

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002091-MR

GREGORY CHAPA

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 03-CI-00115

C.O. TABOR

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, Chief Judge; BUCKINGHAM and TACKETT, Judges.

COMBS, CHIEF JUDGE. Gregory Chapa, acting *pro se*, appeals from an order of the Lyon Circuit Court of July 29, 2003, which dismissed his petition for a declaration of rights brought pursuant to KRS¹ 418.040. We affirm.

Chapa is an inmate at the Kentucky State Penitentiary (KSP) in Eddyville. According to a disciplinary report, KSP Correctional Officer Steven Tabor witnessed Chapa attempting to throw a burning piece of rolled paper (otherwise known as a

¹ Kentucky Revised Statutes.

"wick") from his cell. Officer Tabor grabbed the wick and extinguished it. An initial investigation revealed that Chapa denied throwing anything from his cell and claimed that Officer Tabor "got the wrong cell." Contradictory testimony in the later investigative report provided various and conflicting accounts of the incident.

On December 15, 2002, Chapa was charged with a violation of 501 KAR² 6:020, CPP³ 15.2, Category VI, Item 3 -- deliberately causing a fire. He pleaded not guilty. He did not waive twenty-four hour notice of the Adjustment Committee hearing, his presence at the hearing, or the right to be heard by the Adjustment Committee. Although he did not indicate the names of witnesses that he wished to call, he was also assigned a legal aide inmate. Hearings were held on December 23, 2002, and on January 8, 2003, and the record indicates that no oral testimony was requested.

On January 8, 2003, the Adjustment Committee reached a determination of guilt, finding as follows:

We find Mr. Chapel (sic) guilty (sic) based on facts stated by Officer Tabor that Chapel (sic) had the wick in the door track and threw it out on walk when Officer Tabor bent down to pick it up.

² Kentucky Administrative Regulation.

³ Corrections Policy and Procedure.

The Committee sentenced Chapa to ninety-days' disciplinary segregation and re-imposed a punishment which previously had been suspended of fifteen-days' disciplinary segregation. The two terms were to run consecutively for a total of 105 days.

Chapa appealed the Committee's decision to the warden, arguing that because inmate Crawford's statement contradicted the report of Officer Tabor, Tabor's statement was perforce false. On January 14, 2003, the warden affirmed the decision of the Adjustment Committee.

On June 10, 2003, Chapa filed a petition for declaration of rights alleging that the Adjustment Committee had violated his right to due process. He named as parties Officer Tabor, Investigator Parker, all members of the Adjustment Committee, and the warden.

Chapa alleged five violations of due process: 1) the failure of Officer Tabor to state or to verify facts in the disciplinary report as required by the CPP; 2) the failure of the report to be investigated in accordance with the CPP; 3) the failure of the Adjustment Committee to properly consider an inmate statement that so contradicted Officer Tabor's statement as to invalidate it; 4) the denial of Chapa's request to question Officer Tabor and the failure of the Adjustment Committee to follow the CPP in not providing a written reason for denial of this request; and 5) the failure of the warden to

dismiss the charges based on the enumerated procedural errors. Chapa sought expungement of the report, conviction and sentence; punitive and compensatory damages; trial by jury; and an evidentiary hearing.

On July 23, 2003, the Department of Corrections filed its response, denying that Chapa's allegations rose to the level of a due-process violation. On July 29, 2003, the circuit court dismissed the action, finding that due process had not been implicated by the imposition of solitary confinement for the period stated and that the punishment was not an atypical hardship for a maximum security inmate. The court also found that the petition was factually frivolous and without merit, characterizing the filing as form of harassment.⁴ This appeal followed.⁵

On appeal, Chapa raises seven allegations of error. He contends that: 1) the "some evidence" standard of review is unfair when the underlying evidence relied upon is false; 2) the

⁴ During this time period, Chapa filed several motions. A Motion to Compel Discovery was filed July 28, 2003, requesting an answer to his Request for Admissions. Although Chapa indicates in this motion that he filed the Request for Admissions on June 13, 2003, Officer Tabor's Motion for Protective Order, filed August 4, 2003, indicates that no such request was ever received. We note that the record does not contain a copy of this Request for Admissions. On August 4, 2003, several days after entry of the Order of Dismissal, Chapa also filed a Motion to Amend Relief Requested, a Notice to the Court concerning his Request for Admissions, a Motion for Findings of Fact and Conclusions of Law Pursuant to CR 52.01, and a Counter Response to Respondent's Response on Petition for Declaration of Rights.

⁵ Chapa's petition for declaration of rights named C.O. Tabor, Sgt. Parker, Sgt. Beaver, U.A. Fletcher, Warden Haeberlin, and Lt. Lane as Respondents. Chapa named only C.O. Tabor in his Notice of Appeal even though Chapa styled the Notice of Appeal "Gregory Chapa v. C.O. Tabor et. al."

charge was not properly investigated in accordance with CPP standards; 3) Officer Tabor's failure to answer a request for admissions deprived Chapa of an adequate opportunity to discover evidence in support of his case; 4) a penalty of disciplinary segregation amounts to a loss of a liberty interest that is on a par with a loss of good time; 5) disciplinary segregation amounts to an atypical and significant hardship causing potential collateral consequences (e.g., as to parole eligibility); 6) the circuit court did not properly consider Chapa's arguments because of its bias arising from a complaint filed against it by Chapa with the Judicial Conduct Commission; and 7) the inability to call Officer Tabor as a witness at the hearing. The Department of Corrections (the real party in interest) gave notice to this Court that it would not file a brief in this matter and instead relied on the response that it had filed in the circuit court.

An inmate alleging a due process violation bears the burden of showing that some type of arbitrary governmental action resulted in the deprivation of a protected liberty or property interest. *Williams v. Bass*, 63 F.3d 483 (6th Cir. 1995). Chapa has failed to satisfy this burden.

Chapa's first argument is not preserved for review. In asserting a due process violation, he argues that the "some evidence" standard cannot be substantiated by a false statement.

He reasons that Officer Tabor's statement must be false solely because it was contradicted by an inmate witness. Although he attacks Tabor's veracity and credibility on appeal, he failed to bring this specific issue before the circuit court.⁶ The filing of an inmate's petition for a declaration of rights in a circuit court casts that court in an appellate role of reviewing the administrative action of the disciplinary committee. *Smith v. O'Dea*, Ky. App., 939 S.W.2d 353 (1997). Failure to present an issue to the circuit court in the petition fails to preserve the issue for our review on subsequent appeal. *Marksberry v. Chandler*, Ky. App., 126 S.W.3d 747, 753-754 (2004); *Goben v. Parker*, Ky. App., 88 S.W.3d 432, 433 (2002).

Even if we were to review this unpreserved allegation of error, we would find it to be without merit. The "some evidence" standard was adequately met in this case. In the particular context of prison disciplinary hearings, the Due Process Clause of the Fourteenth Amendment to the United States Constitution is satisfied when "some evidence" of record supports the findings of guilt by a prison adjustment committee. *Superintendent v. Hill*, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356, 365 (1985). See also *Smith*, *supra* at 358.

⁶ Chapa did make a markedly similar argument to the circuit court in his "Counter Response to Respondent's Response on Petition for Declaration of Rights," but this argument was filed six days after the circuit court had entered its order of dismissal.

Chapa cites *Morrison v. LeFeure*, 592 F.Supp. 1052 (D.C.N.Y. 1984) in support of this argument. However, in *Morrison*, the inmate had no opportunity for a hearing prior to implementation of the penalty and was deprived of any opportunity to present evidence of blatant fabrication by the correctional officers. On the contrary, Chapa was afforded the opportunity for a hearing and did in fact present evidence to contradict that of the correctional officer. While Officer Tabor's statement was disputed by Chapa, the Adjustment Committee as sole evaluator of the evidence elected to believe Tabor's version of the incident. Therefore, "some evidence" exists in the record to support the committee's decision. We find no denial of due process and no error as to this issue.

Chapa next contends that the charge was not properly investigated in accordance with the standards of CPP. However, his argument on this point merely re-hashes the inmate testimony contradicting Officer Tabor's statement and again castigates the committee for electing to believe one version of the facts over another. We do not agree that the committee's findings were insufficient solely because conflicting evidence was presented. The committee acted properly within its discretion and issued appropriate findings based upon "some evidence" as it was entitled to do. We find no error.

Chapa's third argument alleges a due process violation because his Request for Admissions to Officer Tabor was not answered. However, this issue was not presented in a timely fashion to the circuit court. Therefore, it has not been preserved for our review. *Goben, supra*. Parenthetically, we note that a circuit court reviewing a prison disciplinary action is only required to review the action that was taken. No additional pleadings are either required or permitted. No new discovery may be conducted. No findings of fact are even permitted. *O'Dea, supra*, at 355. We find no due process violation in the properly circumscribed scope of review undertaken by the circuit court.

Chapa's next three arguments are also unpreserved. He raises claims that he did not allege in his petition: 1) that a penalty of disciplinary segregation amounts to a loss of a liberty interest in the same manner as loss of good time; 2) that disciplinary segregation amounts to an atypical and significant hardship causing potential collateral consequences (again, as to parole eligibility); and 3) that the circuit court did not properly consider Chapa's arguments because of his complaint before the Judicial Conduct Commission.

Regardless of the preservation problem (*Goben, supra*; *Marksberry, supra*), the substance of each argument is lacking in merit. *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293,

2300, 132 L.Ed.2d 418 (1995), holds that in challenging a punishment, an inmate must establish that the condition "imposes atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." Chapa has not alleged nor demonstrated that the conditions which he experienced were more onerous, harsh, or restrictive than those normally entailed in disciplinary segregation. Additionally, numerous cases have failed to find "atypical and significant hardship" in periods far exceeding the 105 days served by Chapa -- with harsher conditions than those imposed under the CPP. *See, e.g., Griffin v. Vaughn*, 112 F.3d 703 (3rd Cir. 1997) (15 months in administrative segregation); *Smith v. Mensinger*, 293 F.3d 641 (3d Cir. 2002) (7 months in disciplinary segregation); *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997) (6 months in administrative segregation); *Jones v. Baker*, 155 F.3d 810 (6th Cir. 1998) (30 months in investigative administrative segregation). *See also Marksberry, supra.*

As to the potentially harmful impact on parole eligibility resulting from the disciplinary segregation, Chapa has merely alluded to a "possibility." In addressing a similar argument, the *Sandin* Court found no due process violation, holding that "(t)he chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause." *Id.*, 515 U.S.

at 487, 115 S.Ct. at 2302. His argument of potential bias as to his official complaint about the circuit court is equally speculative and attenuated. Therefore, we find no error.

Finally, Chapa asserts a due process violation based on his inability to cross-examine Officer Tabor at the Adjustment Committee hearing. However, the record refutes this claim. Chapa asserts that he made a request to cross-examine Officer Tabor twenty-four hours before the hearing. The Disciplinary Report Form, Part II - Hearing/Appeal, reflects that no oral testimony was requested. This document was signed by Chapa's legal aide with a notation that Chapa was unable to sign due to restraints. Pursuant to CPP 15.6 C.5.b., failure to identify witnesses not less than twenty-four hours prior to the initial hearing constitutes a waiver. Therefore, this claim has no merit.

The order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory Chapa, *pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

No Brief filed