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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000238-MR

DANIEL C. STOVALL — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 14-CI-00422

DON BOTTOM, WARDEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Daniel C. Stovall appeals, *pro se*, from an order of the Boyle County Circuit Court denying his petition for a declaration of rights, in which he alleges due process violations in his prison disciplinary proceeding. After a careful review of the record and the applicable law, we affirm.

The parties in this case provide differing accounts of the events. On September 8, 2014, Officer Andrew Mell observed Stovall with an open flame in

the bathroom with another inmate. When Officer Mell approached Stovall, Stovall threw the flaming object in the toilet and flushed it. Officer Mell provided in his report that during the investigation into the incident, Stovall stated that he was given the flaming object by another inmate, but that the wick was extinguished when he received it. As a result of this incident, Stovall was charged with "deliberately or negligently causing a fire," "tampering with physical evidence or hindering an investigation" and "refusing or failing to obey an order" pursuant to CPP[1] 15.2(II)(C)(VI)(3), CPP 15.2(II)(C)(V)(7) and CPP 15.2(II)(C)(III)(2), respectively.

Hearings were held concerning these charges on September 9, 2014. During the hearings, Stovall denied knowledge of the incident, and stated he had no explanation why Officer Mell would identify him as having committed these offenses. The Adjustment Officer ("AO") found Stovall guilty, citing Officer Mell's report and Stovall's statement that he did not know why Officer Mell identified him.

As a result of Stovall's conviction for deliberately or negligently causing a fire, he was sentenced to 90 days of disciplinary segregation, forfeited 180 days of goodtime and put on a 180 day suspension period. As a result of Stovall's conviction for tampering with physical evidence or hindering an investigation, Stovall forfeited 60 days of goodtime. As a result of Stovall's

[1] Kentucky Correctional Policies and Procedures.

conviction for refusing or failing to obey an order, he forfeited 30 days of goodtime and was put on a 180-day suspension period.

Stovall appealed his convictions to Warden Steve Haney on September 14, 2014. Warden Haney denied his appeals on October 10, 2014. Stovall then filed a Petition for Declaration of Rights in Boyle Circuit Court on November 10, 2014.[2] The circuit court dismissed Stovall's petition on January 5, 2015, finding that the record contained "some evidence" sufficient to uphold his conviction. This appeal followed.

Stovall makes three arguments on appeal: 1) he was denied due process because he was not provided with notice of the charges against him twenty-four hours before his hearing; 2) the evidence against him was not sufficient under the evidentiary standard for prison disciplinary proceedings; and 3) the reporting employee unlawfully retaliated against him by filing these disciplinary actions. We affirm.

"Minimal due process is all that is required regarding a person detained in lawful custody." *McMillen v. Kentucky Dep't of Corr.*, 233 S.W.3d 203, 205 (Ky. App. 2007). In order to satisfy this standard, the United States Supreme Court has stated that procedural due process requires: "(1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present

[2] The Court notes that although Warden Haney denied appellant's disciplinary appeals, the petition for declaration of rights, the circuit court's order of dismissal, and the Notice of Appeal all name Warden Don Bottom as the opposing party. The parties (and the circuit court) have not taken issue with this discrepancy. Therefore, we decline to address it any further.

documentary evidence in defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *Superintendent, Mass. Correctional Institution, Walpole v. Hill,* 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985).

These due process requirements are generally met "if some evidence supports the decision by the prison disciplinary board." *Id.,* at 455. Our Supreme Court has noted that the "some evidence" standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of evidence." *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007) (quoting *Walpole*, 472 U.S. at 455, 105 S.Ct. 2768). Instead, the "relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* (quoting *Walpole*, 472 U.S. at 455–56, 105 S.Ct. 2768).

Stovall first argues that he was denied due process when the AO failed to provide him with sufficient notice of the charges against him. Specifically, he argues that he was not sufficiently advised of the category of the charge against him, because the charge of "deliberately or negligently causing a fire" was listed as a category CPP 15.2(II)(C)(VI)(3) violation when it should have been listed as a category CPP 15.2(II)(C)(VI)(2) violation.[3] He cites the Court to CPP

[3] CPP 15.2(II)(C)(VI)(2) is the provision for "negligently or deliberately causing a fire" and CPP 15.2(II)(C)(VI)(3) is the provision for "possession or promoting of dangerous contraband."

Appellant's disciplinary report states that "[i]t is to be noted, that per CPP 15.2, this charge should in fact be a category 6-03 as it is listed in the KOMS system, however this is a known KOMS error and is not a due process violation."

15.6(II)(B)(1)(F) in order to argue that the AO was prohibited from amending his charge. CPP 15.6(II)(B)(1)(F) provides as follows:

> Prior to the hearing, if it appears that the charge is not proper, the Chairperson or Adjustment Officer may send the disciplinary report back to an investigator for a more appropriate charge. If during the hearing, the Adjustment Committee or Adjustment Officer determines that the charge is inappropriate, the report may be returned to the investigator but the committee or Adjustment Officer shall not participate in a subsequent re-hearing. This procedure is in addition to amending the charge within the same category or a lower category; whichever is more appropriate.

First, we note that a review of the record reveals nothing to suggest that Stovall raised this argument during the administrative process, and "[t]he failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of the agency's action." *O'Dea v. Clark*, 883 S.W.2d 888, 892 (Ky. App. 1994). Because Stovall failed to raise this argument in an administrative proceeding, he has waived it on appeal.

The record also indicates that Stovall has also affirmatively waived this argument. In *Yates v. Fletcher*, the appellant had checked a box indicating that he waived 24-hour notice requirement. 120 S.W.3d 728, 729 (Ky. App. 2003). He argued that he did not actually waive the notice requirement, and that in the alternative inmates may not legally waive the notice requirement. *Id.* at 729-30. We held, based on a review of the record and applicable case law, that "[j]ust as

the prisoner has a right to the 24-hour notice, he also has the right to waive this right." *Id.* at 730.

Yates is controlling on this issue here. Stovall's disciplinary report form states that he waived the 24-hour notice of the charges against him.[4] As the United States Supreme Court has stated, "[t]he focal point for [this] judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)). This argument, therefore, was also waived affirmatively.

Even if Stovall had not waived this issue, however, we cannot say that the alleged error on the AO's behalf would amount to a due process violation. Our Supreme Court has recently held that:

> Prison regulations, even those which include mandatory language such as "shall," do not automatically confer on the prisoner an added procedural due process protection. This Court refuses to render a prison official's failure to comply with the DOC's own regulations as a per se denial of procedural due process. To do so would be to expand the protections outlined in *Wolff* to include the extensive procedural requirements set forth in the CPP and other countless prison regulations and policies, a deviation from which would render that divergence a violation of a prisoner's due process rights.

White v. Boards-Bey, 426 S.W.3d 569, 575 (Ky. 2014).

[4] Indeed, the findings by the AO states that "inmate Stovall confirmed on the record that he waived 24-hour notice."

This is not a situation in which Stovall was not given notice that he was to prepare for a different category offense, which would carry an enhanced punishment. Indeed, both CPP 15.2(II)(C)(VI)(2) and CPP 15.2(II)(C)(VI)(3) carry the same penalty, and so we cannot say that Stovall was actually prejudiced by the erroneous listing. As Stovall has waived this argument, and he cannot demonstrate that his due process rights have been violated, he is not entitled to relief in this regard.

Regarding Stovall's claim that the evidence was not sufficient against him, the record indicates that Officer Mell's report stated that he observed Stovall with an open flame in the bathroom, and that Stovall tossed the flame into the toilet when Officer Mell asked Stovall to hand it to him. Though Officer Mell's statement constitutes direct evidence of "tampering with evidence" and "disobeying a direct order," it is only circumstantial evidence of "deliberately or negligently causing a fire."

In *Smith v. O'Dea*, 939 S.W.2d 353 (Ky. App. 1997), an inmate's family visited him in prison, and a small bag of marijuana was found on one of the children visiting him. *Id.* at 355. Smith was charged with the attempted introduction of contraband to the prison. *Id.* We found that "[a]lthough the evidence of Smith's involvement in the attempted smuggling is not compelling, the inference is reasonable that he, at some time, communicated to his daughters a willingness to receive such contraband." *Id.* at 357.

Furthermore, the United States Supreme Court has held that similar circumstantial evidence was sufficient to uphold a disciplinary decision finding an inmate guilty of beating another inmate. *Walpole*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356. In *Walpole*, the only evidence was that the appellant was one of three inmates who had been seen fleeing from an area enclosed by a chain length fence, where a commotion had been heard and which was deserted, except for an inmate who had been beaten. *Id.*, 472 U.S. at 447-48, 105 S. Ct. at 2770. As circumstantial evidence is sufficient to satisfy the "some evidence" standard of review, and the reporting officer testified that Stovall had a burning flame and disposed of it, the evidence in Stovall's case was sufficient to uphold his conviction.

To prove a retaliation claim, a plaintiff must show that "(1) [he] engaged in protected conduct; (2) an adverse action was taken against [him] . . . ; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by [his] protected conduct." *LaFountain v. Harry*, 716 F.3d 944, 948 (6th Cir. 2013) (quoting *Thaddeus–X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc)). Additionally, "while certain threats or deprivations are so de minimis that they do not rise to the level of being constitutional violations, this threshold is intended to weed out only inconsequential actions, and is not a means whereby solely egregious retaliatory acts are allowed to proceed past summary judgment." *Thaddeus–X*, 175 F.3d at 398. "[C]onclusory allegations of retaliatory motive unsupported by material facts

will not be sufficient to state a . . . claim." *Harbin–Bey v. Rutter*, 420 F.3d 571, 580 (6th Cir. 2005) (citation and internal quotation marks omitted).

This issue was apparently presented for the first time in Stovall's administrative appeal to the warden. The record reflects that during Stovall's administrative hearing, he stated that he did not know why Officer Mell would have identified him as committing the actions listed in the report. In fact, Stovall's admission that he had no explanation as to why Officer Mell would have written him up was one of the expressly stated reasons for the AO's finding of guilt. It wasn't until after this finding of guilt that Stovall stated in his administrative appeal that he had previously filed a grievance against Officer Mell.

Regardless, the United States Sixth Circuit Court of Appeals has repeatedly held that "[a] finding of guilt based upon some evidence of a violation of prison rules 'essentially checkmates [a] retaliation claim.'" *Patterson v. Godward*, 505 F. App'x 424, 425 (6th Cir. 2012) (quoting *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994)); *Jackson v. Madery*, 158 F. App'x 656, 662 (6th Cir. 2005); *Clemons v. Cook*, 52 F. App'x 762, 763 (6th Cir. 2002). Because Stovall was found guilty of the charged misconduct by the AO, and because some evidence supported Stovall's conviction, his claim for retaliation must fail.

In sum, we hold that Stovall waived his right to 24-hour notice prior to his hearing both by failing to raise the issue before the administrative body and by affirmatively waiving it. Even if Stovall had not waived the notice requirement, however, we hold that any error in failing to inform an inmate of the name of a

disciplinary violation does not amount to a due process violation, when the penalty of the erroneously charged offense is the same as the penalty for the correct offense. We also hold that the evidence against Stovall was sufficient under the evidentiary standard for prison disciplinary proceedings, even though it was circumstantial evidence. Finally, we hold that Stovall was not entitled to a retaliation claim against the reporting employee because he was adjudged guilty of a rules violation supported by "some evidence."

Because Stovall has failed to demonstrate that his due process rights were violated, the Boyle Circuit Court's order is affirmed.

ALL CONCUR.

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