

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-000508-MR

DONNIE GAMBREL

APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT  
HONORABLE SAMUEL C. LONG, JUDGE  
ACTION NO. 00-CI-00183

GEORGE MILLION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, HUDDLESTON, JUDGES.

BARBER, JUDGE: Donnie Gambrel appeals from an order of the Morgan Circuit Court dismissing his petition for declaratory judgment. Gambrel, a prison inmate at the Eastern Kentucky Correctional Complex, filed the petition in the Morgan Circuit Court against George Million, the Warden at Eastern Kentucky Correctional Complex, and Carl Smith, whose relevance to the case is not disclosed by the record.<sup>1</sup> Having reviewed the record and the arguments of the parties, we conclude that the trial court properly dismissed Gambrel's petition.

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<sup>1</sup>Smith was not named as an appellee in Gambrel's notice of appeal.

This case involves two prison disciplinary write-ups. The first write-up resulted from a random drug test administered on March 4, 2000. Following laboratory testing, Gambrel's urine test came back positive for opiates and hydrocodone. As a result, Gambrel was charged with the unauthorized use of drugs or intoxicants.

The second incident occurred at approximately 11:30 a.m. on March 6, 2000. During visitation, Gambrel's female visitor was seen taking something from her shirt and placing it into a cup. Gambrel was then observed taking the cup, drinking from it, and then chewing the object which had been placed in the cup. Subsequently, Gambrel was glassy eyed and failed a sobriety test, being unable to walk heel-to-toe. In addition, his speech pattern was slurred and he could not count backwards correctly. As a result of this incident, Gambrel was charged with promoting dangerous contraband.

On March 21, 2000, the penitentiary's Adjustment Committee heard the two cases and found Gambrel guilty of both charges. Gambrel was punished with 45 days of disciplinary segregation and 60 days forfeiture of good time for the unauthorized use of drugs charge, and 90 days disciplinary segregation and 180 days forfeiture of good time for the promoting dangerous contraband charge. Gambrel's appeal to the Warden was unsuccessful.

On July 31, 2000, pursuant to KRS<sup>2</sup> 418.040, Gambrel filed a petition for declaration of rights in Morgan Circuit

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<sup>2</sup> Kentucky Revised Statutes.

Court alleging that there was insufficient evidence to support his conviction of promoting dangerous contraband, and that the chain-of-custody in the urine test supporting his conviction for unauthorized use of drugs was flawed. The Department of Corrections responded on behalf of the defendants and filed a motion to dismiss. On September 19, 2000, the circuit court entered an order dismissing Gibson's petition for declaratory judgment. This appeal followed.

It is well-established that "a prison inmate facing administrative disciplinary proceedings does not have the same procedural safeguards as does a person facing criminal prosecution or even parole revocation. . . ." Byerly v. Ashley, Ky. App., 825 S.W.2d 286, 288 (1991). See also Gilhaus v. Wilson, Ky. App., 734 S.W.2d 808, 809 (1987). Nevertheless, "fundamental fairness dictates that the evidence relied upon to punish him at least be reliable." Byerly, 825 S.W.2d at 288. In cases, as here, involving the administrative revocation of good time, the minimum requirements of procedural due process are (1) advanced 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 defense; and (3) a written statement by the fact finder of the evidence relied upon and the reasons for the disciplinary action Wolff v. McDonnell, 418 U.S. 539, 563-567, 94 S.Ct. 2963, 2978-2982, 41 L.Ed.2d 935 (1974). Furthermore a disciplinary decision may not be disturbed on appeal if "some evidence supports the decision by the prison disciplinary board

to revoke good time credits." Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). Kentucky courts have recognized and followed these requirements. Stanford v. Parker, Ky. App., 949 S.W.2d 616, 617 (1996); Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 357 (1997).

First, Gambrel contends that there was insufficient evidence to support his conviction in the second incident, the charge of promoting dangerous contraband. Gambrel alleges that it was never specified what he swallowed; that a urine test which was administered following the visiting room incident showed less of a concentration of hydrocodone than the test administered on March 4, 2000; and that if he was believed to be intoxicated, the proper charge for the incident should have been for unauthorized use of drugs. We are persuaded that there is sufficient evidence in the record to sustain Gambrel's conviction.

The disciplinary report reflects that, in finding Gambrel guilty, the Adjustment Committee relied upon the statements and occurrence reports of corrections officer Tammie Williams, who witnessed the incident via security camera, and Sgt. Neace, who reviewed the incident on video tape. Officer Neace's occurrence report described the incident as follows:

On 3-6-00 at 11:30 a.m. Officer T. Williams was observing Resident Donnie Gambrel 131359 of 7-DL-1. At this time his wife Barbara J. Gambrel . . . reached in her shirt and got an unknown item and put it in a paper cup. B. Gambrel then poured soda into the cup and pushed it over to D. Gambrel. D. Gambrel then picked the cup up and drank the entire contents. Then he began to chew the item and swallow. He seemed to have trouble so he

poured more soda and drank it. Then appeared to be relieved. At approx. 11:45, I, Sgt. Neace, terminated the visit and escorted D. Gambrel to the Medical Unit where he was placed in a holding cell. B. Gambrel was escorted out of the visiting room by C.O.T. Williams. This incident was taped on VHS.

The Adjustment Committee report also indicates that it relied upon the report from the Medical Unit. The report concerns a medical examination of Gambrel administered shortly after the visiting room incident. The Medical Unit report, while in part illegible, stated that Gambrel's eyes were red and glassy; that in counting backwards from 20 to zero he missed the number 10; and that he could not walk heel to toe. In addition, a urine test was administered, which produced a positive result. The foregoing reflects an abundance of evidence that after ingesting the object his wife placed in the cup, Gambrel was under the influence of drugs, a dangerous contraband.

The statements of the officers and the medical report are sufficient evidence, i.e., "some evidence," to support the determination of the Adjustment Committee that Gambrel was guilty of promoting dangerous contraband.

Gambrel also contends that the chain-of-custody for the March 4, 2000, urine test was not properly completed and, therefore, the integrity of the sample was compromised and the test was unreliable evidence. Specifically, Gambrel alleges two problems - first, that when the lab specimen was placed in the hands of the courier, the courier did not sign the form but, rather, the notation "courier" was entered in the applicable

space, and, second, that there is no chain of custody sheet disclosing what occurred at the lab.

At the time Gambrel's urine sample was taken, the Department of Corrections' Policy and Procedure 15.8(VI)(c), regulating chain of custody, provided as follows:

1. A Chain of Custody form shall be properly filled out by the staff who collected the urine sample.
2. Each time the sample is released, the person releasing the sample shall legibly sign, not initial, the Chain of Custody indicating date and time of release.
3. Each time the sample is received, the person receiving the sample shall:
  - a. sign the Chain of Custody;
  - b. indicate date and time of receipt; and
  - c. whether or not the seal is intact.
4. Each time the sample is received or released from an inanimate object including a locked security box, mail pouch or mail room, the form shall be signed on behalf of the object below the name of the object.
5. An institution that utilizes any outside delivery agent to deliver a urine sample to the laboratory shall ensure that the sample is released to the delivery agent by signature of staff packaging the sample.
6. The laboratory personnel conducting the testing shall sign and date the Chain of Custody certifying:
  - a. that the seal is intact; and
  - b. that the name and number on or in the specimen bottle matches the name and number on the Chain of Custody form.

Gambrel relies upon Byerly v. Ashley, Ky. App., 825 S.W.2d 286 (1991), where this Court reversed a disciplinary action against an inmate because the chain-of-custody procedure failed to meet due process requirements. In Byerly, this Court

stated that the chain-of-custody "is for the purpose of establishing that the sample tested is the same as that taken from a particular individual and that, at the time it is tested, the sample is in the same condition as when taken free of tampering." Id. At 287. In that case, the chain-of-custody procedure was followed "only as far as showing the sample being delivered by a correctional officer to the laboratory courier. No one at the laboratory made an entry on the form indicating who or how many handled the specimen there." Id. The Court in Byerly also noted that the form completed by the laboratory failed to state whether the package and the seals were intact upon receipt.

The present case is distinguishable from Byerly. The chain of custody form discloses that the sample was collected from Gambrel on March 4, 2000. Gambrel signed an acknowledgment that "the specimen container(s) was/were sealed with tamper-proof seal(s) in my presence." The specimen identification on the form is 5179295-0. The form is signed as first being received by the person who collected the specimen, Dewayne A. Nickell. Next, the form indicates the specimen as being released by Nickell on March 4, 2000, and being received by the courier for the purpose of sending the specimen to the lab for testing. Rather than a signature occupying the applicable space, the term "courier" is entered.

The form then shows that the specimen was received and signed for by R. Bowling of LabCorp, the laboratory which performed the actual drug screening tests, on March 7, 2000. The

form has boxes to be completed by the lab stating "Pouch intact upon receipt?" and "Seals intact upon receipt?" Both boxes are checked "yes." Finally, the actual LabCorp drug screening report is included in the record. The report is shown as being for specimen number 5179295-0, and as having been prepared by Dr. Ronald J. Elin.

The procedure used herein was approved in Byerly, where this Court stated:

We would have no problem in this case if the laboratory had filled out its own form to at least indicate who received the sample, that the specimen seal was then intact, and who had handled the specimen through the time it was tested. This is hardly a burdensome procedure, as even the laboratory would seem to agree in light of its own forms. Such a simple procedure would obviate any reasonable probability of tampering from the time the sample leaves correctional authorities until it is received by the laboratory, while at the same time establishing the integrity and identity of the specimen actually tested. Id. at 288.

Since a LabCorp employee signed for the specimen on March 7, 2000, and the form was completed to indicate that the package and the seals were intact upon receipt, we believe the "fundamental fairness" requirement of Byerly has been met since the evidence relied upon to punish Gambrel has every indication of being reliable. The entry of the term "courier" in the applicable box rather than the actual signature is not, we conclude, fatal to the chain-of-custody requirements.

Since Gambrel has not identified any facts justifying a finding that the evidence relied upon to punish him was unreliable, or that his due process rights were otherwise



violated, the order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donnie Gambrel, pro se  
Eastern Kentucky Correctional  
Complex  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

John T. Damron  
Justice Cabinet  
Department of Corrections  
Frankfort, Kentucky