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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 Ralph K. Anderson, III

ALC-Case No. 19-ALJ-04-0277-AP
Case No. 2019-002115

Gregory Pencille #312332 ..... Appellant,

v.

South Carolina Department of Corrections ..... Respondent,

INITIAL REPLY BRIEF

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Question I

Did the Administrative Law Court properly dismiss Appellant's appeal by finding that Appellant's claims did not implicate a state-created or property interest?

Appellant agrees with the basic principles of law the Respondent set forth in its brief. The application of the law to the facts of this case is the difference. First, this Court should note the appeal was dismissed on the ground that the Administrative Law Court did not have jurisdiction to hear the case. The merits of the claim of appellant are not in issue. As such, the claims, on their face, must be accepted as true. The basic allegation in the grievance is that the Department of Corrections, without a factual basis, banned the use of an oil as part of religious services of Wiccans while allowing the use of oils in other religious service. Request to Staff Member dated, December 12, 2018; Inmate Request -General dated February 11, 2019.

The record in this case establishes that the only reason given for denying the use of oils was the vague statement that religious practices will be accommodated "to the extent that such practice does not interfere with security and safety . . . ." Inmate Grievance Form, Step 2, dated April 19, 2019. No reason is given as to why the oil used in Wiccan services is more dangerous or a safety hazard as opposed to other religious services use of oil. South Carolina Code § 24-27-500(B) also specifically places the burden on the Department of Corrections to make reasonable accommodations for religious practices.

The Respondent correctly states that religious practices "can be limited where doing so serves a legitimate penological interest." Br. of Resp. at 5. Appellant has no quarrel with this general proposition. The Respondent argues the warden has "determined that allowing inmates

to use oils in religious services poses a threat to the penological goal of maintaining a safe environment for volunteers, staff, and inmates." Br. at 5. The Respondent then erroneously concludes, "As such, Appellant has no right to oils for use in religious ceremonies." The Respondent is wrong in two regards. First, the facts, as alleged in this matter, refute the allegation that the warden has determined that the use of oil in all religious services has been deemed to be a threat. The allegations in this record show that other religious groups are allowed to use oils. So, the ban on religious oils is not a ban as to all religious practices, but a ban on a religious practice of one specific religion. Second, even if the ban applies to all religious practices, the Respondent has failed to address how such a ban does not violate South Carolina Code § 24-27-500 which by statute makes applicable to the South Carolina Department of Corrections the provisions of the South Carolina Religious Freedom Act. South Carolina Code § 1-32-10, *et seq.* South Carolina Code § 1-32-30 specifically states the law provides a "claim or defense whose exercise of religion is substantially burdened by the State." The obligation is upon the State to establish a compelling interest in denying any inmate the basic tenets of their religious practices. Here the State has completely failed in that effort.

First, the practice of using oils by the Wiccan community had previously been approved. By Memorandum dated September 22, 2014, the Warden approved the use of oils in the Wiccan services. Over four years later, by Memorandum dated November 20, 2018, the previously approved practice was denied. The record shows no problems with the previous use of oils nor does the record show the composition of the oil changed over the years. Second, with no facts given to support the conclusion, the Warden disapproved the use of oil in the Wiccan services based on some unknown reason or facts related to the alleged safety of the institution. If a

State agency is able to discriminate against a particular religion without providing a factual basis for the discrimination, then the application of the Religious Freedom Restoration act in our State would be a nullity. No person deprived of their right to exercise their religious practices would ever be able to use the act to vindicate their rights. As the New Jersey court said, "However, if the decision maker is not required to base its decision on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected liberty interest." *White v. Fauver*, 219 N.J. Super. 170, 179, 530 A.2d 37, 41 (App. Div. 1987). *See also, Olim v. Wakinekona*, 461 U.S. 238 (1983). This Court should require the Department of Corrections to give a factually sufficient reason, if they can, to deny the Wiccans their right to use oils in their religious services. To hold otherwise would relieve the Department of Corrections of the obligation to have having a valid reason for denying the practice.

Mr. Pencille argues that Article I, § 2 of the Constitution of the State of South Carolina and the First Amendment to the United States Constitution are sufficient reasons to find a state-created liberty interest to be protected in this litigation. If that position is rejected, the act of the General Assembly in passing South Carolina Code § 24-27-500 surely establishes a state-created liberty interest in freedom to practice the religion of one's choice.

The Respondent further argues an inmate does not have a property interest if the official has the discretion to deny the benefit. Br. of Resp. At 6. An official does not have the arbitrary power to deny an inmate the right to exercise a religious practice. In a case originating from South Carolina, the United States Supreme Court said, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions

upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Once Mr. Pencille has established a deprivation of this right to a religious practice, the burden is upon the Department of Corrections to prove that the practice does have a negative impact on the Department of Corrections. Mr. Pencille does not have the burden of proving the negative. As the United States Supreme Court said over a century ago, "[W]hen the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative." *United States v. Denver & R G R Co*, 191 U.S. 84, 92 (1903). Mr. Pencille is not in possession of the facts to show a need to regulate the use of Wiccan religious oils as opposed to the oil of other religions.

The issue of use of religious oils within a Department of Corrections is not without precedent. In *Hammons v. Saffle,* 348 F.3d 1250 (10th Cir. 2003), a Muslim inmate in the Oklahoma Department of Corrections brought an action to require the Department of Correction to permit him to keep religious oils in his cell for use during his five times a day daily prayers. While the Court denied his right to have religious oils in his cell, the Court did note that the Department of Corrections had reasonably accommodated him by permitting the use of religious oils at his religious services. The use of the oil was supervised by a volunteer Chaplin. This practice, recognized by the Tenth Circuit as being a reasonable accommodation, is precisely what Mr. Pencille is seeking in his grievance.

Mr. Pencille also alleges that he was transferred to another institution in retaliation

for his religious beliefs. Again, the fact that he alleges this must be accepted as true in this case as the state prevailed on a Motion to Dismiss and not on the merits of the claim. This Court has said, "Absent an atypical and significant hardship on the inmate, or an arbitrary, capricious, or biased decision by the prison, the court has no authority to interfere with inmate housing decisions." *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 272, 633 S.E.2d 910, 913 (Ct. App. 2006). What Mr. Pencille has alleged here is that when the Department of Corrections transferred him, they did so to prevent him from exercising his particular religious beliefs. This allegation, if established, would in fact be an "arbitrary, capricious or biased decision." This Court in *Skipper* recognized that *Crowe v. Leeke*, 273 S.C. 763, 259 S.E.2d 614 (1979) establishes such to be the law. Under the Religious Freedom Restoration Act, the Department of Corrections can no more transfer him because of their animosity to his religious beliefs than they can deny him his right to practice a religious belief with which they disagree. Mr. Pencille has alleged a state-created liberty interest that is recognized by the Courts and the legislation of our state.

Question II

Did the Admistrative Law Court properly dismiss Appellant's appeal with prejudice where the Court concluded there was no subject matter jurisdiction and properly acted within its discretion in declining to allow oral arguments?

The appeal in this case is within the jurisdiction of the Administrative Law Court. The Respondent contends that Mr. Pencille can never amend his pleading in such a matter to afford the Administrative Law Court jurisdiction in this case. Br. of Resp. at 9. Mr. Pencille does not need to amend any of his pleading to allege the deprivation of a state-created property right. Mr.

Pencille has a state-created property right in his right to practice his religion even while incarcerated.

The South Carolina Supreme Court held, "Courts traditionally have adopted a 'hands off' doctrine regarding judicial involvement in prison disciplinary procedures and other internal prison matters, although they must intercede when infringements complained of by an inmate reach constitutional dimensions." *Al-Shabazz v. State*, 338 S.C. 354, 382, 527 S.E.2d 742, 757 (2000). Here, the only complaint Mr. Pencille raises is a constitutional violation. The constitutional violation is one that the South Carolina legislature specifically applied to the Department of Corrections in South Carolina Code § 24-27-500.

The allegation that the Department of Corrections is depriving Mr. Pencille of his right to practice the tenets of his religion falls within the *Al-Shabazz* decision. He has alleged his religion is being treated differently from other religions. He has alleged he is being transferred not because of a Department of Corrections policy, but to punish him for his religious beliefs. A more specific deprivation of constitutional rights could not have been alleged.

The Brief of Respondent does not explain how the use of oils by some religious groups but depriving the same use to the religion of Mr. Pencille is not a deprivation of a state-created liberty interest. The brief simply states it is not a state-created liberty interest. Simply saying it is not so with no explanation does not make it not so. Just as the Department of Corrections gave no reason as to why the Wiccan use of oils created a safety hazzard, the Respondent gave no reason why depriving Mr. Pencille the use of such oils does not violate a state-created property right. Both have conclusions with no supporting evidence.

As Mr. Pencille alleged a deprivation of a state-created right under Article I, § 2 of the

Constitution of the State of South Carolina the First Amendment to the United States Constitution, as applied to the Department of Corrections through South Carolina Code § 24-27-500, the Administrative Law Court has jurisdiction to hear this case.

Conclusion

For the foregoing reasons, this Court should remand the matter to the Administrative Law Court for a full hearing and ruling on the merits of the allegations.

September 28, 2020

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September 25, 2020

Jenny Abbott Kitchings, Clerk
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Re: Gregory Pencille #312332 vs. SC Department of Corrections,
Appellate Case No. 2019-002115

Dear Ms. Kitchings:

I am enclosing herewith a copy of the Initial Reply Brief in the above matter. Additional copies will be sent per your request.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt
Enclosure

cc Kensey Evans

THE STATE OF SOUTH CAROLINA
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Ralph K. Anderson, III, Administrative Law Judge

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Appellate Case No. 2013-002115

Gregory Pencille # 312332 ..... Appellant.

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CERTIFICATE OF SERVICE

C. Rauch Wise, Attorney for the Appellant in the above entitled case hereby certifies that on September 28, 2020, he did by e-mailing, send a copy of the Initial Reply Brief in the above case addressed to Kensey Evans, South Carolina Department of Corrections, P.O. Box 21787, Columbia, SC 29221 at evans.kensey@doc.sc.gov .

Sept. 28, 2020

C. RAUCH WISE