RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001713-MR

GARY THURMAN — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 02-CI-00187

CAROLINE MUDD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: Appellant Gary Thurman, an inmate at Northpoint Training Center, brings this appeal from the denial of his petition for declaration of rights in the Marion Circuit Court. Appellant alleged below that he was illegally penalized following a prison disciplinary hearing. We affirm because we believe the Marion Circuit Court correctly interpreted the governing administrative rules.

Our standard of review of prison disciplinary actions is whether some evidence supports the decision of the prison

disciplinary body. Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); Smith v. O'Dea, Ky. App., 939 S.W.2d 353 (1997). The facts of this case briefly are as follows:

Appellant was an inmate at the Marion Adjustment Center. Corrections Officer Stephen Epperson was in charge of checking inmate mail. He came across a letter from appellant to a person named Travis Wolfe in which appellant made inquiries about purchasing drugs. Corrections Officer Jerry Hayden investigated the incident on May 8, 2002, and as a result charged appellant with using mail to obtain money, goods or services by fraud. This infraction is a Category V, item 8, offense under Corrections Policy and Procedures (CPP). The write-up was "sent back for more appropriate charge" by the Marion Adjustment Committee, however, and investigated a second time on May 11, 2002. The second investigation resulted in a charge of conspiring with another to commit the offense of possession or promoting contraband, a Category VI, item 4, inchoate C offense.

Thurman had a hearing on the latter charge before the Marion Adjustment Committee on May 22, 2002. The Committee reduced the offense to possession of drug paraphernalia, a Category IV, item 22 offense. The Committee found appellant guilty of the amended offense and recommended punishment of 30

days loss of good time credit, suspended for 60 days. Appellant appealed the result to the Warden. Appellee, Warden Caroline Mudd, ordered the case retried.

An additional investigation was conducted by Officer Forrest on or about June 12, 2002, which resulted in the same charge as the second investigation, a Category VI, item 4, inchoate C offense. On June 16, 2002, appellant appeared on the charge before an Adjustment Committee composed of different personnel. The Committee found appellant guilty of a Category VI, item 4, inchoate C offense and penalized him 120 days forfeiture of good time credit. Appellant again appealed to Warden Mudd, who concurred with the Adjustment Committee and denied the appeal.

On July 26, 2002, appellant filed a declaratory judgment action in the Marion Circuit Court alleging that the adjustment decision violated his rights to due process and equal protection of law. The court conducted a hearing on July 1, 2003. The court entered an order on July 25, 2002, and denied appellant the restoration of good time credits. The court found that the warden proceeded properly and that there was evidence to support the conclusion of the administrative tribunal. It is from this decision that appellant appeals.

Appellant alleges that his adjustment decision was unauthorized because the language of Corrections Policy and

Procedure (CPP) 15.6, states that an offense or penalty cannot be raised on a retrial. Appellant specifically refers to subsection (F) of that rule, at 6 (c):

> The warden or his designee shall not during his administrative or appellate review:
>
> (c) order a rehearing on a new charge which carries a higher penalty.

Since appellant received a higher penalty after his appeal, he alleges that the Warden did what is expressly forbidden by that rule.

However, we agree with the trial court's construction of this rule as applied to appellant's case. The court below stated:

> The higher punishment set at the re-trial by the Adjustment Committee is not in violation of CPP 15.6(VI)(F)(6). That provision prohibits the warden from raising the penalty during administrative or appellate review. The higher punishment was the result of a new trial before the Adjustment Committee, not the actions of the warden.

We agree that the CPP provision in question prevents the warden from reviewing a case and instituting a higher charge as a result of the review. But we concur that it establishes no prohibition on the warden to order a new trial *on the same charge*, as was done in this case. CPP 15.6 (VI)(F)(5)(f) states that the warden may "remand the charge for a new hearing before a different Adjustment Committee[.]" CPP 15.6(VI)F)(8) also

gives the warden the "authority at any time to order the disciplinary report to be vacated upon justification and may allow it to be re-investigated or reheard[.]"

The warden's order of a retrial in this case in fact resulted in appellant being retried on the same charge. Because we agree that the warden acted properly under the applicable regulations, we find no error.

For the foregoing reasons, we affirm the order of the Marion Circuit Court which denied appellant's petition for declaration of rights.

ALL CONCUR.

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