

The State Of South Carolina
In The Court Of Appeals
Appeal From The Administrative Law Court
S. Phillip Lenski, S.C. Administrative Law Court
Case No:

Joshua Reed, 252079,

Appellant,

v.

South Carolina Dep't. Of Corrections,

Respondent.

Initial Brief Of Appellant

Subscribed on this 5th day of November, 2019.

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DEC 10 2019

SC Court of Appeals

Respectfully Submitted,

Josh LRL # 252079

Joshua Reed, 252079

Kershaw C.I., SB-19

4848 Goldmine Hwy.

Kershaw, S.C. 29067

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Issue Presented On Appeal

The Administrative Law Court Erred In Affirming The South Carolina Dep't. Of Correction's Final Decision Where Their Decision Was Based On Less Than Substantial Evidence And Controlled By An Error Of Law.

Statement Of The Case

Appellant was found guilty at a Disciplinary Hearing held November 14, 2018 before Disciplinary Hearing Officer Bittinger upon the charge Possession of any Communication Device, Charge No. 898. The Hearing was held at the Kershaw Correctional Institution. After the filing and denial of his Step One and Step Two Grievances, Appellant filed appeal to the Administrative Law Court. The Administrative Law Court affirmed South Carolina Dept. of Corrections final decision. Now comes this Appeal before the South Carolina Court of Appeals.

Issue: A: Argument

The Administrative Law Court Erred In Affirming The South Carolina Dept. Of Correction's Final Decision Where Their Decision Was Based On Less Than Substantial Evidence And Controlled By An Error Of Law.

On October 29, 2018 Seargent Ellis assisted by Lt. Hunt and OFC Jones conducted a search of Appellant and his Roommate's Cell (Room) where they found a cellphone on Appellant's Roommate's top bunk and a charger was found in a box on the floor. See: (Incident Report, Attachment: A). At the Disciplinary Hearing held on November 14, 2018, Appellant explained the following to the Disciplinary Hearing Officer, Mr. Bittinger. After the Officers located the phone Officer Jones asked who was on the top bunk where the phone was located. Appellant's roommate replied, "you don't have to charge anybody with what you're finding on the top bunk. Appellant never said anything. See: (Tr. p. 2).

DHO Bittinger found Appellant guilty of the 898-Possession Of Any Communication Device. The Evidence relied upon was Seargent Ellis's Report, Statement at the hearing, picture of the evidence. He further stated, "No one has claimed this phone and charger found in the common area, sir." Appellant tried to explain to the Disciplinary Hearing Officer (twice) that the top bunk belonged to his roommate and was not a common area, but the transcript only read as [Inaudible] in regards. The DHO (Bittinger) then sanctioned Appellant with 150 days canteen, phone and visitation restriction and 70 days loss of good time. (Tr. p. 3).

In Appellant's Step One and Step Two Grievances, he describes that Lt. Hunt had a statement stating that Appellant's roommate said the phone was his (the roommate's) See: (Appellant's Step One and Step Two Grievances, Attachment: B) Appellant was relying that Lt. Hunt's ~~statement~~ statement and Lt. Hunt himself should and would have been subjected as evidence at the hearing, therefore he made no request for Lt. Hunt or his statement to be present for the disciplinary hearing.

There were two main flaws in DHO Bittinger's decision finding Appellant guilty of possessing the phone. The first is the phone was found on Appellant's roommate's bed and not a common area of the room, therefore Appellant could not have had actual or constructive possession over the contraband.

The other flaw is the question of what Statement by what Sergeant or anyone else did DHO Bittinger relied on to make his decision, See: (Entire Transcript). In fact, Bittinger does not make any distinction of what statement he is referring to whether it was given at Appellant's hearing or his Roommate's hearing. The Disciplinary Hearing Officer made reference about what was stated in an earlier hearing by his roommate, See: (Trp 2), Respondent (General Counsel) addressed this issue in their "Response to Appellant Objection To Respondent's Motion To Dismiss, See: (Attachment: C), They stated that the transcript of the hearing complete and Sergeant Ellis did not make a statement, Appellant did and this is the statement Bittinger relied on. This logic is flawed because, first, General Counsel cannot read DHO Bittinger's mind as Bittinger did not state whose statement he relied on, but at the beginning of the Disciplinary Hearing, Bittinger stated, "You stated you wanted your accuser present, Sergeant Ellis is on the speaker phone." Therefore, Sergeant Ellis did give a statement at the hearing and the transcript (Record) was incomplete or due process is violated as Sergeant Ellis was required to testify or give a statement at the hearing as required by S.C.D.C. policy and the DHO's decision would be totally void. Either way, this is a serious violation of Appellant's procedural and substantive due process rights which was a serious Error of Law making the Disciplinary Hearing and Appeal to the Administrative Law Court fundamentally unfair. Both of those processes were unfair and unjust.

In view of the record which may not be whole for appellate review, the SCDC did not have substantial evidence to convict Appellant of the 898 Possession of Any Communication Device and with such a Error of Law, the conviction cannot stand. Let us now review this Analysis in regard.

Law Analysis

An Administrative Law Judge may not reverse or modify an agency's decision unless substantial rights of the Appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence on the whole record, is arbitrary or affected by an error of Law." Matthews V. SCDC, net/decisions.aspx?id=1203 & Q=4 (Filed, Dec. 21, 2004). "Substantial evidence" is evidence which considering the record as a whole would allow a

reasonable mind to reach the same conclusion that the administrative agency reached. Hendly V. S.C. State Budget & Control Bd., 325 S.C. 413, 481 S.E.2d 159 (1996). No reasonable mind could have considered from the whole ^{record} Appellant's guilt where the record is incomplete and not whole and where Appellant did not have actual or constructive possession of contraband found on another Inmate's bed. See, McNell V. S.C.D.C., 02-ALJ-04-00336-AP (September 5, 2001). Appellant was prejudiced by the agency's decision which is clearly erroneous in view of unsubstantial evidence. Matthews V. S.C.D.C., Case No: 04-ALJ-00248-AP, available at <http://w.w.w.scalc.net/decisions.aspx?id=1203&Q=4> (filed, Dec. 21, 2004).

Conclusion

For the foregoing argument within this Initial Brief, the Administrative Law Court's decision should be reversed with Appellant's charge and sanctions removed and all good time credits returned and recalculated to his sentence.

Respectfully Submitted,

Joshua Reed #252079

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Proof Of Service

I, the above-stated Applicant, do hereby certify that I have served a copy of an "Initial Brief of Appellant" on the 11 day of November, 2019, by placing said copies of same in the Kershaw Correctional Institutional Mailbox, addressed to the following: (Also Included, Designation of Appraiser, Matter Included on Appeal)

(1) SCDC/Office Of General Counsel 4444 Broad River Road P.O. Box 21787 Columbia, SC, 29221-1787	2, Clerk Of Court S.C. Court of Appeals P.O. Box 11629 Columbia, SC, 29211
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Dated: 11- -2019.

Respectfully Submitted,
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Dear Clerk,

Please find my "Initial Brief Of Appellants' Designation Of Matter To Be Included On Appeal", with a Certificate Of Service, to be filed with the Court,

Thank you for your kind services.

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Respectfully,

Joshua Reed #252079

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