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SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

James Anthony Primus, #252315 Appellant, v. South Carolina Department of Corrections, Respondent.	Docket No. 19-ALJ-04-0296-AP ORDER

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or Court) in its appellate capacity pursuant to subsection 1-23-600(D) of the South Carolina Code (Supp. 2019). In the case *sub judice*, James Anthony Primus (Primus) challenges a decision of the South Carolina Department of Corrections (Department or SCDC). Specifically, Primus appeals the Department's decision in response to his Step 2 Grievance, wherein the Department concluded it had correctly calculated his sentence and sentence related credits. After careful consideration of the Record on Appeal (Record), arguments raised in the parties' briefs, and the applicable law, the Court affirms the Department's decision.

BACKGROUND

On or about September 1, 1998, Primus was convicted of kidnapping and assault and battery of a high and aggravated nature (ABHAN) and sentenced to consecutive terms of thirty years and ten years, respectively. [1] According to the Department's records, Primus has a projected release or max-out[2] date of April 20, 2028

On March 12, 2019, Primus filed a Step 1 Grievance contending that the Department had incorrectly calculated his sentence. In that regard, he maintained that the Department's calculation of his projected release date exceeded the maximum time he is to be incarcerated for kidnapping—

[1] Appellant was also convicted on this same date of possession of cocaine and sentenced to one (1) year imprisonment.

[2] The Court will use the terms "max-out date" or "release date" interchangeably.

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SC ADMIN. LAW COURT

a period of thirty years. Primus also acknowledged that once he finished serving his sentence for kidnapping, he would begin serving his consecutive sentence for ABHAN. The Warden denied Primus' grievance on April 3, 2019. Primus then appealed the Warden's decision via a Step 2 Grievance submitted on April 4, 2019. Within this grievance, Primus maintained that the Department's interpretation of his sentence was erroneous. More precisely, he asserted that his entire sentence is being interpreted as violent "when the ABHAN conviction is non-violent." [3] The Responsible Official considered and denied Primus' grievance on May 29, 2019, on the basis that his projected release date had been correctly calculated and he had been given the appropriate amount of sentence related credit. The Responsible Official concluded that because Primus' kidnapping offense was classified as a no-parole offense, he had to serve 85% of his thirty-year sentence or approximately 25 years and 6 months. After taking into consideration the additional ten year sentence for ABHAN, the Responsible Official further noted that Primus' projected release date is April 20, 2028, and that he had earned 1,869 days of Earned Work Credits.

Primus thereafter filed his Notice of Appeal with the Court on June 7, 2019. This matter was assigned to the undersigned on June 13, 2019. The Department filed the Record on Appeal (Record) on August 8, 2019.[4] Primus and the Department properly filed their respective briefs on June 26, 2019, and September 30, 2019. Primus thereafter filed a reply brief on October 3, 2019.

ISSUE ON APPEAL

Whether the Department erred in calculating Primus' sentence?

JURISDICTION/STANDARD OF REVIEW

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-Shabazz*, the court held that the ALC's jurisdiction in inmate appeals is limited to non-collateral or administrative matters 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

[3] Primus was convicted of common law ABHAN as a lesser included offense of the charged higher offense of first degree criminal sexual conduct. *See State v. Primus*, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). On the Sentencing Sheet for Primus' ABHAN conviction, the presiding Circuit Court Judge checked the "Non-Violent" box.

[4] On August 13, 2019, Primus filed an Objection to the Record. As will be discussed, this Objection seems to raise, for the first time, an issue of whether Primus received appropriate credit for his presentence incarceration. By virtue of this Order herein, Primus' objection is denied.

of a serious rule violation. *Id.* at 369, 527 S.E.2d at 750. In *Slezak v. South Carolina Department of Corrections*, 361 S.C. 327, 605 S.E.2d 506 (2004), the court clarified that the ALC has subject matter jurisdiction to hear appeals from final decisions of the Department in non-collateral or administrative matters. In the present case, Primus alleges that the Department incorrectly calculated his sentence and sentence-related credits; accordingly, pursuant to *Al-Shabazz* and *Slezak*, the Court has jurisdiction over Appellant's appeal and a state created liberty interest is implicated. *Cf. Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 341, 759 S.E.2d 398, 401 (2014) ("There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest.") (citation omitted).

When reviewing the Department's final decision in a non-collateral or administrative matter, the Court sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 376-77, 527 S.E.2d at 754. The Court's standard of review, after the inmate properly exhausts his administrative remedies, is governed by section 1–23–380 of the South Carolina Code of Laws (Supp. 2019). *See* S.C. Code Ann. § 1-23-600(E) (Supp. 2019) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). Pursuant to this standard, the Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." *Id.* § 1-23-380(5) (Supp. 2019). Although the Court may affirm the agency's decision or remand for additional proceedings, the Court's review in determining whether to reverse or modify an agency decision is circumscribed to the following:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (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.

Id. § 1-23-380(5)(a)-(f) (Supp. 2019). When reviewing, the Court is generally confined to the record presented and, as such, will not consider any fact that does not appear in the record. *Id.* § 1-23-380(4) (Supp. 2019).

DISCUSSION

In seeking reversal, Primus generally asserts that the Department is miscalculating his sentence.[5] The Court disagrees.

In this instance, on or about September 1, 1998, Primus was convicted in General Sessions Court for kidnapping in violation of section 16-3-910 of the South Carolina Code of Laws. At that time, the statute provided that "upon conviction, [the individual] must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20." S.C. Code Ann. § 16-3-910 (1998). For the purposes of sentencing, felonies are classified into six categories, one of which includes Class A felonies. S.C. Code Ann. § 16-1-10(A) (2015). Pursuant to section 16-1-90 of the South Carolina Code of Laws (Supp. 2019), all criminal offenses are classified according to the maximum sentence which can be imposed for the offense. To that end, a Class A felony carries a maximum term of imprisonment of thirty years. *Id.* § 16-1-90(A) (Supp. 2019).[6] Certain felonies, including Class A felonies, are defined as "no-parole offenses." *Id.* § 24-13-100 (2007)("For purposes of definition under South Carolina law, a "no parole offense" means a class A, B, or C felony or an offense exempt from classification as enumerated in Section 16-1-10(d), which is punishable by a maximum term of imprisonment for twenty years or more.") When an inmate is convicted of a "no-parole offense," substantial consequences attach, including:

> Notwithstanding any other provision of law,. . . . an inmate convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, . . . is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the inmate has served at least eighty-five percent of the actual term of imprisonment imposed. This

[5] In his Notice of Appeal, Primus contends that his sentence start date for his cocaine conviction is incorrect, asserting that it should be July 17, 1997, as opposed to the date reflected in the Department's records — September 6, 1997. He further alleged that the Department had not complied with a previous judicial order "to expunge [his] cocaine record. Although Primus' brief attempts to tie these issues into his argument that the Department has miscalculated the length of his sentence for kidnapping, Primus raises these issues for the first time on appeal. Moreover, in his Objection to the Record, in addition to mentioning perceived inconsistencies in the start dates of his sentences as reflected in the Department's records, Primus seems to assert that he may not have been afforded the proper credit for time served prior to conviction under S.C. Code Ann. § 24-13-40. Primus' Objection to the Record is the first time any jail time credit issues have been raised. However, "issues not raised to and ruled on by the agency are not preserved for judicial consideration." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (citation omitted). Primus failed to raise any issue regarding sentence start date, records inconsistency, or jail time credit, to the agency. As such, these issues have not preserved for the Court's review. *See, State v. Allen*, 339 S.C. 393, 529 S.E.2d 541 (2000) (Section 23–13–40 mandates a prisoner be given credit for all time served prior to trial unless one of two exceptions exist.")

[6] Section 16-1-90 relies on the maximum terms of imprisonment for felonies set forth in section 16-1-20 of the South Carolina Code of Laws (2015). Kidnapping under §16-3-910 is listed as Class A felony.

> percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended.

Id. § 24-13-150(A) (Supp. 2019) (emphasis added). An inmate serving a no parole offense may, however, earn various sentence related credits, subject to certain caveats. To wit, for earned work credits, limitations apply to inmates serving sentences for no parole offenses:

> The Director of the Department of Corrections may allow an inmate sentenced to the custody of the department serving a sentence for a "no parole offense" as defined in Section 24-13-100, who is assigned to a productive duty assignment, including an inmate who is serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20 or Section 24-3-30 or who is regularly enrolled and actively participating in an academic, technical, or vocational training program, a reduction from the term of his sentence of six days for every month he is employed or enrolled. . . . [N]o prisoner convicted of a "no parole offense" is entitled to a reduction below the minimum term of incarceration provided in Section 24-13-125 or 24-13-150. A maximum annual credit for both work credit and education credit is limited to seventy-two days.

Id. § 24-13-230(B) (Supp. 2019) (emphasis added).

The foregoing establishes that once an inmate serving a no parole offense has served 85% of his sentence, he can try to effectuate his release by applying, *inter alia*, earned work credits to reduce his sentence for that offense. *See id.* §§ 24-13-150(A), and 24-13-230(B). Here, Primus' kidnapping offense is a Class A felony as it imposes a maximum term of imprisonment of thirty years. § 16-1-90(A) Pursuant to section 24-13-100, therefore, his offense is characterized as "no-parole." Moreover, it follows that under subsection 24-13-150(A), Primus is required to serve at least 85% of his thirty-year sentence — the imprisonment imposed for his kidnapping offense — "without the application of earned work credits, education credits, or good conduct credit." While, as noted *supra*, Primus may earn certain credits to effectuate his release after serving 85% of his sentence — to include earned work credit under subsection 24-13-230(B) — the plain and unambiguous language of these statutes forecloses Primus from reducing his minimum term of incarceration for the kidnapping offense below 85% based upon that credit. *See Jacobs*, 393 S.C. at 587, 713 S.E.2d at 622 (2011) ("[w]here the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.").

As noted *supra*, Primus received a thirty-year sentence for the kidnapping offense on September 1, 1998, and the Department's conviction summary reveals that he began serving the sentence on July 15, 1997.[7] Pursuant to section 24-13-175, "Notwithstanding any other provision of law, sentences imposed and time served must be computed based upon a three hundred and sixty-five day year." Therefore, a 30-year sentence equates to 10,950 days. Eighty-five percent of 10,950 is approximately 9,307 days. Accordingly, adding 9,307 days to the date Primus began serving his sentence — July 15, 2016 — the minimum term of incarceration for this offense is January 7, 2023.

The Department's Conviction Summary contained in the Record reflects that it reached the same conclusion. Moreover, the Record reflects that Primus received a ten-year sentence for the ABHAN offense on September 1, 1998, that runs consecutively after his kidnapping charge. Running the ABHAN sentence from January 7, 2023, and factoring in the earned work credit Primus has received, substantial evidence supports the Department's conclusion that his max-out date is April 20, 2028. Primus' sentence for ABHAN – estimated from January 7, 2023 to April 20, 2028, consists of a period of five (5) years and two months. As stated earlier, the sentencing judge indicated that the ABHAN offense was to be characterized as non-violent; the Department Conviction Summary indicates the offense is being treated as non-violent.

In summary, the Court must reject Primus' contention as he has not established reversible error since the Department has properly calculated his sentence and, likewise, is properly applying the earned sentence-related credits to his sentence.

ORDER

IT IS HEREBY ORDERED that the decision of the Department is **AFFIRMED.**

AND IT IS SO ORDERED.

Milton G. Kimpson, Judge
South Carolina Administrative Law Court

August 26, 2020
Columbia, S.C.

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 26 day of August, 2020

By: _____
Judicial Law Clerk

[7] Primus does not challenge the start date for his kidnapping sentence.