RENDERED: August 1, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000670-MR

DAVID TAYLOR APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 01-CI-00169

GEORGE MILLION AND
LIEUTENANT JOHN UNDERWOOD APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

TACKETT, JUDGE: David Taylor appeals from an order of the Morgan Circuit Court dismissing his petition for declaration of rights brought pursuant to Kentucky Revised Statute (KRS) 418.040 involving the imposition of disciplinary penalties for the violation of the prison regulation prohibiting sexual assault. We affirm.

David Taylor and C.W. were inmates at the Eastern Kentucky Correctional Complex in West Liberty, Kentucky. On June 19, 2001, the prison internal affairs office received information from a confidential source that C.W. had been physically assaulted and raped by Taylor two days earlier on the morning of June 17, 2001. Upon investigation, C.W. made a statement to the prison officials that when he brought cigarette papers to Taylor at his cell, Taylor pulled C.W. into his cell, grabbed him by the throat, and told him that if he screamed he would kill him. Taylor allegedly then proceeded to have anal sex with C.W. During the investigation of the alleged incident, Taylor told prison personnel that he and C.W. were lovers but he denied raping C.W.

On July 9, 2001, Taylor was given an incident report entitled Disciplinary Report Form — Write up and Investigation, which recounted the above alleged facts, stated the confidential information was deemed reliable, and charged Taylor with violation of the Corrections Policies and Procedures (CPP) 15.2, Category VII Item 3, sexual assault, a major violation. He was then placed in administrative segregation. Taylor initially asked for staff counsel to assist him but when problems developed between them, an inmate legal aid was assigned to assist Taylor. The report notes that the confidential

information was being forwarded to the disciplinary adjustment officer.

On July 19, 2001, a hearing was held before an Adjustment Officer. Taylor was present and assisted by an inmate legal aide. Taylor called seven witnesses, two of whom stated they knew nothing of the incident, and two stated they had no comment or testimony to offer. J. McCoy, an inmate witness, testified that C.W. had told him that he (C.W.) was tired of having sex with Taylor. Taylor denied having sexually assaulted C.W., but he admitted having had sex with C.W. on 10-12 prior occasions and stated that they had had consensual sex on the morning of June 17. Taylor challenged C.W.'s credibility based in large part on the two-day delay between the date of the incident and the date it was reported to prison authorities.

After the hearing, the Adjustment Officer found Taylor guilty of sexual assault based on the disciplinary report, McCoy's testimony, Taylor's admission of sexual conduct with C.W., and the confidential information, which he deemed reliable. The Adjustment Officer imposed a penalty of 365 days in disciplinary segregation and non-restorable forfeiture of 1,080 days of good time. Upon administrative appeal, the prison warden concurred with the decision of the Adjustment Officer.

On October 29, 2001, Taylor filed a petition for declaration of rights assailing the disciplinary action on due

process grounds involving the administrative procedure, the disciplinary reports, and the handling of the confidential information. On November 21, 2001, the Department of Corrections filed a combined response and motion to dismiss denying any constitutional violations. It submitted an affidavit from the Adjustment Officer in support of its motion. On November 27, 2001, the trial court entered an order granting the motion to dismiss the petition and rejecting Taylor's constitutional claims. This appeal followed.

On appeal, Taylor raises numerous challenges to the disciplinary proceeding based on 14th Amendment constitutional due process grounds. First, he contends that he was not provided sufficient assistance because he only had five minutes to consult with his inmate legal aide prior to the disciplinary hearing. At the beginning of the hearing, Taylor stated that he was satisfied with having an inmate legal aide to assist him and did not mention inadequate access for consultation. Although the legal aide requested a continuance, which was denied, his basis for the request was to interview additional witnesses. Taylor's appeal to the prison warden did not mention the consultation issue. "The 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, Ky. App., 883 S.W.2d 888, 892 (1994) (citing

Personnel Board v. Heck, Ky. App., 725 S.W.2d 13 (1986)). Taylor's failure to raise this issue in the prison disciplinary proceedings constitutes a waiver preventing judicial review of that issue. See O'Dea v. Clark, supra (involving failure to raise issue of chain of custody for urine sample in prison disciplinary action).

Taylor's primary complaints concern the use of confidential information in the disciplinary proceedings. First, he argues that he was improperly denied a summary of any documents related to the statements by confidential informants. Second, he contends the prison authorities failed to properly account for the reliability of the confidential sources.

In Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974), the United States Supreme Court recognized that "[p]rison discipline proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Moreover, given security concerns in the prison setting, an inmate's right to confront his accuser and cross-examine witnesses may be circumscribed within the sound discretion of prison officials. Id. at 568-69, 94 S.Ct. at 2981. While the Court in Wolff dealt with procedural requirements, 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 substantive quantum of evidence required to support a decision in a prison disciplinary proceeding. It held that disciplinary action negatively impacting a protected liberty interest must be supported by "some evidence in the records" in order to comport with the minimum requirements of due process. Id. at 454, 105 S.Ct. at 2773. "Ascertaining whether this standard is satisfied does not require [a reviewing court's] examination of the entire record, independent assessment of the credibility of witnesses or weighing the evidence. Instead the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." Id. at 455-56, 105 S.Ct. at 2774.

Case law has 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); Gilhaus v. Wilson, Ky. App., 734 S.W.2d 808 (1987); Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001). 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. See, e.g., Hensley v. Wilson, 850 F.2d 269, 278-79 (6th Cir. 1988); Wells v. Israel, 854 F.2d 995, 998-99 (7th Cir. 1988); Stanford, supra. Thus a disciplinary committee may consider confidential information even though the

inmate has not been permitted access to it. However, testimony of confidential informants cannot be given any weight unless there has been a determination that the informant was reliable. See Brown v. Smith, 828 F.2d 1493, 1495 (10th Cir. 1987); Taylor v. Wallace, 931 F.2d 698, 701 (10th Cir. 1991); Williams v. Fountain, 77 F.3d 372, 375 (11th Cir. 1996). The majority of courts hold that due process requires the disciplinary committee to make an independent assessment and to document the reliability of confidential informants upon whose testimony it relies. See Hensley, supra; Taylor, supra; Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995); Freitas v. Auger, 837 F.2d 806 (8th Cir. 1988). A major purpose for the requirement that the disciplinary committee document its assessment of the reliability of confidential sources is to enable meaningful appellate review of prison disciplinary proceedings. Williams, 77 F.3d at 375; Kyle v. Hanberry, 677 F.2d 1386, 1390-91 (11th Cir. 1982).

The federal courts have held there is no single mandatory method for determining the reliability of a confidential informant in a prison setting. See Taylor, supra; Freitas, supra; Mendoza v. Miller, 779 F.2d 1287 (7th Cir. 1985). Generally, where an inmate is disciplined solely or primarily on the basis of confidential information, there must be sufficient information in the record to convince a reviewing authority that

the disciplinary committee undertook an independent inquiry and correctly concluded that the confidential information was credible and reliable. Id.; McKinney v. Meese, 831 F.2d 728 (7th Cir. 1987); Broussard v. Johnson, 253 F.3d 874 (5th Cir. 2001).

On the other hand, some cases have recognized that where there is sufficient evidentiary basis under the "some evidence standard" independent of the information from confidential sources to support the disciplinary action, there is no due process violation.

> When there is other evidence supporting the disciplinary decision, due process is satisfied "without determining the reliability of the confidential informant" or the institutional reasons for nondisclosure. Any other rule would violate the core principle that the some evidence standard "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence."

Espinoza v. Peterson, 283 F.3d 949, 952 (8th Cir. 2002)(internal citations omitted), cert. denied, ___ U.S. ___, 123 S.Ct. 277, 154 L.Ed.2d 119 (2002). See also Turner v. Caspari, 38 F.3d 388 (8th Cir. 1994); Williams, supra.

In the current case, the Adjustment Officer relied in part on confidential information. The incident report states that the confidential information was forwarded to the Adjustment Officer. The hearing report indicates that the

Adjustment Officer did conduct an independent analysis of the confidential information and found it reliable. Unfortunately, the record before the circuit court and this Court does not contain any of the documents related to the confidential information.[1] The better practice would have been for the Department of Corrections to submit these documents to the circuit court for in camera appellate review with their response and motion to dismiss given Taylor's complaints concerning the use of confidential information in the disciplinary proceeding. Nevertheless, we believe Taylor's petition was properly dismissed even though our review would have benefited from inclusion of those documents in the record.

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[1] CPP 9.18 sets out the procedures for dealing with confidential informants. All confidential information presented to the Adjustment Committee should be in writing and the identity of the informant revealed to at least the chairperson. CPP 9.18, Section VI (A)(4) and (5). The reliability of the confidential informant should be determined by the Adjustment Committee and clearly specified. CPP 9.18, Section VI (A)(6). The hearing report should include a summary of the informant's statements, a statement for finding the confidential information reliable, and identify the specific information relied upon. CPP 9.18, Section VI (A)(7). If the chairperson determines that placing the above-mentioned information in the hearing report may reveal the identity of the informant, a separate confidential report should be prepared containing a copy of the confidential informant's statements and a statement identifying the information relied on by the committee "available to appropriate staff for purposes of later administrative or judicial review." CPP 9.18 Section VI (A)(8). The current appellate record does not contain the identity of or the specific information received from the confidential source.

Taylor’s argument that he did not receive a summary of the confidential informant’s statements is without merit. Prison officials have discretion in providing confidential information to an inmate. During the disciplinary hearing, the Adjustment Officer told Taylor that he would be limited to the information contained in the incident report. The incident report included a detailed description of the incident sufficient for him to prepare a defense. We cannot say the prison authorities abused their discretion on this issue.

Taylor’s challenge to the disciplinary action based on the handling of the confidential information is also unavailing. In addition to the confidential information, the Adjustment Officer listed several other evidentiary items for his decision including the investigation report, Taylor’s statement that he had had sexual contact with C.W. at the time in question, and the testimony of J. McCoy that C.W. stated he was tired of having sex with Taylor. The Adjustment Officer also had C.W.’s statement describing the assault as reflected in the incident report. Taylor attacked C.W.’s credibility primarily based on the two-day delay in his reporting the sexual assault to prison authorities. In reviewing prison disciplinary decisions, the weighing of evidence and assessment of credibility is left to the hearing officers. Although not extensive, there is enough evidence to support the Adjustment Officer’s decision under the

"some evidence" standard regardless of the confidential information. Thus, Taylor has not shown he was deprived of due process.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

David Taylor, Pro Se
Eddyville, Kentucky

NO BRIEF FOR APPELLEE