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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Administrative Law Judge H. W. Funderburk, Jr.

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

GREGORY PENCILLE, # 312332,

APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

FINAL BRIEF OF RESPONDENT

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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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* R. p. 7. 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.

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* R. p. 21. S.C. Code Ann. § 24-13-40 states:

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[1] Appellant also has a conviction from Kidnapping, for which he was sentenced to twelve years' incarceration on

> 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* R. pp. 3; 6; 19-20.

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".[2] *See* R. pp. 3; 7. Therefore, 677 days were added to his conviction as there are 677 days between October 1, 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

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November 7, 2005. *See* R. p. 6. This sentence has already been completed.

[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.

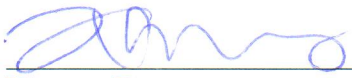
discretion. *See Porter v. Public Service Comm'n*, 333 S.C. 12, 507 S.E.2d 328 (1998). Appellant has not met his burden to demonstrate SCDC is incorrectly calculating his sentence.

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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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."

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