

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2006-CA-000765-MR

JUNIE HOLT

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 05-CI-00306

OTIS COOPER

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND REMANDING

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BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Junie Holt, *pro se*, appeals from an order of the Morgan Circuit Court dismissing his declaratory judgment action challenging a prison disciplinary action. We disagree with the Department of Corrections (“Department”) that Holt failed to show that he filed timely appeals from the adjustment committee’s decision. On the merits of his

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

appeal, we find that the drug test results were admissible, and that the charge of possessing or promoting dangerous contraband was supported by sufficient evidence. However, the administrative record is not sufficient to determine the basis for one of the charges, use of opiates. Therefore, this matter must be remanded for additional findings.

At all times relevant to this action, Holt was an inmate at the Eastern Kentucky Correctional Complex in West Liberty, Kentucky. On August 18, 2005, the prison adjustment committee (“committee”) found Holt guilty of three counts of unauthorized use of drugs or intoxicants and one count of promoting dangerous contraband. For these infractions, the committee imposed a total of 225 days of disciplinary segregation and forfeiture of 120 days of good-time credit. The warden affirmed the adjustment committee’s decision on September 16, 2005, stating that no appeals had been received. Subsequently, Holt’s inmate legal aide sent the appeals along with a letter asserting that they had been placed in the prison mail on September 1. But, on November 7, 2005, the warden dismissed the appeals as untimely.

Thereafter, on December 8, 2005, Holt filed a petition for declaration of rights in the Morgan Circuit Court. He asserted that his appeals to the warden were timely and should not have been dismissed. He further argued that the committee violated his due process rights, that the three separate penalties for unauthorized use of drugs constituted multiple punishments for the same infraction, and that the contraband found in his possession did not meet the definition of “dangerous contraband” set out in the Corrections Policies and Procedures. The Department of Corrections moved to dismiss based upon Holt’s failure to properly exhaust his administrative remedies. In an

order entered on March 1, 2006, the circuit court granted the Department's motion. Holt now appeals to this Court.

As the Department correctly notes, KRS 454.415(1) prohibits an inmate from filing a civil action with respect to a prison disciplinary proceeding unless he first exhausts all administrative remedies set forth by the Department. Corrections Policy and Procedure (CPP) 15.6 requires an inmate to file an appeal to the warden within 15 days from the committee's decision. The Department contends that Holt failed to substantiate his claim that he timely submitted his appeals to the warden. Therefore, the Department argues that his appeals and his declaratory judgment action were properly dismissed.

In the proceedings before the circuit court, Holt submitted an affidavit from an inmate legal aide who stated that he filed Holt's appeals on September 1, 2005. The legal aide also included redacted copies of the prison's "Legal Mail Log Record" showing that Holt's correspondence to the warden was placed in the prison mail on that date. Holt thus contends that his appeals were filed within the 15 days allowed by CPP 15.6.

Recently, in *Robertson v. Commonwealth*, 177 S.W.3d 789 (Ky. 2005), the Kentucky Supreme Court addressed the issue of when a prisoner's *pro se* RCr 11.42 action will be deemed to have been filed. The Court declined to adopt the "prison mailbox rule," set out in *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988), which deems a notice of appeal to be "filed" when the prisoner deposited it with prison authorities for mailing. *Id.* at 270-71, 108 S. Ct. at 2382. However, the Court recognized that prisoners' control over the filing process is circumscribed by prison rules

and procedures. Consequently, the Court held that if the *pro se* petitioner has otherwise complied with all of the requisites for filing a petition, the deadline for such filing is tolled on the date the prisoner delivers the correctly addressed petition to the proper prison authorities for mailing. *Robertson*, 177 S.W.3d at 791, citing *State ex rel. Nichols v. Litscher*, 247 Wis. 2d 1013, 635 N.W.2d 292, 298-99 (2001).

Although *Robertson* specifically considered application of the equitable tolling rule to RCr 11.42 proceedings, we find no reason why this rule should not apply equally to prison disciplinary actions. Thus, the central question in this appeal is whether Holt adequately substantiated his claim that he filed a timely appeal to the warden. We conclude that he has.

After the warden initially denied the appeals, the legal aide sent a letter to the warden claiming that the appeals had been mailed on September 1, 2005. While the legal aide did not provide copies of the mail log, he did refer to it. In the declaratory judgment action, Holt provided an affidavit from the legal aide stating that the appeals had been mailed on September 1. He also provided redacted copies of the prison mail log showing that the appeals to the warden were placed in the prison mail on September 1. These entries are verified by prison staff. This evidence was sufficient to substantiate Holt's claim that he filed timely appeals from the committee's decision. Thus, Holt exhausted all his administrative remedies, and the circuit court erred in dismissing his declaratory judgment action.

Holt raises three issues on the merits of his appeal. First, he argues that there were gaps in the chain-of-custody form for his drug test which undermine its

reliability. Second, he contends that the committee improperly used a single positive drug test result to find him guilty of two separate infractions. And third, Holt asserts that the evidence did not support the committee's finding that he possessed or promoted "dangerous contraband" as defined by the CPP.

As to the first issue, we find no error. Holt argues that the chain-of-custody form on his drug test does not show who released the specimen from the lock box to the delivery courier. This Court has held that such gaps in the chain-of custody documentation do not "undermine confidence in the test where lab personnel certify that the sample arrived within a reasonable time after collection, clearly identified, and with its seal intact." *Lucas v. Voirol*, 136 S.W.3d 477, 479 (Ky.App. 2004). Since Holt has not alleged any other deficiencies in the documentation, we find that the drug test results were admissible against Holt and provide sufficient evidence of an infraction to justify his punishment.

However, we are unable to reach the merits of Holt's second allegation of error. Holt couches his complaints about the multiple punishments for drug use as a double jeopardy violation. It is well established that the constitutional protections against double jeopardy do not apply to prison disciplinary proceedings. *Meeks v. McBride*, 81 F.3d 717, 722 (7th Cir. 1996); *Garrity v. Fiedler*, 41 F.3d 1150, 1152-53 (7th Cir. 1994), *cert. denied*, 514 U.S. 1044, 115 S. Ct. 1420, 131 L. Ed. 2d 303 (1995).

Nevertheless, due process requires that the committee's decision be supported by some evidence in the record. *Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky.App. 1997), *citing Superintendent, Massachusetts Correctional Institution, Walpole*

*v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356 (1985). The committee's decision was based on a drug test showing that Holt had tested positive for THC (marijuana) and oxycodone. The test categorized oxycodone as an opiate. However, the committee found Holt guilty of using marijuana, oxycodone *and* opiates. While the record clearly supports the committee's findings and punishment as to the first two charges, the record does not disclose a basis for the third charge. We recognize that the Department may be able to explain this discrepancy. But where the administrative record does not permit meaningful review, the proper remedy, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Smith v. O'Dea*, 939 S.W.2d at 356.

We do not find any similar deficiency in the committee's finding that Holt was guilty of possessing or promoting dangerous contraband. On August 9, 2005, a corrections officer observed Holt receiving something in his mouth during a kiss from a female visitor. Shortly thereafter, another corrections officer found two burst balloons in Holt's feces. Such balloons are used to smuggle drugs or other contraband into prisons.

Holt contends that this evidence would only support a lesser charge of possession of drug paraphernalia. He points to the CPP sections defining balloons as drug paraphernalia, but separately indicating that "dangerous contraband" only includes "[a]ny drug paraphernalia capable of administering an injection." CPP 15.2 § IV; 9.6 § IV (A). However, the cited policy provisions clearly state that the stated examples of "dangerous contraband" are illustrative rather than exclusive. Furthermore, the CPP incorporates the definition of "dangerous contraband" set out in KRS 520.010, which

includes controlled substances. Under the circumstances, the committee could reasonably believe that Holt ingested the balloons to smuggle controlled substances into the prison. While the committee could have found Holt guilty of a lesser infraction, there was some evidence supporting the committee's finding that Holt was guilty of possessing or promoting dangerous contraband.

Accordingly, the order of the Morgan Circuit Court dismissing Holt's declaratory judgment action is affirmed in part and reversed in part. This matter is remanded to the Morgan Circuit Court with directions that the matter be remanded to the Department of Corrections for further fact finding regarding the charge of use of opiates. If the facts show that this charge was based upon a misinterpretation of the drug test results rather than an indication of use of a controlled substance separate from the other charges, the Department shall vacate the prior adjudication of guilt and adjust Holt's good-time credit.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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