supports the Department's final agency decision. Appellant has the burden of proving that the decision of the Department is clearly erroneous, or arbitrary or capricious, or an abuse of discretion. *See Porter v. Public Service Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998). Appellant has not met his burden to demonstrate SCDC is incorrectly calculating his sentence.

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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November 21, 2019

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In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

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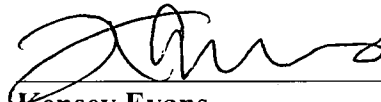
v.

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: **Gregory Pencille**, Evans Correctional Institution, 4A-0253-B, 610 Highway 9 West, Bennettsville, SC 29512.



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November 21, 2019



SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS
Safety, Service, and Stewardship

HENRY McMASTER, Governor
BRYAN P. STIRLING, Director

OFFICE OF GENERAL COUNSEL

November 21, 2019

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
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RE: Gregory Pencille, #312332 v. South Carolina Department of Corrections
Appellate Case No. 2019-001410

Dear Ms. Kitchings:

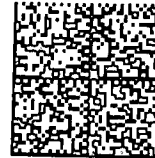
Enclosed please find the original and a copy of the **Initial Brief of Respondent, Designation of Matter to be Included in the Record on Appeal, and Motion to File Out of Time**, with six (6) copies for the Court, in the above captioned appeal, along with **Proof of Service**. Please file the originals and copies of the motion with the Court, and clock stamp and return the second set of copies to myself in the enclosed, stamped envelope.

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

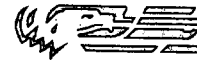
Sincerely,

Kensey Evans
Deputy General Counsel
South Carolina Department of Corrections

cc: Gregory Pencille, 312332
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