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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002521-MR

HENRY BROKAW APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
CIVIL ACTION NO. 02-CI-00165

GEORGE MILLION and
KENTUCKY DEPARTMENT of CORRECTIONS APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: PAISLEY and TACKETT, Judges; HUDDLESTON, Senior Judge.[1]

HUDDLESTON, Senior Judge: Henry Brokaw appeals from a Morgan Circuit Court order dismissing his petition for a declaratory judgment. Brokaw argued in the petition that he was denied due process of law when a prison disciplinary committee "unlawfully

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[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

extended" his period of imprisonment based on scientifically unreliable evidence —— the results of a Duquenois-Levine Reagent test.[2]

Brokaw is an inmate at the Eastern Kentucky Correctional Complex. On December 20, 1999, Brokaw was charged with "possession or promoting of dangerous contraband" after a

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[2] Chemically the Duquenois test is the principal test for tetrahydrocannabinol, the hallucinogenic constituent of marijuana. The test procedure involves the application of Duquenois' reagent to an extract of the sample, or directly to the sample . . . if the treated reagent is placed with chloroform and the purple coloration is absorbed into the chloroform, most chemists can state with certainty that marijuana is present. People v. Escalera, 143 Misc.2d 779, 783, 541 N.Y.S.2d 707, 709 (N.Y. Crim. Ct. 1989)(citation omitted).

Allegedly, the principal shortcoming of the test as modified for field use is that it can give "false negatives." Id., 143 Misc.2d at 783, 541 N.Y.W.2d at 710.

According to Brokaw, this test "was abandoned or dis[re]garded by the Drug Enforcement Agency (DEA) due to its unreliability" as documented in "Michael Smitha v. Michael O'Day, Morgan Circuit Court, Civil Action No. 94-CI-00032," and, therefore, both the Department of Corrections and Million were placed on notice regarding its unreliability. As observed by Million, the case to which Brokaw was presumably referring is Smith v. O'Dea, Ky. App., 939 S.W.2d 353 (1997). Contrary to Brokaw's assertion, however, Smith, does not stand for the proposition that Duquenois-Levine test results do not constitute sufficient evidence to support the decision of a prison disciplinary committee. In that case, we held that "the 'some evidence' standard of review provides courts with a sufficient check upon adjustment committee fact-finding." Id. at 358.

search of his prison cell led to the discovery of thirteen small bags of marijuana.[3] Brokaw admitted owning the bags in question.

On January 4, 2000, the EKCC adjustment committee conducted a hearing on the matter at which Brokaw pled guilty to possession of dangerous contraband. Based on Brokaw's plea and the facts as set forth in the disciplinary report form, the committee found him guilty as charged, assigned him to ninety days' disciplinary segregation and ordered the forfeiture of 180 days of "good time." Brokaw appealed[4] the committee's decision to the warden (Million) who concurred with the committee on January 20, 2000. In denying Brokaw's appeal, Million found "no due process violations" and emphasized that Brokaw had acknowledged ownership of the marijuana both initially and during the investigation.

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[3] As attested to by the reporting officer on the disciplinary report form, a Duquenois-Levine Reagent test was performed in front of both Brokaw and his cellmate with a fellow officer acting as a witness. The test, performed on one of the confiscated bags, was positive for marijuana.

[4] As the sole basis for his appeal, Brokaw argued that the committee "erred and abused its discretion when it arbitrarily found [Brokaw] guilty of said charges violating his due process rights." In so doing, he emphasized that the disciplinary report did not identify the person doing the testing of the marijuana, but did reveal that there was more than one officer involved in the incident. Thus, the "committee assumed that C/O Havens #489 did the testing without any evidence stating this fact" in violation of CPP 9.8, V.E.2.b. which mandates that items considered contraband "shall be hand delivered by the employee confiscating such property . . . ."

On July 5, 2002, more than two years after the denial of his appeal to Million, Brokaw initiated the instant action against Million and the Department of Corrections. In response, Million argued that Brokaw's cause of action had to be filed within one year pursuant to Kentucky Revised Statutes (KRS) 413.140(1)(a) and, therefore, was time-barred. In the alternative, Million contended that Brokaw waived his right to challenge the committee's decision by pleading guilty and, beyond that, Brokaw "received due process, although he was deprived of no protected interest."

Apparently in anticipation of the instant litigation, Brokaw sought to have his appeal to Million reconsidered. In a memorandum dated May 8, 2002, Million denied Brokaw's "reconsideration appeal," concluding as follows: "You submitted a timely appeal within the appropriate timeframe and it was reviewed. Your due process rights were protected and you have provided no new information, which would alter my decision."[5] On September 19, 2002, the circuit court denied Brokaw's petition for declaratory judgment, implicitly rejecting his argument regarding the reliability of the Duquenois-Levine Reagent test. Brokaw now appeals from the denial of his

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[5] As correctly observed by Million, the Kentucky Corrections Policies and Procedures do not provide for multiple appeals from disciplinary decisions. See Policy Number 15.6.

petition for declaratory relief, echoing the arguments he made below.

We begin by clarifying the nature of the proceedings below. An "appeal" to the circuit court from any agency or tribunal other than the district court is an original action and not an "appeal."[6] Although technically original actions, however, inmate petitions closely resemble appeals.[7] Such an action invokes the circuit court's authority to act as a court of review.[8] "The 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."[9] Thus, "the need for independent judicial factfinding is greatly reduced" and is required "only if the administrative record does not permit meaningful review."[10] Our function in reviewing the decision of a prison disciplinary committee is to determine whether "some evidence" of record supports its findings.[11]

However, a guilty plea at the institutional level serves as a waiver of the right to challenge the outcome of a

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[6] Sarver v. County of Allen, Ky., 582 S.W.2d 40, 43 (1979).

[7] Smith, supra, n. 2, at 355.

[8] Id.

[9] Id. (citation omitted).

[10] Id. at 356.

[11] Id.

prison disciplinary proceeding in circuit court.[12] Such is the case here. By pleading guilty to the charge of possessing dangerous contraband at his hearing before the adjustment committee, Brokaw waived his right to challenge its decision in the circuit court. Therefore, we do not reach the merits of his petition. Given our resolution of the waiver issue, further discussion regarding the timeliness of Brokaw's declaratory judgment motion is unnecessary.

Brokaw did not raise the sole issue on appeal, whether the Duquenois-Levine Reagent test is sufficiently reliable for the results to constitute "some evidence" in support of the committee's decision, before the adjustment committee or in his initial appeal to Million. "The failure to raise an issue before an administrative body [the adjustment committee] precludes a litigant [Brokaw] from asserting that issue in an action for judicial review of the agency's action."[13] Accordingly, had Brokaw not waived his right to appeal the decision of the committee by pleading guilty, we would be precluded from addressing his argument on the merits on that basis.

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12 O'Dea v. Clark, Ky. App., 883 S.W.2d 888, 891 (1994).

13 Id. at 892.

The order denying Brokaw's petition for declaratory judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Henry Brokaw, pro se
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Rebecca Baylous
Department of Corrections
Frankfort, Kentucky