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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001625-MR

MICHAEL POUND — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 04-CI-00248

LARRY CHANDLER, WARDEN — APPELLEE

OPINION
AFFIRMING IN PART
AND
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: HENRY, McANULTY AND MINTON, JUDGES.

HENRY, JUDGE: Michael Pound appeals from an order of the Oldham Circuit Court dismissing his declaratory judgment action. On review, we affirm in part, and vacate and remand in part.

On or around February 7, 2004, Terry Wright, an inmate at the Kentucky State Reformatory ("KSR") in LaGrange, Kentucky, was found in possession of a cellular telephone, which is considered "dangerous contraband" under prison rules and not

allowed in the possession of inmates. On or around February 10, 2004, Pound was placed into segregation under suspicion of being the person who owned the cell phone. According to Pound, he was subsequently read his Miranda rights and questioned by Sgt. Richard DeWeese and Capt. Kenneth Martin as to what he knew about the cell phone. However, Pound refused to answer any questions. Further investigation, including a subpoena of the cell phone's records, revealed that Pound was the owner of the phone and that he frequently used it to make calls on prison grounds. The investigation also revealed that Pound had been allowing other inmates to use the cell phone in exchange for tobacco products.

Pound was subsequently subjected to prison disciplinary proceedings on March 12, 2004, and was found guilty by the KSR adjustment committee of the institutional infractions of "hindering an investigation" and "charging another inmate for services." He was assigned to disciplinary segregation for thirty days and forfeited sixty days of "good time" for the former infraction and fifteen days disciplinary segregation for the latter. Pound appealed these findings to KSR warden Larry Chandler, but Chandler concurred with the committee's conclusions based upon the evidence presented during the adjustment committee hearing.

On March 31, 2004, Pound filed a "Petition for Declaration of Rights Pursuant to KRS Chapter 418.040" in the Oldham Circuit Court against Chandler, Bill Searcy (KSR adjustment chairman), Cathy Buck (KSR correctional officer), and Steve Thomas (KSR classification treatment officer). In this petition, Pound sought rulings on whether his due process rights were violated when he was charged for hindering an investigation after invoking his Fifth Amendment right to remain silent, whether his due process rights were violated when he was denied witnesses during the course of his disciplinary proceedings, and whether the evidence produced against him at his disciplinary proceedings was reliable. The petition also sought compensation for mental anguish, attorney's fees, and costs.

On June 29, 2004, the circuit court entered orders denying Pound's motion for an evidentiary hearing and personal appearance, denying his petition for declaratory judgment, and granting a motion to dismiss that was filed by the Appellees on June 21, 2004. Pound apparently was not afforded the opportunity to file a responsive pleading to the motion to dismiss before the orders were issued. On July 9, 2004, Pound filed a motion to reconsider pursuant to CR 12.03, primarily relying on the fact that he was not allowed to tender a response to the Appellees' motion to dismiss before the circuit court

issued its rulings. On this same day, the court entered an order denying said motion. This appeal followed.

Pound's initial two contentions relate to the circuit court's handling of his petition for declaratory judgment. He first argues that he was denied his right to due process when the circuit court granted the Appellees' motion to dismiss his petition for declaratory judgment without allowing him an opportunity to file a responsive pleading. In reviewing the record, we see that the same essential arguments raised by Pound in his response to the motion to dismiss tendered after the circuit court entered its orders were also made in his petition for declaration of rights and in his memorandum of law in support of said petition. We also note that the documents attached as exhibits to the Appellees' motion to dismiss were from the administrative record, and that Pound also relied upon exhibits from that same record in his petition for declaratory judgment. Consequently, there was nothing "new" presented by the Appellees that Pound did not have the opportunity to address. Accordingly, even assuming that the circuit court erred in this respect, we believe that any such error is of a harmless nature and does not constitute grounds for reversal.

Pound next contends that the circuit court erred in denying his motion for a full evidentiary hearing on his petition for declaratory judgment. Under Kentucky law,

challenges to Department of Corrections' disciplinary proceedings are properly made via petitions for declaratory judgment pursuant to KRS 418.040, the mechanism that Pound employed here. Smith v. O'Dea, 939 S.W.2d 353, 355 (Ky.App. 1997), citing Polsgrove v. Kentucky Bureau of Corrections, 559 S.W.2d 736 (Ky. 1977); Graham v. O'Dea, 876 S.W.2d 621 (Ky.App. 1994). "While technically original actions, these inmate petitions share many of the aspects of appeals. They invoke the circuit court's authority to act as a court of review. 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." Id., citing American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n., 379 S.W.2d 450 (Ky. 1964).

With this in mind, the focal point for a court reviewing an administrative decision is the administrative record itself, not some new record made initially in the reviewing court. Id. at 356, citing Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985), in turn citing Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). "The circuit court's fact-finding capacity is required only if the administrative record does not permit meaningful review. Even then, 'the proper course, except in rare circumstances, is to remand to the agency for additional

investigation or explanation.'" Id., citing Florida Power, 470 U.S. at 744, 105 S.Ct. at 1607; American Beauty Homes, supra.

Accordingly, we must reject Pound's contention that the circuit court erred in failing to conduct an evidentiary hearing on his petition. "Its reliance on the agency's record was not only proper but required in its role as reviewer of the administrative decision." Id., citing Florida Power, supra; American Beauty Homes, supra. If we conclude that additional fact-finding is necessary, this matter ultimately must be remanded to the Department of Corrections for additional investigation.

Pound's remaining contentions relate to the disciplinary charges against him and the manner in which the Department of Corrections' disciplinary hearing was conducted. We first note Pound's argument that the Appellees' motion to dismiss should have been treated as one asking for summary judgment. We agree, as our courts have held that motions for summary judgment, in most cases, provide the most appropriate procedure and standards for addressing petitions for declaratory judgment stemming from a prison disciplinary proceeding. Smith, 939 S.W.2d, at 355 n.1. The particular guidelines to be used in reviewing cases such as this one have been set forth as follows:

> Where, as here, principles of administrative law and appellate procedure bear upon the court's decision, the usual summary judgment

> analysis must be qualified. The problem is to reconcile the requirement under the general summary judgment standard to view as favorably to the non-moving party as is reasonably possible the facts and any inferences drawn therefrom, with a reviewing court's duty to acknowledge an agency's discretionary authority, its expertise, and its superior access to evidence. In these circumstances we believe summary judgment for the Corrections Department is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record (including, if submitted, administrators' affidavits describing the context of their acts or decisions), does not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety, and the Department is entitled to judgment as a matter of law. The court must be sensitive to the possibility of prison abuses and not dismiss legitimate petitions merely because of unskilled presentations. Jackson v. Cain, 864 F.2d 1235 (5th Cir.1989). However, it must also be free to respond expeditiously to meritless petitions. By requiring inmates to plead with a fairly high degree of factual specificity and by reading their allegations in light of the full agency record, courts will be better able to perform both aspects of this task.

Id. at 356. We further note that in prison disciplinary proceedings, due process requires that a disciplinary committee's decision to impose sanctions for violations of prison rules must only be supported by "some evidence." Stanford v. Parker, 949 S.W.2d 616, 617 (Ky.App. 1996), citing Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356

(1985). With this general background in mind, we turn to Pound's other contentions.

Pound first raises a general argument that he was unfairly denied the opportunity to question witnesses that he requested be produced at his hearings, specifically Sgt. Deweese, one of the officers who initially questioned him about the cell phone. However, the administrative record with which we have been provided—specifically Pound's "adjustment committee appeal forms"—gives no indication that this particular issue was presented on appeal to KSR warden Larry Chandler after Pound's administrative hearings. The failure to raise an issue before the administrative body precludes an inmate litigant from asserting that issue in an action for judicial review of the agency's action. O'Dea v. Clark, 883 S.W.2d 888, 892 (Ky.App. 1994), citing Personnel Board v. Heck, 725 S.W.2d 13 (Ky.App. 1986). Consequently, we find that this particular argument is not preserved for our review.

We next address Pound's argument regarding the disciplinary action taken against him for charging other inmates for services. He specifically contends that the confidential informant information provided to the committee was unreliable because the inmates giving said information "were looking for away [sic] out of trouble making them less reliable." He further asserts that the "adjustment committee never did

determine the reliability of the confidential information." We disagree with these contentions.

In Gilhaus v. Wilson, 734 S.W.2d 808 (Ky.App. 1987), this court examined the use of confidential information in the prison disciplinary setting and addressed an argument identical to the one Pound makes here. Gilhaus specifically holds that the "verification procedure [for informant information] need not be comprehensive, the committee need only include some reference to verification." Id. at 810, citing Goble v. Wilson, 577 F.Supp. 219, 220 (W.D.Ky. 1983). Here, the adjustment committee found Pound guilty of charging inmates for services based upon statements given by multiple inmates that he was responsible for the cell phone and that he was charging other inmates tobacco products for use of the phone. The incident report containing this information also contains a statement finding the inmates' statements to be reliable because they all gave the same account of the incidents leading up to the disciplinary charge against Pound. Nothing more is required under Gilhaus. Accordingly, we conclude that the adjustment committee satisfactorily examined the reliability of the confidential information in question. We further conclude that there was sufficient evidence to find Pound guilty of charging other inmates for services under the "some evidence" standard followed by our courts.

Pound also offers a vague contention that the trial court erred in not declaring that he had a viable equal protection claim, because some inmates who were questioned about the cell phone received fewer days of segregation time than he did. We have found nothing within the administrative record with which we have been provided to suggest that Pound raised this argument during the administrative process. Again, we note that the failure to raise an issue before the administrative body precludes an inmate litigant from asserting that issue in an action for judicial review of the agency's action. O'Dea, 883 S.W.2d at 892 (Citation omitted). Consequently, we find that this issue is not preserved for review. Even if the issue had been preserved, our "[c]ourts have consistently held that the difference in treatment of incarcerated persons does not constitute a denial of equal protection of the laws, in the absence of a showing of suspect classification." Mahoney v. Carter, 938 S.W.2d 575, 577 (Ky. 1997). As no such showing has been made by Pound here, we see no substantive merit in his equal protection argument.

Pound's next group of arguments revolve around the disciplinary action taken against him for hindering an investigation, specifically, for his refusing to answer any questions posed to him about his knowledge and possible ownership of the cell phone even though the investigating

officers allegedly read his Miranda rights before questioning Pound. In examining this contention, we must first determine whether the 5th Amendment of the U.S. Constitution or Section 11 of the Kentucky Constitution securing the privilege against self-incrimination is applicable to the situation here.[1]

"The privilege has been held to protect a person from being forced to put forth evidence against himself or herself and 'the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'" Welch v. Commonwealth, 149 S.W.3d 407, 410 (Ky. 2004), quoting In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967). "Moreover, the privilege is not limited to criminal proceedings and protects in circumstances where the person's freedom is curtailed." Id., citing Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). Miranda warnings are only required when a custodial interrogation is involved. Id., citing Miranda, supra.

CPP[2] 15.6(VI)(C)(4)(b)(2)(a) sets forth that during the course of an investigator's review of an incident that may constitute a disciplinary infraction, the investigator shall

[1] Kentucky decisions generally hold Section 11 to be coextensive with the Fifth Amendment. See Hourigan v. Commonwealth, 962 S.W.2d 860, 864 (Ky. 1998); Commonwealth v. Cooper, 899 S.W.2d 75, 78 (Ky. 1995); Newman v. Stinson, 489 S.W.2d 826, 829 (Ky. 1972).

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“[g]ive the inmate the Miranda warnings for purposes of criminal prosecution, if criminal charges may be filed.” Here, Pound has alleged that Officers DeWeese and Martin read him his Miranda warnings before they questioned him about the cell phone. If this is indeed the case, it would indicate that Pound was subjected to what could possibly constitute a custodial interrogation by state officials about a crime for which he could be charged. The question then becomes whether invoking his right to remain silent in this situation is something for which Pound could receive an administrative punishment.

The United States Supreme Court specifically held in Miranda that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." Miranda, 384 U.S. at 465 n. 37, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966). To penalize Pound for “hindering an investigation” on the sole grounds that he invoked his right to remain silent would appear to violate this principle, particularly in a situation where he perceived that he faced possible criminal charges. Indeed, the U.S. Supreme Court has held that the 5th Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the

answer might incriminate him in future proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973). To the degree that it suggests otherwise, CPP 15.6 is invalid.

However, the record with which we have been presented is inconclusive as to whether or not Pound was actually read his Miranda rights before being questioned by Officers DeWeese and Martin. The adjustment committee waived the appearance of these officers due to having their statements in the disciplinary reports. We note that these reports say nothing about whether or not they read Pound his Miranda rights before questioning him about the cell phone. Accordingly, the portion of the order of the Oldham Circuit Court which denied Pound relief from the decision of the Kentucky Department of Corrections assessing administrative penalties against Pound for hindering an investigation is vacated, and the matter is remanded to the Oldham Circuit Court with directions that the matter be remanded to the Department of Corrections for further fact-finding as to this issue. See Smith, 939 S.W.2d at 356. If the facts show that Pound's disciplinary charge for hindering an investigation resulted solely from his invoking his Miranda rights when faced with a custodial interrogation that could lead to criminal charges, the charge is impermissible as being violative of the 5th Amendment of the United States Constitution and Section 11 of

the Kentucky Constitution and should therefore be dismissed. The Order and Judgment of the Oldham Circuit Court is affirmed except as stated above.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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