

RENDERED: NOVEMBER 9, 2007; 2:00 P.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2006-CA-002587-ME

CAROLINE MUDD, WARDEN;  
LT. SHAWN GAITHER; STACY TAYLOR;  
JENNIFER PONCE; AND  
MARION ADJUSTMENT CENTER

APPELLANTS

APPEAL FROM MARION CIRCUIT COURT  
v. HONORABLE DOUGLAS M. GEORGE, JUDGE  
ACTION NO. 05-CI-00394

JAMES HUNTER

APPELLEE

OPINION  
REVERSING

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BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

TAYLOR, JUDGE: Caroline Mudd, Warden, Lieutenant Shawn Gaither, Stacy Taylor, Jennifer Ponce and Marion Adjustment Center (collectively referred to as Mudd) bring this appeal from a November 16, 2006, Order of the Marion Circuit Court granting James Hunter's petition for declaration of rights. We reverse.

The facts of this case have been succinctly set forth by the Marion Circuit Court as follows:

1. On May 26, 2005, inmate Russell Hansbrough complained of jaw pain and swelling to Pansy Fair, LPN, in the Marion Adjustment Center Medical Facility. The medical report indicates that he told Fair that he had been hit three times in the face. She reported the injuries to Shift Supervisor David Hill ("Captain Hill").

2. Captain Hill questioned Hansbrough who stated that James Hunter and Bryan Reinhart had attacked him. Investigating Officer Christopher Rakes then completed a Write Up and Investigation Disciplinary Report Form ("Report"), charging Hunter with a Category VII, Item 2 violation of physical action against another inmate resulting in serious injury.

3. Hunter pled [sic] not guilty and waived the twenty-four hour notice. He requested that Recreation Supervisor Jessica Wade, Inmate Edward Lane and Inmate Steven Yates be witnesses at the hearing. They testified at the disciplinary hearing on May 31, 2005. During the hearing, Hunter requested that Hansbrough be called to confirm his statements to Nurse Fair and Inmate Yates that Hansbrough was hit in the face with a softball. Hansbrough was not a witness at the hearing.

4. Administrative Shift Supervisor Lola Cox complied two confidential Incident Statements. Cox forwarded these statements to Adjustment Committee Chairperson Shawn Gaither on May 30, 2005, a day prior to the hearing. The first incident statement indicated that Cox had learned from more than one but less than five confidential sources that Reinhart had assaulted Hansbrough over "Hansbrough spilling some 'hooch.'" The second statement indicated that Cox had learned from more than one but less than five confidential informants that Hunter has assaulted Hansbrough over "hooch" and that these informants were "reliable." The statement also indicated that Inmate "Davis" was hearing on the telephone telling a female that he was "in the hole for supposedly breaking a kid's jaw." "Davis" denied the allegation during the telephone conversation but indicated that he knew that other inmates had been "busted for drugs and the way they got caught was by using the phones." The

two documents were not provided to Hunter before the hearing. Gaither read the statements from Cox. The names of informants are not allowed to be released. The statement showing "Davis" was a typographical error.

5. Recreation Coordinator Jessica Wade supervised a softball game on May 26, 2005[,] in which Hansbrough was struck with a softball. She checked with him and he said he was okay. He did not require any medical attention. She testified at the disciplinary hearing.

6. The Incident Statements in addition to Captain Hill's report and the witnesses' testimony formed the basis of the Adjustment Committee's ruling.

7. The Adjustment Committee found that Hunter was guilty. The Committee's "Findings" on the Disciplinary Report Form indicated that the Committee based its decision on Captain Hill's report and the fact that Yates testified that he did not accompany Hansbrough to the medical facility as Hunter had stated. The ruling does not disclose any information about the confidential statements.

8. Hunter asked the Adjustment Committee to call Hansbrough as a witness. He was not allowed to question Hansbrough because he was a confidential informant. The Adjustment Committee deemed Hansbrough as a reliable informant.

9. Hansbrough was found to be in possession of contraband ("hooch") and his Category VI, Item 4 violation was dismissed.

10. The Adjustment Committee set punishment at two (2) years non-restorable forfeiture of good time credit, one hundred eighty (180) days of segregation and restitution for medical bills of Hansbrough.

11. Hunter appealed to the Warden who denied the appeal on June 24, 2005.

Subsequently, Hunter filed a petition for declaration of rights in the Marion Circuit Court. By a November 16, 2006, order, the circuit court concluded that the Marion Center Adjustment Committee (adjustment committee) violated Hunter's due process rights by refusing to call as a witness the victim, inmate Russell Hansbrough. The court remanded the matter to the adjustment committee with directions to allow Hunter to call Hansbrough as a witness and then to reconsider its decision. This appeal follows.

Mudd contends the circuit court committed error by concluding that the adjustment committee violated Hunter's due process rights by refusing his request to call Hansbrough as a witness. We agree.

It is well-established that a decision in a prison disciplinary hearing will be upheld if there is some evidence to support the findings of the committee. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445 (1985). And, the right to confront and cross-examine witnesses is not implicated in a prison disciplinary hearing. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

In concluding that Hunter's due process rights were violated, the circuit court reasoned as follows:

Committee Chairperson Gaither testified before this Court that Hansbrough did not testify because he was not requested by Hunter as a witness on the Report. This Court finds that even though Hunter should not be allowed to call "the whole yard," he should have been allowed to at least list the accuser as a witness. The need to keep Hansbrough's identity a secret for institutional safety or correctional goals does not apply to Hansbrough. He was the alleged victim and

should not be a confidential informant. He could hardly risk anymore reprisals by testifying at the hearing; therefore the Adjustment Committee cannot deny Hunter's request because the testimony of Hansbrough will not be unduly hazardous to institutional safety or correctional goals.

At the hearing before the circuit court, there was absolutely no evidence that Hunter requested Hansbrough as a witness prior to the disciplinary hearing and that such request was denied by a prison official. Rather, the evidence demonstrated that Hunter first requested Hansbrough to be called as a witness during the disciplinary hearing.

Under Kentucky Correction's Policy and Procedures 15.6 (II)(C)(5), an inmate must identify to the adjustment committee any witness he desires to call not less than twenty-four hours prior to the hearing. Under this rule, the failure to so identify a witness "shall constitute a waiver." As Hunter failed to identify Hansbrough as witness twenty-four hours before the hearing, we are of the opinion that Hunter waived the right to call this witness and that the adjustment committee did not err by refusing to call Hansbrough at the disciplinary hearing.

Moreover, there exists some evidence in the record to support the adjustment committee's finding that Hunter was guilty of physical action against Hansbrough resulting in serious injury. The investigative disciplinary report, completed by Officer Christopher Rakes, constitutes some evidence upon which to base the adjustment committee's finding of guilt. Additionally, we cannot say that Officer Rakes failed to comply with the Correctional Policies and Procedures when investigating whether Hunter was guilty of attacking Hansbrough.

In sum, we are of the opinion that Hunter's due process rights were not violated and that there existed some evidence to support the adjustment committee's finding of guilt. Thus, we hold that the circuit court erroneously remanded this action to the adjustment committee for further proceedings.

For the foregoing reasons, the Order of the Marion Circuit Court is reversed.

ALL CONCUR.

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