RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000151-MR

KEVIN R. WILSON — APPELLANT

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 09-CI-00075

REBECCA[1] S. LEWIS, ADJUSTMENT OFFICER; JOSEPH P. MEKO, WARDEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Kevin R. Wilson, *pro se*, appeals from the dismissal of his petition for a declaration of rights by the Elliott Circuit Court. Upon review, we affirm the Elliott Circuit Court.

[1] Notice of appeal shows spelling as "Rebbecca".

Wilson was an inmate at the Little Sandy Correctional Complex at all times relevant herein. Wilson's personal property was searched, on October 31, 2008, while he was confined in segregation pending an investigation of a charge against him. The search, conducted by correction officers Littleton and Finch, produced a baggie containing a leafy green substance which later tested positive as marijuana. As a result, Wilson was charged with possessing or promoting dangerous contraband.

A prison disciplinary hearing was held on November 20, 2008. At the conclusion of the hearing, Adjustment Officer Rebecca Lewis found Wilson guilty of possessing or promoting dangerous contraband. This finding was based upon the report written by Officer Littleton. As a result, Wilson was assessed a penalty of ninety-days' segregation and forfeited one-hundred-eighty days of good-time credit.

Thereafter, Wilson appealed the adjustment officer's findings to the warden. The warden, Joseph P. Meko, concurred with Adjustment Officer Lewis's findings. Wilson then filed a *pro se* petition for a declaration of rights in the Elliott Circuit Court, alleging violation of his due process rights and violation of Kentucky Corrections Policy and Procedures (KCPP) 9.8, 15.2, and 15.6. The respondents, Lewis and Meko, filed a motion to dismiss the petition on the grounds that Wilson failed to comply with the mandates of Kentucky Revised Statutes (KRS) 454.415.

Lewis and Meko contended in the motion that Wilson failed to exhaust his administrative remedies by first presenting his appeal to the warden and attaching documentation. While Lewis and Meko recognized that Wilson did appeal to the warden, he only attached "Part II" of his disciplinary report to the petition which showed the warden's response to the appeal. Lewis and Meko argued that this was insufficient because, with no documentation setting forth the grounds for his appeal, it was impossible to determine whether the arguments Wilson included in his petition were identical to those raised before the warden. Lewis and Meko further argued that Petitioner's due process was satisfied and that the findings were otherwise supported by "some evidence."

The Elliott Circuit Court allowed Wilson time to respond. Wilson responded and filed a motion to amend his petition for a declaration of rights to include the necessary documentation. The court allowed Wilson to amend and accepted the amended petition with the added documentation. Thereafter, however, the Elliott Circuit Court still dismissed Wilson's petition pursuant to Lewis and Meko's motion to dismiss, presumably on the grounds that the disciplinary decision was supported by "some evidence." Wilson now appeals to this Court.

Before addressing the merits, we note as a preliminary matter that although Wilson's petition was dismissed pursuant to Kentucky Rules of Civil Procedure (CR) 12.02, we will treat it as a summary judgment for the purposes of review. *Adams v. Meko*, 341 S.W.3d 600, 602 (Ky. App. 2011); *Smith v. O'Dea,*

939 S.W.2d 353, 355 n.1 (Ky. App. 1997). Therefore, we find that judgment was proper only if Wilson's petition and supporting materials, when construed in light of the entire agency record, do not raise any genuine issues of material fact sufficient to overcome the presumption of agency propriety. *Id*.

Wilson claims that his property was searched when he was initially placed in segregation on September 29, 2008, and that the search did not result in the discovery of any contraband. He asserts that a second search of his property took place after he had already been in segregation for approximately twenty days. It was during this search that correctional officers found marijuana. Wilson states that he was not present for the search in violation of the KCPP.

Wilson further alleges that the original time of the search contained in the disciplinary report was changed, by hand, after he signed it. He notes that Littleton apparently had other duties in the prison at the same time listed for the search and would not have been able to be in both places at once. Thus, Wilson concludes, the search did not actually take place at the time listed in the report. Wilson was denied access to records which he purports would have listed the actual date and time of the search. He claims that the access to this information was improperly denied.

Wilson also alleges irregularities in the chain of custody. Specifically, Wilson states that Littleton surrendered the evidence to Lt. Wallace at 7:00 p.m. on October 31, 2008. Wallace did not release the evidence to Capt. Stevens until over seventeen hours later, at 12:45 p.m. on November 1, 2008.

Finally, Wilson argues that there is no indication of who performed the test on the substance or what testing procedures were used. He further states that the record shows Stevens destroyed the evidence on November 1, 2008, at 2:23 a.m., despite the fact that Stevens also recorded that there was "only enough residue to test." Wilson alleges that this is also a direct violation of the KCPP because the determination regarding the final disposition or destruction of evidence is to be made by the warden.

It is well settled that an inmate in a prison disciplinary proceeding does not enjoy the "full panoply of rights due a defendant" in a criminal prosecution. *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). However, prison disciplinary proceedings affecting a prisoner's good-time credit must comply with minimal due process. *Id*. At a minimum, the prisoner must receive notice of the charges against him, be given an opportunity to present evidence in his own defense, and must be provided with a report containing the committee's reasoning and conclusions. *Wolff,* 418 U.S. at 548.

On appellate review, we will uphold a prison disciplinary decision as long as it is supported by "some evidence." *Smith*, 939 S.W.2d at 358. At the same time, we recognize that our courts "must be sensitive to the possibility of prison abuses[.]" *Id*. at 356. Nonetheless, we recognize that the courts must also be "free to respond expeditiously to meritless petitions." *Id*.

In the present case, Wilson was given more than the requisite twenty-four hours of notice for the hearing. However, Wilson argues that he was deprived of his right under *Wolff,* 418 U.S. at 566*,* to present documentary evidence in his defense because he was denied access to documentation pertaining to the search of his property. The documents in question consisted of security logs and occurrence reports intended for corrections personnel only. As noted in *Wolff*, an inmate is only allowed to call witnesses and present documentary evidence on his behalf when doing so would "not be unduly hazardous to institutional safety or correctional goals." *Id*. Regardless, the report states that these documents were irrelevant and were not relied upon by Adjustment Officer Lewis in reaching her decision. Finally, as to the third requirement in *Wolff*, a report was lodged containing Lewis's reasoning and conclusions. Thus, all of the minimal requirements of due process were met in this case. Therefore, we affirm the decision of the prison disciplinary board so long as it is supported by "some evidence."

We now turn to the question of whether there was "some evidence" to support the decision. The relevant inquiry is "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455-56, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985). In applying this standard, we agree with the Elliott Circuit Court that Wilson's allegations raise no

genuine issue of material fact sufficient to overcome the presumption of agency propriety.

The evidence showed that correctional officers found a baggie containing a leafy green substance appearing to be marijuana. This alone meets the "some evidence" standard, as officers are allowed to base their impressions upon firsthand observations. *Webb v. Sharp*, 223 S.W.3d 113, 121 (Ky. 2007). Our Supreme Court has previously held that the "some evidence" standard was met where correctional officers observed a "leafy green substance" that smelled like marijuana. *Id*. at 121-122. Thus, we need not address Wilson's arguments regarding chain of custody and testing procedures.

Finally, we address Wilson's argument that the corrections officers involved violated the KCPP. KRS 197.020(1)(a) authorizes the Department of Corrections to "[p]romulgate administrative regulations . . . for the government of the prisoners in their deportment and conduct." The KCPP has been incorporated into Kentucky's Administrative Regulations. However, a state's implementation of procedural directives to guide the actions of prison administrators, such as those found in the KCPP, does not create a protected liberty or property interest under the United States Constitution. *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996); *Levine v. Torvik*, 986 F.2d 1506, 1516 (6th Cir. 1993). Thus, we do not find that violation of the KCPP deprived Wilson of minimal due process.

As the adjustment officer's decision was supported by "some evidence," we affirm the Elliott Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin R. Wilson, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Angela T. Dunham
Department of Corrections
Frankfort, Kentucky