

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Administrative Law Court Judge

Appellate Case No. 2020-001476

South Carolina Department of Probation, Parole and Pardon Services. Respondent,

vs.

Kenneth Cole, #377835 Appellant

BRIEF OF APPELLANT

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DEC 10 2020

SC Court of Appeals

51

Kenneth Cole, #377835 Pro se
McDougal Correctional Institution
1516 Old Gilliard Road
Ridgerville, South Carolina 29472

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STATEMENT OF THE ISSUES ON APPEAL

1. The dismissal of appellant's case for failure to file a brief within the time limits set forth in SCALC, Rule 62, was made upon unlawful procedure, or was otherwise ~~was~~ improper by the Administrative Law Court.
2. Did the Administrative Law Court improperly grant respondent's motion to dismiss?

STATEMENT OF THE CASE

This is an inmate appeal of a final decision of the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS) filed under the South Carolina Administrative Procedures Act, (APA) under the South Carolina Supreme Court's decisions in Al-Shabbatt v. State, 338 S. C. 354, 527 S. E. 2d 742 (2000); and Furtick v. South Carolina Department of Probation, Parole and Pardon Services, 352 S. C. 594, 527 S. E. 2d 146 (2003) seeking reinstatement of appellant's parole eligibility, and reversal of the ALC's order of dismissal in this case.

FACTS

On October 3, 2018 appellant pled guilty in the Pickens County Court of general sessions on indictments numbers 2018-GS-39 60673 and 60674 for the offense of possession with intent to distribute (PWID) methamphetamine (S.C. Code Ann. 44-53-375(b)(3)). Appellant was sentenced to two concurrent terms of eleven years imprisonment with credit for time served of 47 days. On December 10, 2018 subsequent to appellant's plea and sentencing hearing he was notified in writing by his SCDC classification caseworker of his release date: 2-27-2024, parole eligibility date: 9-23-2020, SF - II A Dates: 8-26-2023, and Sentence Start date: 8-17-2018.

Subsequent to receiving notice of his parole eligibility from his SCDC classification caseworker appellant applied for transfer and was transferred to the Pickens County Detention Center under the Designated Facilities Agreement, S.C. Code Ann. 24-3-20, et. seq.. On February 26, 2019 was transferred from McDougall C.I. to the Pickens County Detention Center as the place of confinement for the service of his current sentence pursuant to S.C. Code 24-3-20, et. seq. At the Pickens County Detention Center appellant worked at various job-assignments in the community, i. e., maintenance worker in the Pickens County Detention Center and Courthouse. He was regarded by Detention Center Staff and his work supervisors in the Pickens County community as a hardworking and respected inmate worker, during his time spent at the detention center. He maintained a clear disciplinary record at all times relevant to the service of his current sentence. On or about April 28, 2020 appellant received a letter from respondent dated April 24, 2020 stating, "On October 3, 2018 - you were convicted of Distribution of Meth, third offense, in Indictment Number 18-GS-39-00673 and 674. Pursuant to South Carolina law a person convicted of this offense is not eligible for parole, unless all prior drug convictions were possession of controlled substances. A review of your prior record reveals prior drug convictions, therefore, your current offense is ineligible for parole pursuant to South Carolina law. You will not be considered for parole on this offense." On or about May 17, 2020 appellant received an amended letter dated May 14, 2020 from respondent in regards his parole eligibility stating in pertinent part, "A review of your prior record reveals disqualifying or out-of-state drug convictions, therefore, your current offense is ineligible for parole pursuant to South Carolina law. You will not be considered for parole on this offense." On April 28, 2020 appellant filed and served a notice of appeal of the final decision of the respondent concerning his parole eligibility status on his current sentence.

In June 2, 2020 appellant was returned to the S.C. Department of Correction's Reception and Evaluation Center at Lieber Correctional Institution from the Pickens County Detention Center. At the date and time of his return to the SCDC all prisoners in every SCDC facility, including those prisoners housed at the Lieber C.I. Reception and Evaluation Center were under a mandatory lockdown status confined to their cells without access to a law library or legal materials provided by prison officials, after the Governor of South Carolina declared a State of Emergency on March 13, 2020 pursuant to Executive Order 2020-08. This action was taken in response to the Covid-19 Pandemic. After that date, the Governor issued several executive orders which closed businesses and activities throughout the State of South Carolina. On March 24, 2020, the Administrative Law Court (Court) in recognition of the crisis and potential effects on the citizens of South Carolina, especially those with matters pending before the Court found it necessary to issue an order regarding extending deadlines before the Court. This order became effective immediately the date of filing on 3-24-2020. - See Order of the Court dated 3-24-2020. On April 28, 2020 appellant filed and served the notice of appeal with the ALC and upon respondent. On May 5, 2020 the ALC assigned the case to Ralph King Anderson, III, Administrative Law Court Judge. Appellant written notice of the date of assignment on May 11, 2020. On September 21, 2020 appellant received written notice of entry of the order of dismissal with prejudice dated September 14, 2020. On October 8, 2020 appellant filed a motion for reconsideration of the Order of Dismissal. The motion was denied pursuant to ALC Rule 65. On October 27, 2020 appellant filed the notice of appeal in the South Carolina Court of Appeals regarding the Order of Dismissal by the ALC dated September 14, 2020 in this matter. On November 17, 2020 appellant received written notice from South Carolina Court of Appeals of assignment of the appeal and case number.

Appellant's initial brief follows.

STANDARD OF REVIEW

In Rose v. South Carolina Department of Probation, Parole and Pardon Services, (January 29, 2020) 429 S.C. 136, 838 S.E. 2d 505, 509 the South Carolina Supreme Court citing its prior opinion in Barton v. SCDPPPS, 404 S.C. 404, 752 S.E. 2d at 113, held, explaining that, "In appeal to this Court from a final agency decision, the Administrative Procedures Act (APA) provides the appropriate standard of review . . . This Court will only reverse the decision of an ALC if that decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of 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;
- (f) arbitrary or capricious or characterized by an abuse of discretion. S.C. Code Ann. 1-23-610(C)."

ARGUMENT

- I. The ALC erred in dismissing appellant's case with prejudice for failure to file a brief within the time limits set forth in SCALC, Rule 62.
- II. The ALC erred in granting respondent's motion to dismiss the case.

Point I.

Appellant is an inmate incarcerated within the S.C. Department of Corrections serving two concurrent terms of eleven years confinement after he entered a guilty-plea to the offense of possession of methamphetamine 3rd (S.C. Code Ann. 44-53-375(b)(3)).

Upon entrance to the DOC on October 4, 2018 appellant began service of the sentence and was informed in writing of his initial parole eligibility date of 9-23-2020.

The respondent SCDPPS informed appellant one year, seven months and ten days after his entry to the DOC he was ineligible for parole on his current offense for possession with intent to distribute methamphetamine 3rd offense (S.C. Code - Code 44-53-375(b)(3) under South Carolina because a review appellant's record revealed disqualifying or out-of-state convictions.

S.C. Code Ann. 44-53-375(b)(3) the controlling sentencing statute in appellant's case states in pertinent part, "A person who manufactures, distributes, . . . or possess with intent to distribute, dispense or deliver methamphetamine, or cocaine base in violation of the provisions of Section 44-53-370, is guilty of a felony, and upon conviction: . . . (3) For a third or subsequent offense, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars or both. . . Notwithstanding another provision of law a person convicted and sentenced for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A) may the sentence suspended and probation granted and is eligible for parole supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. In all other cases, the sentence shall not be suspended nor probation granted."

The appellant filed a notice of appeal on April 29, 2020 with the ALC within the thirty day limit set forth in SCALC Rule 59. On the face of his notice of appeal, appellant a pro se litigant, stated, "I have only been convicted on control substances. This is my only conviction of Distribution."

On May 5, 2020 the case was assigned to Ralph King Anderson, III, Administrative Law Court Judge. SCALC Rule 60 requires the party first noticing the appeal to file an original brief within ninety days after the date of assignment, unless otherwise ordered or stayed by the operation of SCALC Rule 59.

SCALC Rule 59, states in pertinent part, "If the agency files a motion to dismiss the appeal prior to filing the record, such a motion shall stay the time for the agency to prepare the transcript and file the record pending the resolution of the motion. The time for filing briefs shall likewise be stayed by the filing of a motion to dismiss. Unless otherwise ordered, the initial time frames for the filing of the record and briefs shall begin upon resolution of the motion by the Court. The time frames shall run from the date of the order resolving the motion rather than the date of assignment, without regard to any time which elapsed prior to the filing of the motion..."

The respondent SCDPPS argues in their motion to dismiss the Appellant failed to file his brief within the time limits set forth in SCALC Rule 60(A). The ALC granted the SCDPPS's motion to dismiss citing the Court's authority and discretion to dismiss an inmate's appeal pursuant to SCALC Rule 62 (Upon motion of any party, or on its own motion, An Administrative Law Judge may dismiss an appeal or resolve the appeal adversely to the offending party for failure to comply with any of the rules of procedure for appeals, including the failure to comply with any of the time limits provided by this section (V), or for failure to provide a factual basis for each expressly and specifically asserted constitutional violation as prescribed by Rule 59(B)).

The appellant argues that the ALC erred in granting respondents motion to dismiss because he was prevented from filing a brief because he was incarcerated in the DOC at the Lieber Correctional Institution in Reception and Evaluation status, and additionally, he was confined to his cell there without access to a law-library or legal materials under a mandatory lock down due to the worldwide Covid-19 Pandemic from June 2, 2020 through ~~October~~ October 2, 2020 encompassing the time period he was required by SCALC Rule 60(A) to file his brief. (this court can reverse the ALC if the findings are affected by error of law, are not supported by substantial evidence, or are characterized by abuse of discretion or clearly unwarranted exercise of discretion. "Olsen v. S. C. Dept. of Health and Environmental Control, 379 S.C. 57, 64, 663 S.E. 2d 497, 501 (Ct. App. 2008)) (Schwiers v. South Carolina Department

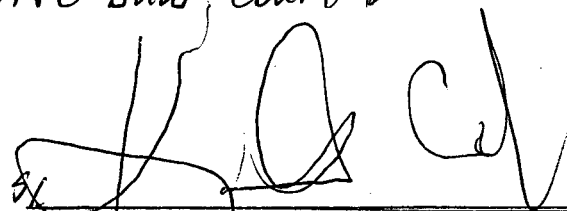
of Health and Environmental Control (December 31, 2019) 429 S.C. 43, 49, 837 S.E. 2d 730, 733).

Because appellant was in the lock down status during the time frames required to file his brief the ALC abused its discretion in dismissing the appellant's appeal before giving him a fair opportunity to file a brief. The ALC should've taken extra steps to insure appellant was advised of the requirement to file a brief, since the Court was aware appellant is an proceeding pro se. ("In all cases involving pro se litigants or those without substantial knowledge and experience in administrative matters, the administrative law judge may make reasonable efforts to insure fairness. . . ." See 2014 REVISED NOTES, Administrative Law Court, Rule 38. .

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Administrative Law Court.

Respectfully submitted,


Kenneth Coley #377835 Pro se
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South Carolina Department of Probation, Parole and Pardon Services, Respondent

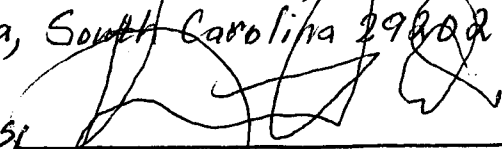
v.

Kenneth Cole, # 377835, Appellant

PROOF OF SERVICE

I, certify that I have served the initial brief of appellant on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November , 2020, addressed to Matthew C. Buchanan attorney of record, Matthew C. Buchanan, General Counsel, South Carolina Department of Probation, Parole and Pardon Services, 293 Greystone Boulevard, Post Office Box 207, Columbia, South Carolina 29802.

Dated 11-26-2020.

SI 
Kenneth Cole #377835, Pro se
McDougall Correctional Institution
1516 Old Gilliard Road
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November 26, 2020

The Honorable Kenneth A. Richstad
Clerk of Court's Office
South Carolina Court of Appeals
Post Office Box 11629
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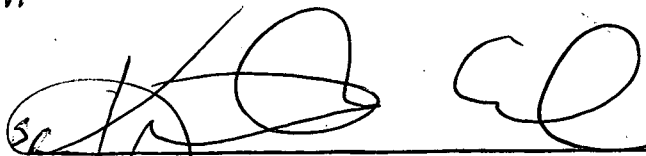
Re: Kenneth Cole, # 377835 v. SCDPPPS
Appellate Case No.: 2020-001476

Dear Mr. Richstad:

Please find enclosed for filing in the above referenced case the original copy of appellant's initial brief and proof of service. Please file the enclosed and return file + stamped copies of everything to me. For your convenience I've enclosed a self-addressed stamped envelope.

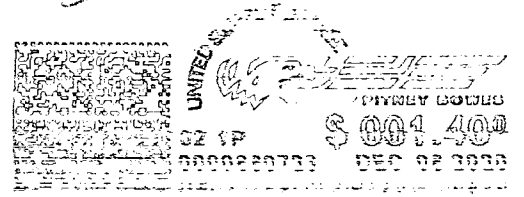
I'd genuinely appreciate your assistance in this regard.
With best wishes, I remain

Very truly yours,



Kenneth Cole, #377835
McDougal Correctional Institution
1516 Old Gilliard Road
Ridgeway, South Carolina 29472

From: Kenneth Cole, SCDC # 377835
McDougall Correctional Institution
1516 Old Gilliard Road
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To: The Honorable Kenneth A. Richstad
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