

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001816-MR

TERRENCE R. ZITTER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 11-CI-02291

DON BOTTOMS, WARDEN; and MARK
KILBURN, Adjustment Officer, BLACKBURN
CORRECTIONAL COMPLEX

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

COMBS, JUDGE: Terrence Zitter, *pro se*, appeals the order of the Fayette Circuit Court which denied his petition for declaratory judgment in a prison disciplinary action. After our review, we affirm.

On November 20, 2010, Corrections Officer Kimberly Garnett of the Blackburn Correctional Complex conducted a search of Zitter's dorm unit. During the search, Zitter confessed that there was a cigarette lighter hidden in a loaf of bread in his locker: "I want to go ahead and be honest with you, there is a lighter in there." Garnett filled out a disciplinary report which charged Zitter with possession of dangerous contraband.

A disciplinary hearing was held on December 8, 2010, by Adjustment Officer Mark A. Kilburn. Zitter admitted that he owned the loaf of bread, but he claimed that he was holding the lighter for someone else. However, he refused to name the owner. Kilburn found Zitter guilty of possession or promoting of dangerous contraband, a Category VI-4 offense. Zitter received a penalty of sixty days of disciplinary segregation (suspended for 180 days) and 120-days' forfeiture of Good Time Credit.

On May 5, 2011, Zitter filed a petition for declaration of rights in Fayette Circuit Court. The court denied the petition on September 6, 2011. This appeal follows.

The United States Supreme Court has declared that "[p]rison 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). Therefore, in prison discipline proceedings that result in a loss of good time credit, Kentucky's due process requirements provide that the prisoner should receive:

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 Inst.*, *Walpole v. Hill*, 472 U.S. 445, 454 (1985) (citing *Wolff*, 418 U.S. at 563-67)). Thus, our standard of review necessarily is “highly deferential” to the trial court. *Smith v. O’Dea*, 939 S.W.2d 353, 357 (Ky. App. 1977).

Kentucky Revised Statute[s] (KRS) 197.020(1)(a) authorizes the Department of Corrections to “[p]romulgate administrative regulations . . . for the government of the prisoners in their department and conduct[.]” Kentucky Administrative Regulations (KAR) have incorporated the Department of Corrections Policies and Procedures (CPP). 501 KAR 6:020.

CPP 9.6(I) directs that contraband and dangerous contraband are both defined by KRS 520.010, but it also provides examples within the CPP. CPP 9.6(II)(B)(9) includes cigarette lighters as an example of “contraband.” Zitter nonetheless contends that he was improperly charged with possessing **dangerous** contraband and that he should have come under the definition of contraband alone rather than the heightened standard of dangerous contraband.

Dangerous contraband is “contraband which is capable of use to endanger the safety or security of a detention facility or persons therein.” KRS 520.010(3).

CPP 9.6(II)(A)(1) further provides that dangerous contraband is “[a]ny gun, firearm, weapon, sharp instrument, knife, unauthorized tool, or *any other object* which may be used to do bodily harm or facilitate escape.” (Emphasis added.)

While a lighter is specifically named as contraband, the definition of *dangerous* contraband includes contraband that can endanger security or be used to cause bodily harm. While not all items of contraband may be classified as dangerous, *dangerous* is a heightened classification of prohibited items and encompasses a broader range of items. It is not unreasonable to construe a lighter as dangerous in a prison environment where fires can be devastating. They can create opportunities both for escape and for risk of bodily harm to inmates, staff, and emergency responders. Furthermore, lighters may be used to smoke certain drugs that are specifically enumerated as dangerous contraband. Under these circumstances, we cannot conclude that it was erroneous for Zitter to be charged with possession of dangerous contraband.

Zitter also argues that his due process rights were violated by lack of notice of the charge of possession of dangerous contraband. However, the record indicates that the initial disciplinary report was a Category VI-4 violation, specifically involving dangerous contraband. Zitter was provided notice several days prior to his disciplinary hearing, and he was given the opportunity to present witnesses in his defense. The prison adjustment officer also provided Zitter with written findings following the hearing. Zitter does not present any proof that he

was not afforded the limited due process to which he was entitled in the context of a prison discipline proceeding.

Accordingly, we affirm the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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