STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

John Ward, #171770, Appellant, v. South Carolina Department of Corrections, Respondent.	)	Docket No. 20-ALJ-04-0495-APP **ORDER**

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to an appeal filed by John Ward (Appellant), an inmate incarcerated with South Carolina Department of Corrections (SCDC or Department), challenging the calculation of his sentence-related credits.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 8, 2006, Appellant was arrested and charged with First Degree Burglary, Assault and Battery with the Intent to Kill (ABWIK), and two counts of Petit Larceny. Later, on October 17, 2006, the Oconee County Grand Jury returned indictments for First Degree Burglary and ABWIK, but also directly indicted Appellant for Armed Robbery.[1] On December 11, 2006, Appellant plead guilty to First Degree Burglary, ABWIK, and Armed Robbery. That same day, he was sentenced to twenty years' imprisonment for each crime, to run concurrently, and Appellant was given credit for time served pursuant to section 24-13-40 of the South Carolina Code. As reflected in the Department's system, Appellant's sentence start date for First Degree Burglary and ABWIK was July 8, 2006, and his sentence start date for Armed Robbery was the date of his indictment, October 17, 2006. The Jail Time Report for SCDC Transfer (Report) included in the Record shows Appellant served jail time in the Oconee County Jail for First Degree Burglary and

[1] According to the Record, the date of the offense for the First Degree Burglary charge and the ABWIK charge is July 8, 2006. However, Appellant asserts these charges resulted from an incident that occurred on July 4, 2006. According to the Record, the date of the offense for the Armed Robbery indictment is July 4, 2006. Additionally, Appellant asserts the two counts of Petit Larceny were nolle prossed so the charge could "upgraded" to Armed Robbery, for which Appellant was then direct indicted on October 17, 2006.

ABWIK from his arrest on July 8, 2006, through December 14, 2006, when he was transferred to SCDC, or 156 days. The Report does not include any jail time served for Armed Robbery.

On August 13, 2020, the Department received Appellant's Step 1 Grievance in which Appellant asked to receive 156 days' credit for jail time served "concurrent on All charges – Burglary 1st Degree, Armed robbery, and ABWIK." The Department denied the Step 1 Grievance, finding Appellant had already been credited for the 156 days of jail time for First Degree Burglary and ABWIK and had recently been credited with fifty-five days of jail time for Armed Robbery since that sentence did not start until October 2006. Appellant filed a Step 2 Grievance in which he again alleged he had not been credited with "the full total of 156 days credit concurrently on each charge." The Department denied the grievance, stating again that Appellant had received all credit to which he was entitled, and his projected release date had recently been moved from 12/7/2023 to 10/13/2023.

Appellant then filed an appeal to this Court on December 9, 2020. The case was assigned on January 7, 2021. The Record was filed on March 18, 2021.

On March 25, 2021, Appellant filed a brief. Along with his brief, Appellant filed two motions. First, Appellant filed a Motion for Leave to Exceed Page Limit in which he asked the Court asked the Court to exceed the page limits for special appeals in SCALC Rule 60(a) in order to clarify the circumstances of the case and accommodate the greater space taken up by handwriting. Second, Appellant filed a Motion for an Order Compelling Designation (Motion to Compel), in which he requested the Court issue an order "compelling designation" because the Record on Appeal that was filed did not include all documents his identified in the Designation of Matter he filed on January 21, 2021.[2]

On April 5, 2021, the Court issued a letter to the parties in which it requested the Department respond to Appellant's Motion to Compel within fifteen days of the date of the letter. The Court also informed the parties that until the Department submitted a response to the Motion to Compel, the Court would not consider the Record closed and the deadline for the Department's brief would be extended until the matter was resolved.

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[2] Before the Department filed the Record on Appeal, Appellant filed a Designation of Matter to be Included in the Record on Appeal on January 21, 2021, in which he asked the Department to include a list of seven documents in the Record on Appeal.

On April 13, 2021, the Department field a Response to Appellant's Motion to Compel in which the Department opposed the Motion because the documents Appellant requested be included in the Record were either redundant to those already in the Record or irrelevant.

On April 20, 2021, the Court issued an Order denying Appellant's Motion for Leave to Exceed Page Limit and Motion to Compel, thus resolving the motions.[3] Thereafter, on April 30, 2021, Appellant filed an Amended Brief that was within the page limit required by this Court's rules. Also on April 30, 2021, Appellant filed a Motion for Judicial Notice. In his Motion for Judicial Notice, Appellant asks the Court to take notice that: (1) his Amended Appellant's Brief was filed within the proper page limits; (2) Appellant filed a fifty-three-page Appendix on March 25, 2020; and (3) Appellant's reply to the Department's response to Appellant's Motion to Compel.

As of the date of this Order, the Department has not filed a Respondent's Brief or a response to Appellant's Motion for Judicial Notice.[4]

DISCUSSION

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 Supreme Court set forth that the ALC has jurisdiction to review inmate appeals involving state-created liberty interests in which an inmate contends that prison officials have erroneously calculated his or her sentence. *Id.* The Court reviews these matters in "an appellate capacity." *Id.* at 388, 527 S.E.2d at 754.

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[3] On April 21, 2021, after this Court had already issued its Order resolving the motions, Appellant filed a reply to the Department's response to Appellant's Motion to Compel.

[4] Pursuant to SCALC Rule 60(A), the Department had 110 days from the date of assignment, January 7, 2021, to file its brief. On April 5, 2021, the Court stayed the time to file Respondent's Brief until Appellant's Motion to Compel was resolved. At the time of the stay, eighty-eight days from the date of assignment had passed. The Motion to Compel was resolved by this Court's Order on April 20, 2021. Accordingly, the Department had twenty-two days from April 5th, or until April 27, 2021, to file a Respondent's Brief. SCALC Rule 68 provides that an ALC judge may apply the South Carolina Appellate Court Rules in an ALC appeal to resolve questions not addressed by the ALC rules. Rule 208(a)(4), SCACR, provides that "[u]pon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper." Since the Department has failed to file a timely brief, the Court will review this case without it.

The Department also failed to timely respond to Appellant's Motion for Judicial Notice. *See* SCALC Rule 63 ("Any response to the motion must be filed within ten (10) days after receipt of the motion, unless the time is extended or shorted by the Administrative Law Judge.").

"A reviewing court will not disturb findings of [an administrative agency] if its findings are supported by substantial evidence on the record as a whole." *Pearson v. JPS Converter & Indus. Corp.*, 327 S.C. 393, 397, 489 S.E.2d 219, 220 (Ct. App. 1997). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). Furthermore "the party challenging a[n administrative agency's] order bears the burden of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

Motion for Judicial Notice

In his motion, Appellant first asks the Court to take judicial notice that Appellant filed an Amended Appellant's Brief. This motion was not necessary for the Court to consider Appellant's Amended Brief, which it has.

Next, Appellant asks the Court to take judicial notice of the Appendix he filed on March 25, 2021. Appellant filed the Appendix with his original Appellant's Brief. This Court can only consider documents that are properly part of the Record on Appeal. S.C. Code Ann. § 1-23-380(4) (Supp. 2020) ("The review must be conducted by the court and must be confined to the record."); SCALC Rule 36(G) ("The administrative Law Judge will not consider any fact which does not appear in the Record."). Furthermore,

> Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Masters v. Rodgers Dev. Grp., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (citations omitted). However, "[a] court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C.

490, 313 S.E.2d 325 (Ct.App.1984). Since this Court's review on appeal is limited to the Record, any documents included in the Appendix that are not part of the Record on Appeal will not be considered by this Court.

Finally, Appellant asks this Court to take judicial notice of the reply he filed to the Department's response to his Motion to Compel. Nevertheless, the Court had already resolved the motion when Appellant's reply was received.

Based upon the above, Appellant's Motion for Judicial Notice is denied.

Issue on Appeal

Appellant asserts the Department erred in declining to set the date of arrest as the start date for calculating time served on all charges that arose out of a multi-crime incident. Appellant acknowledges the Department credited him with 156 days' time served for First Degree Burglary and ABWIK but contends the Department failed to credit him with 156 days' time served for Armed Robbery, a crime that was committed at the same time as the First Degree Burglary and ABWIK. However, Appellant was not initially charged with Armed Robbery but was later directly indicted for that charge. Therefore, the Department determined that Appellant is only entitled to fifty-five days' time served for Armed Robbery because he was not indicted until October 17, 2006, whereas he was arrested for the two other charges and served time for them beginning on July 8, 2006.

Section 24-13-40 of the South Carolina Code (Supp. 2020) provides, in pertinent part:

> 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. 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.

This statute requires that prisoners be given credit for all time served prior to sentencing unless either of the two statutory exceptions applies. *See id.* In this case, neither exception to section 24-13-40 applies to Appellant.

Appellant argues the South Carolina Supreme Court's decision in *Blakeney v. State*, 339 S.C. 86, 529 S.E.2d 9 (2000), supports his assertion that he is entitled to 156 days' time served for Armed Robbery because the crime occurred in July 2006. I do not find this case supports

Appellant's argument. In *Blakeney*, the Respondent was already in jail in Berkeley County for charges in that county when a "hold" was placed upon him by the Beaufort County Sheriff's office for another charge. *Id.* at 88, 529 S.E.2d at 11. Although the arrest warrant for the Beaufort County charge was not issued until fifteen months later, the Supreme Court held the Respondent was entitled to credit for time served from the date Beaufort County placed a "hold" on him because he was confined in Berkeley County upon placement of the hold based on the Beaufort County charge. *Id.* at 88–89, 529 S.E.2d at 11. Overall, *Blakeney* relies on the Supreme Court's earlier holding in *Crooks v. State* that "time served" means "the time during which a defendant is in pre-trial confinement *and* charged with the offense for which he is sentenced (so long as he is not serving time for a prior conviction)." *Id.* at 88, 529 S.E.2d at 10–11 (emphasis original) (citing to *Crooks v. State*, 326 S.C. 171, 485 S.E.2d 374 (1997)). Therefore, *Blakeney* does not stand for the principle that an inmate should receive time served for time spent in jail on other charges before being charged or indicted for the crime at issue.

Nevertheless, Appellant argues that he should receive the same amount of time served for Armed Robbery because this crime arose from the same incident or course of events on July 4, 2006, as the First Degree Burglary charge and ABWIK charge. Appellant argues it is inequitable and contrary to the legislative intent of section 24-13-40 to only give him time served after he was indicted for Armed Robbery when he was arrested and jailed for the incident leading to this charge on July 8, 2006. The Record shows the date of the offense for Armed Robbery is July 4, 2006, but the date of the offense for First Degree Burglary and ABWIK is July 8, 2006. However, according to Appellant, the incident or course of events resulting in all three crimes occurred on July 4, 2006. Because the Department did not submit a brief to contradict Appellant's assertions, the Court accepts that the Armed Robbery indictment stemmed from the same incident or series of events leading to the First Degree Burglary and ABWIK charges.

But even accepting that the Armed Robbery charged stemmed from the same incident, the Court does not have authority under *Blakeney* to back-date Appellant's indictment to July 8, 2006, for the purposes of section 24-13-40. Here, unlike in *Blakeney*, Appellant was "directly" indicted for Armed Robbery on October 17, 2006. He was not arrested for that charge or held for that charge until that date. He thus could not begin serving any jail time until the date of the direct indictment for Armed Robbery. *See Blakeney,* 339 S.C. at 88–89, 529 S.E.2d at 11.

Furthermore, Appellant's assertion that his charges for Petit Larceny were essentially "upgraded" to Armed Robbery and, therefore, he should receive time served as if one continuous charge had been in place also fails. While pleading down to a lesser charge will not affect the start time for calculating time served, nolle prossed charges followed by a direct indictment for a higher charge represents a completely new charge that breaks continuity with any former charge that may have preceded it. *See Mackey v. State*, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004) ("[W]e hold that when a solicitor enters a nolle prosequi, charges are extinguished."); *cf. State v. Boggs*, 388 S.C. 314, 316-17, 696 S.E.2d 597, 598-99 (Ct. App. 2010) ("We find the plea judge committed an error of law when he denied Boggs credit for time served based upon the State's decision to drop the charge from armed robbery to strong arm robbery.").

Pursuant to the plain language of section 24-13-40 and the holding in *Blakeney*, Appellant is entitled to time served for the time he was in jail **and** charged (or in this case, indicted) for the crime for which he was later sentenced. Since Appellant was not indicted on Armed Robbery until October 17, 2006, he could not have served any jail time before that date. Therefore, the Department correctly awarded him fifty-five days' time served for the time he was confined in the Oconee County Jail for Armed Robbery from October 17, 2006, to December 11, 2006. In sum, Appellant failed to carry his burden of proving that SCDC improperly calculated his sentence and the Department's decision must be affirmed. *See Porter*, 333 S.C. at 20, 507 S.E.2d at 332.

ORDER

For the reasons set forth in this Order,

IT IS HEREBY ORDERED that Appellant's Motion for Judicial Notice is **DENIED**.

IT IS FURTHER ORDERED that the Department's final agency decision is **AFFIRMED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

June 16, 2021
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

Stephanie Perez
Judicial Law Clerk

June 16, 2021
Columbia, South Carolina