

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-002104-MR

DAVID SWINNEY

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 13-CI-00147

CLARK TAYLOR  
AND DAWN DECKARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, JONES, AND MAZE, JUDGES.

JONES, JUDGE: This appeal involves the dismissal of David Swinney's declaratory judgment action by the Oldham Circuit Court. For the reasons set forth below, we affirm.

## I. Background

During the relevant time period, David Swinney, a state inmate, was incarcerated at the Kentucky State Reformatory (KSR) in LaGrange, Kentucky.<sup>1</sup> On September 9, 2012, Officer Aaron Perkinson was conducting rounds in the B-wing of Dorm 6 where Swinney's cell was located. Officer Perkinson observed what he perceived to be Swinney hiding behind the locker door in his cell. Officer Perkinson instructed Swinney and his cell mate, Michael Johnson, to step out of their cell so he could perform a visual inspection. Officer Perkinson then decided to conduct a pat down search of Swinney during which Officer Perkinson felt some sort of hard object around Swinney's waist. As a result, Officer Perkinson ordered Swinney to go into an office for further investigation.

Swinney gave chase. Officer Perkinson called for assistance and pursued Swinney up a set of stairs. Officer Perkinson then saw Swinney pull a cellular telephone from the waistband of his pants and attempt to pass it on to several other inmates. When none of the other inmates would take the phone, Swinney ran towards a restroom. The restroom was being blocked by Officer McCollum, who had witnessed the events unfolding. Swinney struggled with Officer McCollum and eventually made his way around her. Once inside the restroom area, Swinney attempted to flush the telephone as well as a black plastic baggy down the toilet. Swinney resisted as Officers Perkinson and McCollum attempted to retrieve the items from the toilet. The Officers successfully retrieved

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<sup>1</sup> Swinney has since been transferred; he is now housed at the Kentucky State Penitentiary in Eddyville, Kentucky.

the telephone, but not the baggy. Officer McCollum allegedly sustained injuries during her involvement in these events.

An investigation ensued. A "write-up" and investigation report were issued summarizing the above facts. The report indicates that a digital picture of Officer McCollum's hand injuries was included with the report.<sup>2</sup> Ultimately, Swinney was charged with "physical action resulting in death or injury of an employee." A disciplinary hearing was held on October 12, 2012. At that time, Swinney was found guilty. He received 365 days of disciplinary segregation and forfeiture of 365 days of good-time credit.

Swinney appealed to the Warden on the basis that (1) the incident report and Officer Perkinson's write-up conflict with one another; (2) a statement given by another officer, Sergeant Brinker, is inconsistent; (3) the lack of any statement by any officer that Swinney was the one that injured Officer McCollum; and (4) the lack of any medical documentation regarding the alleged injury to Officer McCollum. Upon review, the Warden denied Swinney's appeal.

Thereafter, Swinney commenced a declaratory action in Oldham Circuit Court. Therein, Swinney made the same arguments he presented to the Warden. Additionally, he also challenged the fact that he was not allowed to call Officer McCollum as a witness and that he was not provided with copies of the photographs of her alleged injuries.

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<sup>2</sup> The photograph(s) are not a part of our record.

The circuit court ultimately dismissed Swinney's action for failure to state a claim upon which relief can be granted. It concluded that Swinney had failed to exhaust his administrative remedies as related to his arguments about the photographs and inability to call Officer McCollum as a witness. With respect to the remaining claims, the circuit court concluded that Swinney received all the procedural due process he was entitled to and that the adjustment officer's written findings appropriately summarized the evidence relied upon and created a record sufficient to allow for meaningful appeal.

This appeal by Swinney followed. On appeal, Swinney presents the following alleged errors: 1) the trial court erred in concluding that Swinney did not exhaust his administrative remedies with respect to the photographs and testimony; and 2) the trial court abused its discretion when it failed to make independent findings relative to the presented case in controversy which involved a liberty interest to 365 days good-time loss which could not simply be rubber stamped.

## II. Standard of Review

A motion to dismiss a petition for declaration of rights arising out of a prison disciplinary proceeding should be treated as a motion for summary judgment. *See Smith v. O'Dea*, 939 S.W.2d 353, 355 n. 1 (Ky. App. 1997). The standard of review on appeal from the grant of summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

Moreover, in reviewing prison disciplinary proceedings, “[t]he court seeks not to form its own judgment, but, with due deference, to ensure that the agency's judgment comports with the legal restrictions applicable to it.” *Smith*, 939 S.W.2d at 355. Thus, if there is some evidence to support the outcome, the court should not interfere with the disciplinary proceedings. *Superintendent, Mass. Cor. Inst., Walpole v. Hill*, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985). Finally, in conducting our review, we are cognizant that prison officials are afforded broad discretion in prison disciplinary matters. *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003). With these standards in mind, we analyze the issues raised by Swinney on appeal.

### III. Analysis

#### A. *Exhaustion of Administrative Remedies*

"Exhaustion of administrative remedies is a well-settled rule of judicial administration that has long been applied in this state." *Kentucky Ret. Sys. v. Lewis*, 163 S.W.3d 1, 3 (Ky. 2005). "As a general rule, exhaustion of administrative remedies is a jurisdictional prerequisite to seeking judicial relief." *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 625 (Ky. 2001).

The exhaustion requirement for prison inmates is prescribed by Kentucky Revised Statutes (KRS) 454.415. It provides in relevant part:

- 1) No action shall be brought by or on behalf of an inmate, with respect to:
  - (a) An inmate disciplinary proceeding;
  - (b) Challenges to a sentence calculation;
  - (c) Challenges to custody credit; or
  - (d) A conditions-of-confinement issue;until administrative remedies as set forth in the policies and procedures of the Department of Corrections, county jail, or other local or regional correctional facility are exhausted.
- (2) Administrative remedies shall be exhausted even if the remedy the inmate seeks is unavailable.
- (3) The inmate shall attach to any complaint filed documents verifying that administrative remedies have been exhausted.
- (4) A court shall dismiss a civil action brought by an inmate for any of the reasons set out in subsection (1) of this section if the inmate has not exhausted administrative remedies, and may include as part of its order an assessment of court costs against the inmate as the court may deem reasonable and prudent. The correctional facility may enforce this assessment against

the inmate's canteen account and against any other assets of the inmate through any other mechanism provided by law.

*Id.* Compliance with KRS 454.415 requires an inmate to present all issues at the administrative level. *Houston v. Fletcher*, 193 S.W.3d 276, 278 (Ky. App. 2006). Failure to raise an issue at the administrative level precludes judicial review of that issue. *Id.*

We have carefully reviewed Swinney's appeal to the warden, which appears at pages 24-27 of the record. While it contains separately numbered paragraphs, each relates to a single issue: Swinney's contention that KSR officials produced insufficient evidence to convict him. Nowhere in the appeal does Swinney indicate that he requested copies of the photographs or that he was denied the opportunity to call any of the witnesses at the hearing. Thus, we must agree with the circuit court's conclusion that Swinney did not exhaust his administrative remedies regarding access to the photographs and the right to call witnesses. Because these claims were not exhausted at the administrative level, the circuit court was correct to dismiss them.<sup>3</sup>

### ***B. Due Process Claims***

Without a protected liberty or property interest, a prisoner cannot successfully maintain a claim under the Due Process Clause. “Process is not an

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<sup>3</sup> We briefly note that even if these issues had been properly preserved, it seems doubtful they would have given rise to relief as our Supreme Court recently rejected a due process violation involving similar circumstances. *See White v. Boards-Bey*, 426 S.W.3d 569 (Ky. 2014).

end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct.1741, 1748, 75 L.Ed.2d 813 (1983). Thus, the first issue we must decide is whether Swinney asserted a cognizable due process claim.

With respect to constitutional due process protections, the Fourteenth Amendment's Due Process Clause does not protect every change in the conditions of confinement having an impact on a prisoner. *See Meachum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976) (“[T]o hold ... that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.”) Rather, a prisoner is entitled to the protections of the Due Process Clause only when the alleged deprivation imposes an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 2300, 132 L.Ed.2d 418 (1995).

Swinney's disciplinary proceeding resulted in disciplinary segregation and revocation of good-time credits. Standing alone, placement in segregation is not enough to trigger due process protection because such a placement does not impose any atypical or significant hardship on the prisoner. *Id.* However, revocation of earned good-time credits is a different matter. *See Marksberry v. Chandler*, 126 S.W.3d 747, 752 (Ky. App. 2003). Where a state has created a right



to good-time credit that shortens a prison sentence and provides that the credit is revocable only upon an inmate's serious misconduct, he has an interest of “real substance” subject to procedural due process protection. *See Wolff v. McDonnell*, 418 U.S. 539, 556–57, 94 S.Ct. 2963, 2974–75, 41 L.Ed.2d 935 (1974). Here, Swinney's disciplinary proceeding resulted in the revocation of good-time credit. Thus, we have no difficulty concluding that Swinney has alleged an interest protected by the Due Process Clause.

Having concluded that Swinney was entitled to some process under the Due Process Clause, we must next determine how much process he was due under the circumstances. It is well settled 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*, 418 U.S. at 556, 94 S.Ct. at 2975. When a protected liberty or property interest is at stake, a prisoner is entitled to: “(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 factfinder of the evidence relied on and the reasons for the disciplinary action.” *Hill*, 472 U.S. at 454. “The due process requirements set out in *Hill* have been recognized and applied in Kentucky.” *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007).

Nonetheless, unlike in a criminal proceeding, due process does not require that a guilty finding in a prison disciplinary proceeding be supported by

evidence establishing guilt beyond a reasonable doubt or even substantial evidence. Rather, due process dictates simply that in establishing guilt, the disciplinary body must rely on “some evidence” it has determined to be reliable. *Hill*, 472 U.S. at 454–57, 105 S.Ct. at 2773-75.

On appellate review, ascertaining whether the “some evidence” standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. *Hill*, 472 U.S. at 456, 105 S.Ct. at 2774. Rather, the applicable question for the appellate court is simply whether the circuit court correctly determined there to be “some evidence” that the fact-finder reasonably relied upon in determining guilt. *Houston*, 193 S.W.3d at 279. A reviewing court must also determine whether the fact-finder's written findings indicate that he or she *independently* assessed the reliability of the evidence relied upon. *Haney v. Thomas*, 406 S.W.3d 823, 826 (Ky. 2013).

We have carefully reviewed the hearing officer's findings. Those findings indicate that the hearing officer found all the statements of the witnesses and parties to be substantially similar. The hearing officer even remarked that Swinney did not deny the events that took place, including the struggle in the bathroom. Rather, it appears that Swinney only denied whether Officer McCollum was seriously injured. To this end, the hearing officer stated that he so found, based on the photographs he viewed.

Having reviewed the record, we believe that "some evidence" supported Swinney's conviction and that the hearing officer's findings adequately show that he independently reviewed the evidence and adjudged it to be credible. Accordingly, we agree with the circuit court that Swinney failed to state an actionable claim for relief based on procedural due process.

#### **IV. Conclusion**

For the reasons set forth above, we affirm the Oldham Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Swinney, *Pro se*  
Eddyville, Kentucky

BRIEF FOR APPELLEES:

Allison Rene Brown  
Frankfort, Kentucky