

RENDERED: September 28, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002089-MR

LESTER SMOTHERS

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 00-CI-00149

GEORGE MILLION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Lester Smothers, pro se, has appealed from an order of the Morgan Circuit Court entered on August 2, 2000, which dismissed his petition for declaration of rights¹ concerning a prison disciplinary matter. Having concluded that Smothers has received due process of law in the administration of the prison discipline, we affirm.

¹Kentucky Revised Statutes 418.040.

On March 14, 2000, Smothers, while imprisoned at the Eastern Kentucky Correctional Complex, was required to submit a urine sample for the purposes of a drug test. Smothers' urine sample was sent for analysis that same day to a private company, Lab Corp. Test results reported to the prison on March 21, 2000, showed positive results for "THC metabolites," or marijuana. A disciplinary report charged Smothers with the "unauthorized use of drugs or intoxicants." On April 3, 2000, a prison adjustment officer found Smothers guilty as charged. Smothers was required to forfeit 60 days of good time credit and to serve 45 days in disciplinary segregation. Smothers appealed these findings to the prison warden. On April 20, 2000, the warden concurred with the adjustment committee's findings and actions. On June 13, 2000, Smothers filed a petition for declaration of rights in the Morgan Circuit Court. On August 2, 2000, the circuit court granted the warden's motion to dismiss the petition. This appeal followed.

Smothers claims his due process rights were violated because (1) the drug testing procedures failed to comply with the required chain-of-custody procedures; (2) the prison adjustment officer conducted an unauthorized investigation into an incident prior to the hearing; and (3) prison personnel presented perjured testimony. As this Court noted in Gilhaus v. Wilson,²

The United States Supreme Court has held that prisoners retain rights under the Due

²Ky.App., 734 S.W.2d 808, 809 (1987).

Process Clause, subject to restrictions imposed by the nature of their lawful imprisonment. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). However, the full panoply of rights due a defendant in a criminal prosecution is not applicable in a prison disciplinary proceeding. Id. The inmate's interest in the procedural protections required by due process must be balanced against the legitimate institutional needs of assuring safety and control of inmates, avoiding burdensome administrative requirements and preserving the disciplinary process as a means of rehabilitation. Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985); Wolff, supra.

At the time Smothers' urine sample was taken, the Department of Corrections' Policy and Procedure 15.8(VI)(c), regulating chain of custody, provided as follows:

1. A Chain of Custody form shall be properly filled out by the staff who collected the urine sample.
2. Each time the sample is released, the person releasing the sample shall legibly sign, not initial, the Chain of Custody indicating date and time of release.
3. Each time the sample is received, the person receiving the sample shall:
 - a. sign the Chain of Custody;
 - b. indicate date and time of receipt;
and
 - c. whether or not the seal is intact.
4. Each time the sample is received or released from an inanimate object including a locked security box, mail pouch or mail room, the form shall be signed on behalf of the object below the name of the object.

5. An institution that utilizes any outside delivery agent to deliver a urine sample to the laboratory shall ensure that the sample is released to the delivery agent by signature of staff packaging the sample.
6. The laboratory personnel conducting the testing shall sign and date the Chain of Custody certifying:
 - a. that the seal is intact; and
 - b. that the name and number on or in the specimen bottle matches the name and number on the Chain of Custody form.

Smothers and the Department of Corrections both rely upon Byerly v. Ashley,³ where this Court reversed a disciplinary action against an inmate because the chain-of-custody procedure failed to meet due process requirements. In Byerly, this Court stated that the chain-of-custody "is for the purpose of establishing that the sample tested is the same as that taken from a particular individual and that, at the time it is tested, the sample is in the same condition as when taken free of tampering."⁴ In that case, the chain-of-custody procedure was followed "only as far as showing the sample being delivered by a correctional officer to the laboratory courier. No one at the laboratory made an entry on the form indicating who or how many handled the specimen there."⁵ The Court in Byerly also noted

³Ky.App., 825 S.W.2d 286 (1991).

⁴Id. at 287.

⁵Id.

that the form completed by the laboratory failed to state whether the package and the seals were intact upon receipt.

We believe the case sub judice is distinguishable from Byerly since a Lab Corp employee signed for the specimen on March 18, 2000, and the form was completed to indicate that the package and the seals were intact upon receipt. The procedure used herein was approved in Byerly, where this Court stated:

We would have no problem in this case if the laboratory had filled out its own form to at least indicate who received the sample, that the specimen seal was then intact, and who had handled the specimen through the time it was tested. This is hardly a burdensome procedure, as even the laboratory would seem to agree in light of its own forms. Such a simple procedure would obviate any reasonable probability of tampering from the time the sample leaves correctional authorities until it is received by the laboratory, while at the same time establishing the integrity and identity of the specimen actually tested.⁶

We believe the "fundamental fairness" requirement of Byerly has been met since the evidence relied upon to punish Smothers has every indication of being reliable.

The other two issues raised by Smothers involve allegations of improprieties committed by the prison adjustment officer, Carl Smith. Smothers claims that at his disciplinary hearing Smith stated that he had spoken with Deputy Warden Gary Beckstrom concerning the charge against Smothers; and that Smith relied upon this conversation in denying Smothers' request for witnesses. Smothers further alleges that in his action before

⁶Id. at 288.

the Morgan Circuit Court for a declaration of rights that Smith filed a false affidavit in support of the Department's motion to dismiss. In his affidavit, Smith stated in part:

I conducted Inmate Smothers' hearing on April 3, 2000. CPP 15.6 stipulates that it is the inmate's responsibility to identify to the Adjustment Officer what witnesses he has selected not less than twenty-four (24) hours prior to the initial hearing. On the date of Inmate Smothers' hearing, I had received no witness list. The information is documented on the Part II Hearing form [citation omitted].

Unfortunately for Smothers, there is nothing in the record to support his bare allegations that Smith misrepresented his request for witnesses. The hearing form in the record indicates that the hearing was taped, but no tape was filed as evidence before the trial court. When a record is silent as to a factual matter, an appellate court must assume that the record would support the findings of the trial court.⁷ Here, the trial court found no procedural due process violation; and based on the record before us, we must affirm.

For the foregoing reasons, the order of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lester Smothers, Pro Se
West Liberty, KY

BRIEF FOR APPELLEE:

John T. Damron
Frankfort, KY

⁷See Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).