

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Kenneth Darrell Rivera, #318979,)
)
 Appellant,)
)
 vs.)
)
 South Carolina Department of Corrections.)
)
 Respondent.)
 _____)

Docket No. 19-ALJ-04-0446-AP

ORDER

RECEIVED

FEB 18 2020

SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Kenneth Darrell Rivera (Appellant), an inmate incarcerated in the South Carolina Department of Corrections (Department or SCDC).

On April 17, 2019, Appellant filed a Step 1 Grievance asserting that he was being denied a vegan diet on days when his institution served bag lunches during lockdown. In his grievance, Appellant requested bagged lunches have non-meat products. On June 17, 2019, the Warden denied the grievance, noting that “vegan diets have not been approved as a choice of dietary preferences at SCDC” and Appellant “may consult medical to discuss dietary options that may apply.” On June 26, 2019, Appellant filed a Step 2 Grievance. The Department denied the Step 2 Grievance noting that “security-related concerns may cause normal operations to be modified in an institution.” The denial also stated that “religious diets will be provided only if the circumstances make it feasible to do so.”

On September 12, 2019, Appellant filed his Notice of Appeal. Appellant asserts in his Notice of Appeal that “forcing a prisoner to consume meat when he’s a vegetarian is a violation of the constitution.” The Notice of Assignment was filed September 27, 2019. On December 5, 2019, the Record on Appeal was filed. Appellant filed his brief on December 18, 2019. On January 15, 2020, the Department filed a Motion to Dismiss because Appellant has no state-created liberty interest in receiving a religious diet during a security lockdown. As of the date of this Order, Appellant has not responded to the Motion to Dismiss.

DISCUSSION

The Court’s jurisdiction to hear this matter is derived from the decision of the South Carolina Supreme Court in *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). In *Al-*

FILED

February 3, 2020

SC ADMIN. LAW COURT

Shabazz, the Court held that the ALC's jurisdiction in inmate appeals is limited to state-created liberty interests typically involving: (1) cases in which an inmate contends that prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; and (2) cases in which an inmate has received punishment in a major disciplinary hearing as a result of a serious rule violation. *Id.* at 382; 527 S.E.2d at 757. "The only way for the [ALC] to obtain subject matter jurisdiction over [an inmate's] claim is if it implicates a state-created liberty interest." *Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003). Thus, in *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004), *cert. denied*, 544 U.S. 1033, 125 S.Ct. 2266, 161 L.E.2d 1060 (2005), our Supreme Court explained that while the ALC has jurisdiction over properly filed inmate grievance appeals, summary dismissal is appropriate "where the inmate's grievance does not implicate a state-created liberty or property interest." *See also Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006) (finding dismissal of inmate's appeal appropriate because his grievance did not implicate a state-created liberty interest).

In *Kentucky Department of Corrections v. Thompson*, the United States Supreme Court set forth that in examining procedural Fourth Amendment due process questions regarding state-created liberty interests, the court considers two questions: (1) "whether there exists a liberty or property interest which has been interfered with by the State" and (2) "whether the procedures attendant upon that deprivation were constitutionally sufficient." 490 U.S. 454, 460 (1989). Furthermore, the liberty or property interest must be created by explicit, mandatory language. *Id.* In *Town of Castle Rock, Colorado v. Gonzales*, the Supreme Court further clarified that even if a benefit is created, a person does not have a protected property interest in that benefit "if officials have discretion to grant or deny it." 545 U.S. 748, 748 (2005).

Here, Appellant's Notice of Appeal states that he is appealing the Department's decision on the grounds that his constitutional rights were violated when he was forced to consume meat during lockdown when he's vegetarian. However, in his Step 1 and Step 2 Grievances, Appellant states he is vegan. Furthermore, Appellant's brief references SCDC Policy PS 10.05 and cites to *Simms v Edmonds*, 232 F.3d 889 (4th Cir. 2000) (noting "an inmate has the constitutional right to obtain adequate nourishment from prison foods permitted by his religious dietary rules, unless the prison's failure to provide such foods is reasonably related to a legitimate penological interest").

Appellant also cited *Rivera v. Byars*¹, 2013 WL 6018616, at *1 (D.S.C. Oct. 31, 2013) (“It is well settled that prisoners have a right to a diet that is consistent with their religious beliefs, absent some legitimate penological interest preventing the accommodation of a prisoner’s religious restrictions.” (internal quotation marks and citation omitted)). At the outset, this Court’s review is limited in these instances to whether the Department deprived an inmate of a state-created liberty interest. The ALC does not consider general issues of whether an inmate’s constitutional rights have been violated.²

Turning to the court’s jurisdiction, Appellant maintains that his constitutional rights were violated during the month of April because he was given a bagged lunch containing meat products during an institutional lockdown at Broad River Correctional Institution (BRCI). In his brief, Appellant asserts that he is on a vegetarian diet due to his Rastafarian religious beliefs, but he never argued that in his Notice of Appeal. Therefore, the issue is not preserved for appeal. *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997); *See State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996) (a constitutional argument is not preserved for appeal where appellant failed to argue the constitutional basis for his request at trial); *See State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995) (a party cannot argue one ground below and then argue another ground on appeal).

Even if his argument was preserved on appeal, it still fails. Both SCDC Policy ADM-1605 “Food Service Operations” and PS- 10.05 “Inmate Religion” establish procedures by which an inmate may qualify for religious meal services. Neither of these policies, however, mandate the provision of a religious diet to inmates during a security lockdown. *See Town of Castle Rock, Colorado*, 545 U.S. at 748 (holding a person does not have a protected property interest in that benefit “if officials have discretion to grant or deny it”). In addition, as the Department stated in its decision, religious diets will be provided only if the circumstances make it feasible to do so. During lockdown, the main concern is the safety of inmates and staff. The food services staff must

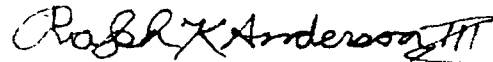
¹ The Court finds it noteworthy that the Appellant seems to be citing his own case in Federal court. In that case, the Plaintiff asserted that his rights were violated when he was given meat products during lockdown as he is a vegetarian due to his Rastafarian religious beliefs and when he wasn’t given the proper number of B-12 drinks. The Plaintiff in that case was Kenneth Syncere Rivera while the Appellant’s name in this case is Kenneth Darrell Rivera. Although the middle name is different, the allegation in that case is the same as Appellant’s in this case.

² Even if this Court had jurisdiction to review general constitutional issues, it is notable that while Appellant may have a First Amendment right to dietary options that conform to his religious beliefs, that right can be limited where doing so serves a legitimate penological interest. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

provide nutritional meals to all inmates during lockdown. This is a legitimate penological goal. *Cf. Turner v. Safley*, 482 U.S. at 89 (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”). Furthermore, special arrangements can be made to ensure that medical dietary needs are met but these are limited to diabetics, hypoglycemics, and renal inmates. It is simply not feasible to accommodate all inmates with religious diets during a security lockdown and, therefore, bagged lunches are served. As such, Appellant has failed to show he has a state-created liberty or property interest in receiving a special diet conforming to his religious beliefs during a security lockdown. Consequently, the *Thompson* test is not satisfied, and this Court does not have jurisdiction.

IT IS HEREBY ORDERED that the Department’s Motion to Dismiss is **GRANTED**, and this appeal is therefore **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.




Ralph King Anderson, III
Chief Administrative Law Judge

February 3, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Michelle Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Stephanie Michelle Perez
Judicial Law Clerk

February 3, 2020
Columbia, South Carolina