

NO. 97-CA-1098-MR

JOHN MICHAEL TRUSTY

APPELLANT

V. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 97-CI-121

WALT CHAPLEAU, WARDEN

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, MILLER, and SCHRODER, Judges.

DYCHE, JUDGE. John Michael Trusty (Trusty), acting pro se, appeals from an order of the Oldham Circuit Court entered on April 23, 1997, denying his petition for declaratory judgment brought pursuant to KRS 418.040. We affirm.

Trusty is an inmate at the Kentucky State Reformatory (KSR). In April 1996, prison officials received information from an informant that Trusty was planning to assault Don Green, the director of the prison unit in which Trusty was housed. Trusty was placed in administrative segregation and an investigation was conducted. After the initial investigation, a disciplinary report was filed on May 17, 1996, charging Trusty with violation of Corrections Policies and Procedures (CPP) Category VII 1.A.,

attempt to commit assault on an employee. On May 22, 1996, the Adjustment Committee conducted a hearing at which Trusty testified and denied the charge. Trusty's request to call two witnesses was denied based on relevancy. The Adjustment Committee found Trusty guilty and imposed penalties of 180 days disciplinary segregation and forfeiture of two years nonrestorable good time. Upon internal appeal, Walt Chapleau, the prison warden, affirmed the Adjustment Committee's decision.

On March 17, 1997, Trusty filed a petition for declaratory judgment alleging the disciplinary committee violated due process. On April 14, 1997, Chapleau filed a response to the petition, accompanied by confidential information received during the initial investigation, and a motion to have the confidential documents kept under seal subject to in camera review by the court. On April 23, 1997, based in part on its review of the confidential information, the circuit court denied the motion for declaratory judgment effectively dismissing the action. This appeal followed.

Trusty contends that the disciplinary action violated procedural due process on the following grounds: 1) he was denied ample access to a legal aide to prepare for the disciplinary hearing; 2) he was refused the right to present two witnesses before the Adjustment Committee at the disciplinary hearing; 3) he was not allowed to personally confront and question the confidential informants; 4) the Adjustment Committee failed to make findings on the reliability of the confidential

informants; and 5) the Adjustment Committee's decision was not based on sufficient reliable evidence. Trusty alleges the disciplinary action was retaliation for a grievance he filed challenging the denial of his request for a transfer from KSR. He alleges the confidential information relied on by the Adjustment Committee was uncorroborated hearsay.

A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle whereby inmates may seek review of their disputes with the Corrections Department, whenever habeas corpus proceedings are inappropriate. Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977); Graham v. O'Dea, Ky. App., 876 S.W.2d 621 (1994). While technically original actions, inmate declaratory judgment petitions share many of the attributes of appeals. They invoke the circuit court's authority to act as a court of review utilizing the administrative record. The circuit court's role is not to form its own judgment, but to insure that the administrative body's judgment comports with due process and the legal restrictions applicable to it. American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n., Ky., 379 S.W.2d 450 (1964); Smith v. O'Dea, Ky. App., 939 S.W.2d 353 (1997). Thus, the circuit court's determinations in these cases are usually strictly matters of law, as in the case at bar, which we review de novo. City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964).

In Wolff v. McDonnell, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the Supreme Court held that the due process clause protects an inmate's liberty interest in good-time credits. While not subject to a full range of procedural safeguards, inmates are entitled to certain minimum requirements of procedural due process including advanced written notice of the disciplinary charges, a written statement by the fact finders of the evidence relied upon and the reasons for the disciplinary actions, and an impartial decision-making tribunal. Wolff, 418 U.S. at 563-567, 94 S. Ct. at 2978-2982; see also Hewitt v. Helms, 459 U. S. 460, 465 n.3, 103 S. Ct. 864, 868 n.3, 41 L. Ed. 2d 935 (1983). The Court also held that an inmate should be allowed the opportunity to call witnesses and to present documentary evidence, subject to restrictions within the prison officials' discretion based on institutional safety and correctional goals. Wolff, 418 U.S. at 566, 94 S. Ct. at 2979. Prison officials are allowed even greater discretion in not permitting confrontation and cross-examination of persons furnishing evidence against the inmate. Id. at 566, 94 S. Ct. at 2979-80.

While the Court in Wolff outlined certain minimal procedures required by due process before revocation of an inmate's good time credit, in Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), the Supreme Court articulated the quantum of evidence required to support a decision in a prison disciplinary proceeding. The Court held that the

revocation of good-time credits must be supported by "some evidence in the record" in order to comport with the minimum requirements of due process. Id. at 454, 105 S. Ct. at 2773. Accord Smith v. O'Dea, supra.

Trusty's first argument involves the lack of access to a legal aide. In Wolff, the Court recognized that the procedural due process protections are necessarily more limited in the context of the prison setting. 418 U.S. at 556, 94 S. Ct. at 2974 ("[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"). It noted that disciplinary hearings involve confrontation between inmates and prison authorities, and often also involve other inmates who furnish evidence of offenses. 418 U.S. at 562, 94 S. Ct. at 2978. Thus, disciplinary procedures must balance the rights of inmates against the prison official's need to advance rehabilitative goals and internal security. The Court in Wolff indicated that an inmate is not entitled to aid from prison authorities or assistance from a legal aide unless the inmate is illiterate or the disciplinary issue is so complex "it is unlikely the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case." 418 U.S. at 570, 94 S. Ct. at 2982. The numerous filings in the record attest to Trusty's literacy, and the issues involved were not so complex that Trusty's alleged restricted access to legal assistance amounted to a constitutional violation. Trusty's

reliance on Baxter v. Palmigiano, 425 U.S. 314, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) is misplaced because the Court in that case in fact relied on the ruling in Wolff that inmates are not entitled to representation by counsel in disciplinary hearings. See also Freitas v. Auger, 837 F.2d 806, 812 n.13 (8th Cir. 1988) (holding that inmate was not entitled to have a lawyer or legal aide present his case to the disciplinary committee).

Trusty's second argument concerns the denial of his request to call inmates Mike Taylor and John Thompson as witnesses at the disciplinary hearing. During the disciplinary hearing, Trusty described the testimony he intended to elicit from the prospective witnesses. He stated that Mike Taylor was a good friend who would testify about Trusty's character. Trusty indicated that John Thompson could testify to receiving the grievance appellant filed against Don Green on April 15, 1996. The Adjustment Committee denied the request based on relevancy.

In Ponte v. Real, 471 U.S. 496, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985), the Supreme Court held that due process did not require the disciplinary committee to state in writing at the time of the hearing its reasons for refusing to allow the inmate to call a witness. The Court reiterated the holding in Wolff that prison officials may limit an inmate's right to call witnesses when it would otherwise be unduly hazardous to institutional safety or correctional goals. 471 U.S. at 499, 105 S. Ct. at 2197 (citing Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935 (1974)). In addition, the

Court stated that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority. . . ." Id. (quoting Wolff, 418 U. S. at 566, 94 S. Ct. at 2979). Prison officials may exclude witnesses because of irrelevance, lack of necessity or the hazards presented in a particular case. Wolff, 418 U.S. at 566, 94 S. Ct. at 2980.

In the case at bar, the Adjustment Committee provided a contemporaneous record at the hearing for its reasons for denying Trusty's witnesses. The committee chairman indicated that Trusty's request to call Taylor was denied because he was only a character witness, and the request to call Johnson was denied because he had no relevant information on the charges. At the hearing, Trusty was allowed to describe the substance of and purpose for these witnesses' testimony. The Adjustment Committee did not abuse its discretion or violate due process in denying Trusty's request to call these witnesses.

Trusty's next three arguments, which involve the Adjustment Committee's use of confidential information and Trusty's inability to question the informants, are closely intertwined. Generally, the Court in Wolff stated that an inmate's right to confront his accuser and cross-examine witnesses may be circumscribed within the sound discretion of prison officials. 418 U.S. at 568-69, 94 S. Ct. at 2981. Subsequent cases have clearly recognized the legitimate use of

confidential information and limited access to the identity of confidential informants in prison disciplinary actions. See, e.g., Stanford v. Parker, Ky. App., 949 S.W.2d 616 (1996). For instance, in Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988), the court stated that inmates have no absolute due process right to information possibly exposing the identity of a confidential informant because of the legitimate need to prevent retaliation. Id. at 278-79. See also Gilhaus v. Wilson, Ky. App., 734 S.W.2d 808, 810 (1987). However, the court recognized a need for the disciplinary committee to make an independent assessment of the reliability of the confidential informant. But see Russell v. Scully, 15 F.3d 219, 223 (2d Cir. 1993) (stating there is no clearly established due process right to independent assessment of informant's credibility by hearing officer). The court in Hensley stated:

We hold that prison disciplinary committees are obligated to assess the reliability of inmate informants upon whose testimony they rely to deprive inmates of good time credits. A contemporaneous written record must be made of the evidence relied upon. If, because of efforts to protect informant anonymity, the evidence in support of disciplinary action supplied to the inmate fails to meet the constitutional minimum of "some evidence," more detailed evidence, sufficient to meet constitutional standards, must be placed in a non-public record.

850 F.2d at 283. See also Freitas v. Auger, 837 F.2d 806 (8th Cir. 1988) (subsequent in camera review of confidential information before disciplinary committee revealing indicia of reliability of informants was sufficient for due process). The

court in Hensley indicated that although the disciplinary committee need not make contemporaneous explicit written findings on the reliability of informants with accompanying reasons, this would be beneficial. In Gilhaus, supra at 810, the court held that the disciplinary committee "need only include some reference to verification" of the trustworthiness of confidential informants.

In the instant case, the Adjustment Committee found Trusty guilty based primarily on confidential information evidenced by documents accompanying the report of an investigative officer. The Adjustment Committee also noted in the disciplinary hearing report that Trusty's testimony contained a factual inconsistency. The circuit court conducted an in camera review of the confidential information considered by the Adjustment Committee. The trial court found no due process violation and held the findings of the Adjustment Committee were supported by sufficient evidence. This Court also has reviewed the confidential information filed under seal and we believe it contains adequate indicia of reliability. Our review of the disciplinary committee's determination of the reliability of informants is deferential. Taylor v. Wallace, 931 F.2d 698, 701 (10th Cir. 1991); Mendoza v. Miller, 779 F.2d 1287, 1293 (7th Cir. 1985), cert. denied, 476 U.S. 1142, 106 S. Ct. 2251, 90 L. Ed. 2d 697 (1986). The confidential information includes statements from several individuals containing internal consistencies and factual details about the plan to assault Don

Green on which the disciplinary charges were based. In addition, the disciplinary hearing report states that the Adjustment Committee considered confidential information received from no less than two and no more than seven witnesses deemed reliable during the investigation of the incident. Although abbreviated, this statement is sufficient reference to verification under Gilhaus. In conclusion, the record contains sufficient reliable evidence to support the "some evidence" standard of Superintendent v. Hill, supra.

For the foregoing reasons, we affirm the order of the Oldham Circuit Court.

ALL CONCUR.

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