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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from the Administrative Law Court
Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5843 (S.C. Ct. App. filed 08/04/21)
Appellate Case No. 2021-001143

QUINCY ALLEN, #006019,

PETITIONER,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

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ISSUE PRESENTED

DID THE COURT OF APPEALS PROPERLY AFFIRM THE ADMINISTRATIVE LAW COURT'S DISMISSAL OF PETITIONER'S APPEAL WHERE PETITIONER'S CLAIM DID NOT IMPLICATE A STATE CREATED LIBERTY OR PROPERTY INTEREST?

STATEMENT OF THE CASE

This matter comes before this Court pursuant to the appeal of of Quincy Allen ("Petitioner"), an inmate incarcerated with the South Carolina Department of Corrections ("SCDC" or "Department"). On March 21, 2018, Petitioner filed a Step One grievance regarding the disapproval of visitation applications on the basis that the applicant did not know Petitioner prior to his incarceration. App. p. 68. On March 29, 2018, SCDC denied the Step One grievance. App. p. 69. Thereafter, on March 30, 2018, Petitioner filed a Step Two grievance appealing the disposition of his Step 1 grievance. App. p. 73. On May 11, 2018, SCDC denied the Step Two grievance, and Petitioner appealed to the Administrative Law Court. App. p. 73. On November 1, 2018, Administrative Law Judge Ralph King Anderson, III dismissed Petitioner's appeal. App. p. 54-56.

Petitioner appealed to the South Carolina Court of Appeals, and on August 4, 2021, the Court of Appeals issued an order affirming the Administrative Law Court's order. App. p. 1-6. Petitioner now seeks review of the Court of Appeals' decision.

STANDARD OF REVIEW

S.C. Code § 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.

S.C. Code § 1-23-380(5).

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 § 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 COURT OF APPEALS PROPERLY AFFIRMED THE ADMINISTRATIVE LAW COURT'S DISMISSAL OF PETITIONER'S APPEAL WHERE PETITIONER'S CLAIM DID NOT IMPLICATE A STATE CREATED LIBERTY OR PROPERTY INTEREST.

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. The South Carolina supreme court clarified the ALC's appellate jurisdiction over inmate appeals in *Sullivan v. South Carolina Department of Corrections* holding that 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. 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003).

Moreover, regarding categories (*2*) and (*3*), *supra*, the South Carolina Supreme Court has consistently emphasized that the liberty or property interest implicated must be one that is state created. *See Wicker v. S.C. Dep't of Corr.*, 360 S.C. 421, 602 S.E.2d 56 (2004) (emphasizing that the ALC's jurisdiction extends only to those cases involving the denial of "state created liberty interests" and that the Court's holding [*i.e.*, in *Wicker*] "is not to be viewed as expanding the jurisdiction of the [ALC] in any other circumstance."); *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 605 S.E.2d 506 (2004) (holding that the ALC "may

summarily dismiss those appeals that do not implicate an inmate's state created liberty or property interest"). The South Carolina Court of Appeals has interpreted *Slezak* to mean that where a state-created liberty interest is not implicated in a prisoner appeal, a judge of the ALC "should" dismiss the appeal. *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006).

The United States Supreme Court, in *Kentucky Department of Corrections v. Thompson*, articulated the test by which a court can determine if a state has created a liberty interest. 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 506 (1989). The Court stated that a state creates a liberty interest by (1) "establishing 'substantive predicates' to govern official decision-making" and (2) mandating a certain outcome "be reached upon a finding that the relevant criteria have been met." *Id.* at 462, 109 S. Ct. at 1909 (internal citation omitted). In *Town of Castle Rock, Colorado v. Gonzales*, the Supreme Court further clarified the second prong of the *Thompson* test stating that a person is not entitled to, and thus has no property interest in, a benefit "if officials have discretion to grant or deny it." 545 U.S. 748, 748, 125 S. Ct. 2796, 2798-99, 162 L. Ed. 2d 658 (2005).

Aside from prohibiting conjugal visits, South Carolina law does not address inmate visitation. S.C. Code § 24-3-81. However, under the authority granted him by S.C. Code § 24-1-90, the Director of the Department of Corrections has promulgated a policy regarding inmate visitation: SCDC Policy OP-22.09, "Inmate Visitation." This policy clearly states that visitation can be "suspend[ed], restrict[ed], den[ied], or terminate[d]." App. p. 90. Additionally, permissive language such as "may" is used throughout in describing the granting or revoking of visitation. This makes it clear that decisions regarding visitation are

subject to wide discretion. SCDC Policy OP-22.09 also consistently refers to visitation as a privilege, not a right. This policy does not mandate any particular outcome upon the satisfaction of certain criteria. Thus, it does not create a liberty interest in visitation.

Petitioner argues that he does have a state created liberty interest in visitation and that such a right is established by Article XII, section 2, of the South Carolina Constitution, which states, "[t]he General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates." App. p. 25. This language does not mention visitation and certainly does not create criteria for awarding visitation privileges, mandate any particular outcome upon the completion of those criteria, or limit the discretion of decision makers in any way. Thus it does not create a liberty interest in visitation. *Thompson* at 462, 109 S. Ct. at 1909. Additionally, the South Carolina supreme court has already ruled that this language does not create a liberty interest. In *Sullivan v. South Carolina Department of Corrections,* the Court rejected Sullivan's argument that this exact same language regarding rehabilitation created an interest in sex offender treatment and ruled that the Administrative Law Court did not have jurisdiction over the claim. 355 S.C. at 445, 586 S.E.2d at 128.

Petitioner also argues that ALC Judge Anderson's reliance on *Kentucky Department of Corrections v. Thompson* was improper. App. p. 23-25. Petitioner asserts that the facts in this case are so different from the facts in *Thompson* that the *Thompson* Court's conclusion that "[t]he denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence" is not applicable here. *Thompson*

at 462, 109 S. Ct. at 1909 (internal quotations omitted); App. p. 23-25. While Judge Anderson did make note of this language from *Thompson* in his Order, he did so only after noting that neither prong of the *Thompson* test had been established. App. p. 54-56. The *Thompson* test on which Judge Anderson relied is applicable to any situation in which the court must determine whether or not a state has created a liberty or property interest. In fact, in *Slezak v. Evatt*, the United States Court of Appels for the Fourth Circuit relied on this test in determining that South Carolina law does not create a liberty interest in a particular custody or security classification. 21 F.3d at 594. Judge Anderson' reliance on *Thompson* was proper.

SCDC Policy OP-22.09 makes it clear that visitation is a privilege – a privilege SCDC officials can grant, deny, or limit in their discretion. Therefore, applying the Supreme Court precedents *Thompson* and *Gonzales*, Petitioner has no state created liberty interest in having any visitors, let alone the specific group of visitors of which he complains. Because no state created liberty or property interest is implicated in this case, Judge Anderson's November 1, 2018 dismissal of this appeal was proper under *Slezak* and *Skipper* and the Court of Appeals properly affirmed.

Petitioner argued below that SCDC's final agency decision was arbitrary and capricious because disapproval of potential visitors who did not know the inmate prior to their incarceration is not in SCDC's visitation policy. App. p. 20. However, Alice Mascio explained her reasoning for denying these visitors in her response to Appellant's Request to Staff Member stating, "not knowing an inmate but wanting to visit [is] a security concern." App. p. 66. This was again explained to Petitioner in the responses to his Step One and Two

Grievances. App. p. 69 & 73. This decision was within the discretion allowed by SCDC Policy OP-22.09, "Inmate Visitation" which states, "SCDC reserves the right to suspend, restrict, deny, or terminate an inmate's or visitor's visitation privileges and/or telephone privileges due to legitimate concerns regarding the security and safety of the institution." App. p. 90. SCDC's final agency decision was based on concerns regarding institutional security and was within the limitations set by policy. It was not arbitrary or capricious. Therefore, the Court of Appeals properly affirmed the Administrative Law Court.

CONCLUSION

The Administrative Law Court's decision below is supported by substantial evidence and is neither effected by legal error nor clearly erroneous in view of the whole record. Accordingly, the Court of Appeals properly affirmed the Administrative Law Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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