

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-001683-MR

CECILIO NAVARO

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 10-CI-00632

STEVE HANEY; TIM SETTLES; TRACEY  
NIETZEL; NURSE MURPHY; DAVID MUDD;  
and GARY FREDERICK

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS AND MOORE, JUDGES; ISAAC,<sup>1</sup> SENIOR JUDGE.

COMBS, JUDGE: Cecilio Navaro appeals the order of the Franklin Circuit Court that dismissed his petition for declaration of rights. After our review, we affirm.

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

In August 2009, two inmates at Northpoint Training Center were brutally attacked by a group of inmates wielding padlocks attached to strings. One of the victims was severely injured and had to be treated at a local hospital. The other one was treated at the prison's medical facilities.

Navaro was accused of being one of the attackers. After the Department of Corrections (DOC) conducted an investigation, it held a disciplinary hearing for Navaro. He was found guilty of conspiring, aiding, and attempting to cause serious physical harm to another inmate, and he received punishment by the loss of 730 days of good-time credit and by 80 days in disciplinary segregation. Navaro was also ordered to pay restitution for the victims' medical bills. He submitted an appeal to the warden, which was denied. Navaro then filed a petition for a declaration of rights in the Franklin Circuit Court. The DOC filed a motion to dismiss for failure to state an actionable claim. The trial court granted the motion, and Navaro filed this appeal.

Kentucky courts have long held that earned good-time credits are privileges, "merely a conditional gratuity which may be forfeited by the prisoner's misconduct." *Fowler v. Black*, 364 S.W.2d 164, 164 (Ky. App. 1963), see also *Martin v. Chandler*, 122 S.W.3d 540, 543-44 (Ky. 2003). Similarly, the Supreme Court of the United States has declared, "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

Kentucky has developed a standard of “some evidence” for judicial review of prison disciplinary proceedings. In *Smith v. O’Dea*, 939 S.W.2d 353, 358 (Ky. App. 1977), this Court held:

in light of the exceptional difficulties confronting prison administrators, a highly deferential standard of judicial review is constitutionally appropriate with respect to both the factfinding that underlies prison disciplinary decisions and the construction of prison regulations.

*Id.* at 357.

Kentucky has adopted the standards of the Supreme Court of the United States for due process requirements in prison disciplinary hearings involving the loss of good-time credit:

1) advance written notice of the disciplinary charges; 2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and 3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action.

*Webb v. Sharp*, 223 S.W.3d 113, 117-18 (Ky. 2007), quoting *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454 (1985) citing *Wolff*, 418 U.S. at 563-67.

Navaro does not contend that he did not receive notice of the charges or that the adjustment officer as factfinder did not fulfill her responsibilities. Rather, he argues that he was denied due process because he was not allowed to present certain pieces of evidence. We do not agree.

Navaro also argues that the adjustment officer should have reviewed the security video of the attack. Kentucky Revised Statute[s] (KRS) 197.020(1)(a)<sup>2</sup> authorizes the Department of Corrections to “promulgate administrative regulations . . . for the government of the prisoners in their department and conduct[.]” Kentucky Administrative Regulations (KAR) have incorporated the Kentucky Corrections Policies and Procedures (CPP). 501 KAR 6:020. CPP 15.6 addresses adjustment (disciplinary) procedures and programs. CPP II(C)(4)(b)(3)(c) requires the incident investigator to provide the inmate with “all documents **to be used by the Adjustment Committee or Adjustment Officer** unless the disclosure of those documents constitutes a threat to the safety and security of an inmate, the public, or the institution.” (Emphasis added).

The term *documents* includes tape recordings. CPP II(C)(4)(b)(3)(c)(2) mandates that if the document is not given to the inmate, then the inmate must be provided with a summary of the information contained within it. In this case, the record does not include a recording of the hearing, but the written summary does not mention the security tape. While we believe that it might have been prudent for the adjustment officer to note why the tape was not used, we cannot conclude that reversible error occurred.

Navaro also argues that it was improper for the adjustment officer not to consider a log from the gym that day. He alleged that he was in the gym at the time of the attack. The adjustment officer noted in her findings that the gym log

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<sup>2</sup> This statute has since been amended by the 2010 General Assembly. However, the amendment does not affect the subsection pertinent to this case.

did not have times marked on it and that, therefore, it would be irrelevant. Her ruling is in accordance with CPP II(C)(4)(b)(3)(c)(2).

Navaro further contends that it was improper for the adjustment officer to use information from a confidential informant without providing him with the informant's identity. However, the record lacks any reference to a confidential informant. Kentucky Rule[s] of Civil Procedure (CR) 76.12(4)(c)(v) requires briefs to include citations to the record. While we accord leniency to *pro se* appellants, we nonetheless must assume that the trial court's judgment supported the evidence if something is entirely omitted from the record. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

Navaro last argues that he was denied due process because he did not receive notice of the charge for which he was found guilty. The record shows that he was charged with "physical action resulting in the death or serious injury of another inmate," which is a Category VII (Major Violations) offense. CPP 15.2(II)(C). However, he was actually convicted of **conspiring, aiding, and attempting** to cause serious physical harm to another inmate, which is referred to in the policy manual as an "inchoate violation." CPP 15.2(II)E(1) states that a person may be found to have committed the violation **listed in this policy** if he:

- (a) Attempts to commit the violation;
- (b) Solicits another or others to commit the violation;
- (c) Conspires with another or others to commit the violation;
- (d) Aids the action of another or others in committing the violation.

The penalty for the offense does not change with the distinction. Accordingly, Navaro received adequate notice of the charge and has not shown a denial of due process in this respect. He was given a hearing, and the record shows that he presented his defense – namely, that he was in the gym during the attack. There was no error.

The adjustment officer found that the record contained more than “some evidence” to find that Navaro was guilty. One of the victims named Navaro as one of his attackers. Two corrections officers identified Navaro from a group of inmates who were roaming together right before the attack. Additionally, the recreation leader saw Navaro in proximity of the location of the attack immediately after it occurred. We cannot agree with Navaro that there was not at least “some evidence” of his involvement.

We conclude that Navaro received sufficient due process and that there was some evidence to support the finding that he was guilty. Therefore, we affirm the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cecilio Navaro, *pro se*  
Sandy Hook, Kentucky

BRIEF FOR APPELLEE:

Stafford Easterling  
Justice and Public Safety Cabinet  
Frankfort, Kentucky