THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Administrative Law Judge Milton G. Kimpson

ALC Case No. 19-ALJ-04-0296-AP
Appellate Case No. 2020-001252

James Primus, #252315.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

April 2, 2021

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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STATEMENT OF THE CASE

This matter is before this Honorable Court pursuant to the appeal of James Primus ("Appellant"), an inmate incarcerated with the South Carolina Department of Corrections ("SCDC" or "Department"). Appellant filed a Step One Grievance on March 12, 2019, claiming his sentence was calculated incorrectly. The Step One grievance was considered resolved on April 3, 2019, after Appellant was informed that his Assault and Battery of a High and Aggravated Nature sentence would begin after his Kidnapping sentence. Appellant filed a Step Two Grievance on April 4, 2019. This grievance was also investigated and deemed resolved after Appellant's sentence was explained. On August 26, 2020, Administrative Law Judge Milton G. Kimpson affirmed the final decision of the Department. 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.

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 the 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 DEPARTMENT'S CALCULATION OF APPELLANT'S SENTENCE

The ALC's jurisdiction to hear inmate appeals of final decisions by the South Carolina Department of Corrections is derived entirely from the decision of the South Carolina Supreme Court in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). When reviewing SCDC's decisions in inmate grievance matters, the ALC sits in an appellate capacity. Id. at 377, 527 S.E.2d at 754. Subsequently, the supreme court clarified the ALC's appellate jurisdiction over inmate appeals in Sullivan v. S.C. Dep't of Corr., 355 S.C. 437, 586 S.E.2d 124 (2003). In affirming, as modified, the ALC's *en banc* decision of McNeil v. S.C. Dep't of Corr., 02-ALJ-04-00336-AP (September 5, 2001), the supreme court held the ALC's jurisdiction was limited to (*1*) cases in which an inmate contends prison officials have erroneously calculated his sentence, sentence-related credits, or custody status; (*2*) cases in which SCDC has taken an inmate's *state-created* liberty interest in major disciplinary hearings; and (*3*) cases in which an inmate's confinement implicates a *state-created* liberty interest. See Sullivan, 355 S.C. at 443, 586 S.E.2d at 127 (emphasis added).

On September 1, 1998, Appellant was sentenced to thirty years for Kidnapping. R. p. 16. Appellant argues that SCDC has miscalculated his sentences, specifically, that the SCDC failed to give him all jail time credits and has structured his sentences in a way which denies him parole eligibility. App. Brief, p. 7. Appellant was sentenced for Kidnapping[1] under S.C. Code Ann. § 16-3-910, which is a felony and a person convicted of such "must be imprisoned for a period not to exceed thirty years." S.C. Code Ann § 16-1-90 ("The following offenses are Class A felonies [. .

[1] Kidnapping is a violent offense under S.C. Code § 16-16-60.

.], 16-3-910 Kidnapping [. . .]). 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."); § 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.").

Appellant must be incarcerated at least 85% of his sentence. S.C. Code Ann. § 24-13-150(A) provides:

> Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, 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**.

(Emphasis added).

Appellant must serve 85% of his sentence for kidnapping because his conviction is a no parole offense. Appellant must serve twenty-five years and six months of his thirty-year sentence, which is approximately 85% of thirty years. Appellant's sentence for kidnapping is expected to be complete on January 7, 2023. R. p. 8. In addition to the kidnapping charge, however, Appellant was sentenced to ten years for Assault and Battery of a High and Aggravated Nature (ABHAN), which runs consecutively after the kidnapping charge. R. pp. 8, 15. Therefore, Appellant's projected max out date is currently April 20, 2028. Id at 8.

Appellant raised the issue of his possession of cocaine sentence in his brief to the Administrative Law Court. R. p. 7. Therefore, the issue was not preserved for the court's review.

Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved.") Furthermore, Appellant's Possession of Crack Cocaine sentence is pending in the Court of Appeals under a different case number.

Appellant also argues that parole eligibility has not been applied to his ABHAN sentence. App. Brief, p. 10. Appellant's kidnapping sentence is a no parole offense and must be served prior to Appellant serving the ABHAN sentence which is parole eligible. Structuring Appellant's sentences in this manner ensures that Appellant will become eligible for parole. The South Carolina Supreme Court ruled in Major v. S.C. Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 468, 682 S.E.2d 795, 801 (2009), that if "the consecutive sentence is a non-parolable offense then its sentence must be served and credited first against the aggregated sentence." The Department has structured Appellant's sentence in the manner outlined in Major.

Appellant has not carried his burden to demonstrate SCDC has incorrectly calculated his sentence. Therefore, Judge Kimpson's Order affirming the Department's calculation was proper.

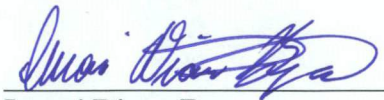
CONCLUSION

Wherefore, for all the reasons stated above, the Court should affirm the Administrative Law Court's decision.

[Signature page to follow]

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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