

# South Carolina Court of Appeals

Appeal from Administrative Law Court

Hon. H.W. Funderburk Jr.

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Appeal case no. 2019-001410

AUG 04 2020

SC Court of Appeals

Gregory Pencille, 312332, Appellant

V.

SC Dept. of Corrections, Respondant

FINAL BRIEF

Gregory Pencille, 312332

Evans CI F4A275

610 Hwy 9 West

Bennessville, SC 29512

Appellant, Pro Se

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## ISSUE ON APPEAL

Did the South Carolina Administrative Law Court improperly affirm the Department of Corrections sentence calculation of Appellant Penitentiary Jail Credit?

Where the order issued by the Administrative Law Court improperly indicates an indictment number [2010-65-26-04686] twice [Exhibit A, p. 1-3] which is not an actual indictment number. Does this error invalidate the ALC's order in its entirety?

## STATEMENT OF THE CASE

On November 7<sup>th</sup>, 2005, Appellant was sentenced in Horry County to twelve (12) years for kidnapping on indictment number 2005-65-2054 [Exhibit B, p6]

on August 9<sup>th</sup>, 2010, Appellant was sentenced in Horry County to thirty (30) years for Criminal Sexual Conduct, First degree on indictment number 2008-65-2604686 [Exhibit C, p7] from a case allegedly occurring in 2004. This sentence was to run concurrently with the 2005 sentence for kidnapping that appellant was still serving. However

the judge along with Solicitor's Lively's instance allowed jail credit for time served from October 2008. The Dept. calculated the appellant was entitled to 677 days for Oct. 1<sup>st</sup>, 2008 to August 9<sup>th</sup>, 2010. Effectively, the judge calculated the sentence start date to be October 1<sup>st</sup> 2008.

Appellant filed Step 1 grievance on August 15<sup>th</sup>, 2018 [Exhibit D, p 8-9] arguing that credit should have been calculated from Nov. 7<sup>th</sup> 2005. The Grievance was denied on August 24<sup>th</sup>, 2018 but in SCDC response by the warden it clearly states that the Appellants sentence was concurrent, but claims that Penelle only has 677 days jail credit on his thirty (30) year sentence despite that his confinement originally began on Nov. 7<sup>th</sup>, 2005. 677 days credit is clearly far less days than the difference between August 9<sup>th</sup>, 2010 commitment on CSC 1<sup>st</sup> and the original Nov. 7<sup>th</sup>, 2005 commitment. [Perversely SCDC explains possible loss of good time credit due to failure to earn work credits or possible RHU lock-up time, Penelle has never been or never will be entitled by law to good time earned credits.] Appellant filed Step 2 Grievance on August 30<sup>th</sup>, 2018 [Exhibit E, p 10-11] contesting the same issue of original start date of sentence and credits to be calculated from

Nov. 7<sup>th</sup> 2005. This grievance was denied October 25<sup>th</sup>, 2018 and in the agency's response stated the thirty (30) year sentence with the start date of November 7<sup>th</sup>, 2005, but then projected a release date of March 26<sup>th</sup> 2034. In this case SCAC correctly reidentified the sentence start date (despite the illegal start date marked upon the sentencing sheet by the trial court) but failed to properly calculate that a thirty (30) year sentence at 85% only requires 25 years and 6 months (that would obviously place Penciler's release date in 2030 not 2034).

Appellant promptly filed an appeal with the Administrative Law Court on Nov. 16<sup>th</sup>, 2018 [Exhibit H, p 12] raising the same issue of jail time credit. Appellant filed his brief on December 7<sup>th</sup>, 2018 [Exhibit I, p 13-16] followed by SCDC filing record on appeal Feb. 1<sup>st</sup> 2019 and its brief on March 19<sup>th</sup>, 2019. Nothing further was filed until the final order was filed July 24<sup>th</sup>, 2019, 4 months to render a decision affirming the Dept's calculation for which appellant filed a response to the order August 6<sup>th</sup> 2019, [Exhibit J, p 17-18] to correct the error in the order of the indictment number being false, corrupting the <sup>entire</sup> ~~entire~~ order. The ALC did not regard or address this issue. Appellant then timely filed with the SC Court of Appeals on August 20<sup>th</sup>, 2019.

## ARGUMENT

Where Appellant argued that SCDC improperly constructed and computed Perille's concurrent thirty (30) year commitment for CSC, 1<sup>st</sup> sentenced in 2010, indicted in 2008, issued warrant in 2007. When Perille had been in custody continually from 2005 (upon the face of the sentencing sheet [Exhibit C, p 7] the trial court ordered Perille to begin service of his concurrent sentence in 2008 but ordered in the court room to be served concurrent with the charge currently serving; [plea transcript, p 25, Ln 19-20]

Court: ... I'm going to run that concurrent with the sentence that you are presently serving. I'll give you credit for the time you were charged with this, okay?

but this was in violation of SC code Ann § 24-13-40 that requires mandatory credit for time served, The CSC 1<sup>st</sup> for which Perille was sentenced in 2010 was allegedly committed in 2004 - Plainly prior to his arrest in 2005).

If SCDC is only an administrator for calculating an inmates sentence and has no sentencing authority, Tant v. SC DOC 408 SC 334, 759 S.E. 2d 398, 399 (2014). Then how does a

"Court ordered." ATU and 44-48-50 S.V.A. statute

Show added to Pencille's SCDC institutional record

[Exhibit K, p 19-22], where it does not appear anywhere on the face of the sentencing sheet [Exhibit C, p 7]?

The concurrent sentence is the legal standing for which the judge imparts the sentence structure for Pencille's sentence but "since 2008" is an illegal enhancement that the judge added to the sentence sheet [Exhibit C, p 7] statute § 24-13-40 (c)(2) can not apply do to the sentence not being a second offense.

In the ALE's final order the respondent argues round-a-bout issues and only one pertaining to the issue of sentence start date which derives from SC Code Ann § 24-13-40 (2), which respondent mis-applies its meaning. Allen v State 339 SC 398, 529 SE 2d 541 (2000). where the terms of a sentence are clear, the court must apply those terms according to their literal meaning? 2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentencing for a Second offense in which case he shall not receive credit for time served prior to total in a reduction of his sentence for the Second offense [emphasis added]. The use of the word "Second", (Webster's Dictionary 10<sup>ed</sup>) Next to the first in place or time". An offense which occurred prior to the first offense.

could not be a second offense. If it is, it becomes an illegal Ex-post facto enhancement violating Art. I § 10, cl 1 of the US and State Constitution and implicates an 8<sup>th</sup> Amendment issue. The respondent changes the word "second" to "different" to explain the meaning of § 24-13-40 (2) statute [Exhibit A, p 3] which changes its interpretation. Paschel v. State election Comm'n, 317 SC 434, 454 SE 2d 840 (1995). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced constructions to limit or expand its scope.

SC code Ann § 1-23-600(E) and § 1-24-380(A)(5) places discretion within the ALC's Jurisdiction. See... Al-Shehazz v. State 338 SC 354, 527 SE 2d 742 (2000). SC code Ann § 1-23-380 (A)(5) a-f all apply in this incorrect indictment number twice. While the issues of the court ordered ATU program and SVPA additions to Penalties sentencing that are not on the sentencing sheet and the illegally added "since 2008" back date that appear on the sentencing sheet are prima facie is reversal of the ALC's decision. The Appellant's ALC initial brief [Enclosed for this court's convenience, Exhibit F, p 13-16] shall be reversed de novo.

CONCLUSION

Appellant request and prays that for the above reasons this court reviews the ALC's decision to affirm the SC DOC ruling and that this court rule that the Administrative Law Judge order that SC DOC classification recalculate Pencilly's sentence start date to November 07th, 2005 and recalculate Pencilly's release date to 2030,

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CERTIFICATE OF APPELLANT PRO SE

The undersigned certifies that this Small Book complies with Rule 210(b), SCMR.

Date July 28 2020

*[Handwritten Signature]*

Gregory Pencilly 312332

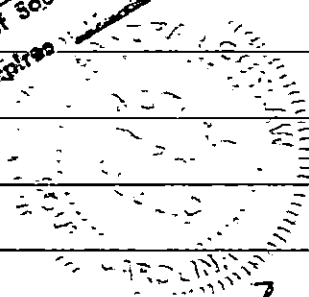
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CERTIFICATE OF SERVICE

SC Court of Appeals

I hereby certify that I, Gregory Pencille, on the 28 day of July, 2020 in Bennettsville, South Carolina served a copy of the Appellant's Final Brief on all parties in this matter by depositing the same in the US mail, postage paid, or in the institutions mail room and addressed as follows:

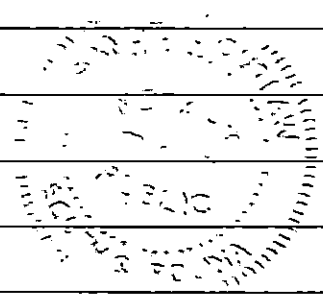
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