

RENDERED: June 16, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001401-MR

WALLACE STEWART

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 04-CI-00129

RANDY ECKMAN; and
JASON COMBS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND VANMETER, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

VANMETER, JUDGE: Wallace Stewart appeals pro se from an order entered by the Lee Circuit Court granting summary judgment in favor of appellees Randy Eckman and Jason Combs in a prisoner discipline matter. For the reasons stated hereafter, we affirm.

On January 24, 2004, while incarcerated at the Lee Adjustment Center, Stewart was visited by his wife, Benita Stewart (Benita). Benita obtained food items from the vending

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

machines in the visiting area, including a bag of pretzels which she opened and handed to Stewart. Stewart began eating the pretzels, but he then jumped up and ran to the adjacent restroom. He was followed by Corrections Officer Bessie Hughes.

Hughes asserted that she called for backup assistance, and Stewart ran to the restroom, after she saw him remove a black object from the pretzel bag and place it into his pocket. Hughes followed Stewart to the restroom, where he injured her arm as he shut the restroom door against her. By the time Hughes entered the restroom, Stewart was holding his hand in the toilet and was flushing it repeatedly despite being ordered not to do so. Stewart, by contrast, denied either possessing a black object or intentionally shutting the door against Hughes. He claimed that he ran to the restroom because he was choking on a pretzel, and that he was flushing the toilet only because he was leaning against it while trying to regurgitate the pretzel.

Shortly thereafter a black object, identified by Hughes as being the item she observed in Stewart's possession, was retrieved from the sewer system downstream from the visiting area restroom. Examination of the object showed that it consisted of black electrical tape wrapped around 38 pills which the prison medical department identified as Oxycontin. Benita apparently admitted to institutional and local law enforcement officials that she had brought the pills to Stewart, and a

search of her car evidently revealed electrical tape and an Oxycontin prescription bottle. Benita was arrested, and Stewart was placed into disciplinary segregation.

Prison disciplinary proceedings were conducted, and Stewart was convicted of possessing dangerous contraband and physical action against an officer, resulting in disciplinary segregation and the forfeiture of good time. The warden concurred with the adjustment committee's decision. Stewart then sought a declaration of rights by the circuit court, which eventually granted appellees' motion for summary judgment. This appeal followed.

Stewart alleges on appeal that the trial court erred by granting summary judgment for appellees because (1) he was denied proper advance notice of the adjustment committee hearing, (2) the investigation of the alleged incident was not properly conducted, and (3) the evidence was insufficient to support the finding of guilt. We disagree.

Contrary to Stewart's contention, there is no genuine issue of material fact² as to whether he received the minimum advance notice required by various provisions of Kentucky Corrections Policy and Procedure (CPP) 15.6. Those provisions include requirements that at least twenty-four hours before a hearing, an inmate must be provided with a copy of the

² CR 56.03.

disciplinary report,³ and with nonexcluded documents used by the adjustment committee or adjustment officer.⁴ The inmate's choice of legal aide or staff counsel must be identified within twenty-four hours of the inmate's receipt of the completed disciplinary report,⁵ and the inmate must identify any chosen witnesses at least twenty-four hours before the initial hearing.⁶

Here, although Stewart claims that he was denied the advance notice required before his adjustment committee hearing, the record shows that he was given the required notice on January 25, 2004, and that the hearing was scheduled for January 28. The hearing was postponed to January 29, and it then was conducted on February 9, 2004, so that Stewart would have time to obtain legal assistance. Given Stewart's failure to name any witnesses whom he intended to call at the hearing, we are not persuaded by his argument that his notice rights were violated either because he was placed in segregation, or because he was unable to give sufficient notice of the hearing to his witnesses.

We also are not persuaded that there is any genuine issue of material fact relating to the adequacy of the

³ CPP 15.6(VI)C.4.b.(3)(b).

⁴ CPP 15.6(VI)C.4.b.(3)(c)(1).

⁵ CPP 15.6(VI)C.5.a.(1).

⁶ CPP 15.6(VI)C.5.a.(2).

investigation of the incident. Stewart asserts in his brief on appeal that when the disciplinary report was read to him while he was in segregation, he requested

that every person, or at least inmates, present in the visiting room be listed as his witnesses and then interviewed for their opinions as to what they witnessed **relevant** to the alleged incident that Stewart took physical action against Officer Hughes. The investigator listed Stewart's request. However, she wholly failed to contact the visiting room officer on duty the date of the alleged incidents so as to review the log for the purpose of obtaining the names of the inmates present on the date of the alleged incident and then interview them and take their statements. Thus, due to the lack of a proper investigation, Stewart suffered the substantial prejudice of not being [in] the position to offer testimony that he did **not intentionally** slam the restroom door on Officer Hughes arm with the **intent** to cause her **any** amount of injury.

Although the investigation report confirms Stewart's claim that he requested that all "visitation inmates and visitor[s] visiting on 1-24-2004 be called as witnesses," Stewart signed an investigation report on January 25, 2004, stating that he understood that it was his "responsibility to make arrangements for inmate legal aide representation and witnesses" and that he would "notify legal aid[e] of witnesses[.]"⁷ Given Stewart's clear responsibility under CPP 15.6(VI)C.5.a.(2) to identify his

⁷ See CPP 15.6(VI)C.5.a.(2), which requires an inmate to identify selected witnesses, and CPP 15.6(VI)C.5.b., which provides that the failure to identify witnesses "in accordance with this procedure shall constitute a waiver."

own witnesses, coupled with the absence of any evidence to show that he attempted to identify or call any witnesses at the hearing, we cannot say that the trial court erred by failing to grant relief on this ground.

Further, we are not persuaded that the evidence was insufficient to support the findings of Stewart's guilt as to both charges. Regardless of whether different conclusions might have been drawn, the evidence certainly was sufficient to satisfy the "some evidence" standard applicable to prison disciplinary proceedings.⁸

Finally, Stewart asserts that the trial court erred by failing to resolve his petition for a declaration of rights within sixty days of this court's order. We disagree.

Stewart sought declaratory relief from the circuit court in June 2004. On March 9, 2005, a panel of this court directed the circuit court to adjudicate all pending issues within sixty days. On May 4, which was still within the sixty-day period, the circuit court directed that Stewart should be permitted until May 16 to respond to appellees' pending motion for summary judgment. After obtaining an enlargement of time, Stewart responded to the motion on May 19. The trial court then granted appellees' motion for summary judgment five days later, on May 24, 2005.

⁸ See *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985).

Although the trial court obviously did not adjudicate all issues within sixty days of March 9, 2005, the record clearly shows that issues of noncompliance were waived when Stewart sought two different delays so that he would have time to respond to the pending motion for summary judgment. An earlier ruling would have required the trial court to act without considering Stewart's response to the pending motion, which surely was not his intent or desire. Thus, even though the trial court did not adjudicate all issues within the sixty-day period directed by this court's prior order, under these circumstances the delay was a justifiable one which clearly worked to Stewart's benefit and any objections were waived. We conclude, therefore, that Stewart is not entitled to relief on this ground on appeal.

The court's order is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEES:

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