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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-002446-MR

LANCE CONN — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 06-CI-00299

JAMES L. MORGAN, WARDEN, AND
AL MCQUEARY — APPELLEES

OPINION
AFFIRMING

*** *** *** ***

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES[1]

BUCKINGHAM, SENIOR JUDGE: Lance Conn appeals from an order of the Boyle Circuit Court that dismissed his petition for declaration of rights involving the imposition of disciplinary penalties for the violation of the prison regulation prohibiting the physical assault of another inmate. More specifically, Conn challenges the use of confidential

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

information from other inmates in the disciplinary action. After reviewing the record, the arguments of the parties, and the law, we affirm.

On May 16, 2005, while Conn was at the Northpoint Training Center, two inmates, Chadwick York and Ernest Nickell, assaulted another inmate, Kenneth Carter. Carter was injured seriously enough that he was transported outside the prison for medical treatment. During the initial investigation of the incident, Corrections Officer Lieutenant Gribbins obtained information from confidential informants that Conn had given York and Nickell gloves and rags that had been used during the assault. In an interview with Sergeant Bryant, Conn admitted giving the gloves and rags to York earlier in the evening before the incident. However, Conn asserted he had no prior knowledge of the two inmates' intent to assault Carter.

Lieutenant Gribbins prepared an incident report entitled Disciplinary Report Form-Writeup and Investigation that indicated Conn had taken the gloves and rags hidden under his shirt to a smoke tunnel and had given them to York. York and Nickell put on the gloves, covered their faces, and then went to the upper left wing of the prison where they assaulted Carter. Gribbins stated in the report that the confidential informants had provided reliable information in the past and that he had submitted a list of the confidential informants to the disciplinary hearing officer. Conn was charged with a major violation of the prison disciplinary regulations, Corrections Policies and Procedures (CPP) Policy Number 15.2, Category VII, Item 2, Physical Action Resulting in the Death or Serious Injury of Another Inmate.

At the disciplinary hearing conducted by Lieutenant Al McQueary acting as the Adjustment Officer, Conn presented several witnesses who said he was with them watching television during the time of the incident. Conn stated that he had given the gloves and rags to York, but he denied knowing anything about the planned assault. Conn maintained that he had borrowed the gloves and rags earlier for working out with the prison weightlifting equipment and had merely returned them to York.

Lieutenant McQueary found Conn guilty of an inchoate violation of the CPP category VII-2 involving aiding the action of others in committing a violation. *See* CPP 15.2(E)(1)(d). The penalty imposed included disciplinary segregation for 180 days, forfeiture of two years non-restorable good time credit, and restoration of medical expenses. Upon administrative appeal, James Morgan, the prison warden, concurred in the Adjustment Officer's decision.

On June 28, 2006, Conn filed a petition for declaration of rights in the Boyle Circuit Court assailing the disciplinary action on due process grounds involving the use of the confidential information in the administrative process. The Justice and Public Safety Cabinet filed a combined response to the petition for declaration of rights and motion to dismiss the action denying any due process violations. Conn also filed a motion requesting an *in camera* review of the confidential information by the circuit court, which was denied. On September 1, 2006, the circuit court entered an order dismissing the petition and rejecting Conn's constitutional claims. This appeal followed.

Conn condemns the use of the confidential information as violating his constitutional right of due process under the Fourteenth Amendment of the U.S. Constitution and Section 2 of the Kentucky Constitution as reflected in case law and the prison disciplinary regulations. He contends that the Adjustment Officer's finding of guilt was arbitrary because he failed to account properly for the reliability of the confidential sources.

In *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974), the U.S. Supreme Court recognized that "prison discipline proceedings are not part of the criminal prosecution, and the full panoply of rights due to a defendant in such proceedings does not apply." Moreover, given security concerns in the prison setting, an inmate's right to confront his accuser and cross-examine witnesses may be circumscribed within the sound discretion of prison officials. *Id.* at 568-69, 94 S.Ct. at 2981.

While the court in *Wolff* dealt with procedural requirements, in *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill,* 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985), the Supreme Court articulated the substantive quantum of evidence required to support a decision in a prison disciplinary proceeding. The Court held that a disciplinary action negatively impacting a protected liberty interest must be supported by "some evidence in the record" in order to comport with the minimum requirements of due process. *Id.* at 454, 105 S.Ct. at 2773. "Ascertaining whether this standard is satisfied does not require [a reviewing court's] examination of the

entire record, independent assessment of the credibility of witnesses or weighing the evidence. Instead the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455-56, 105 S.Ct. at 2774. Kentucky has similarly adopted a "some evidence" standard for judicial review of prison disciplinary proceedings under Section 2 of the Kentucky Constitution. *Smith v. O'Dea,* 939 S.W.2d 353, 358 (Ky.App. 1997); *Webb v. Sharp,* 223 S.W.3d 113, 118 (Ky. 2007).

Case law has clearly recognized the legitimate use of confidential information and limited access to the identity of confidential informants in prison disciplinary actions. *See, e.g., Stanford v. Parker,* 949 S.W.2d 616 (Ky.App. 1996); *Gilhaus v. Wilson,* 734 S.W.2d 808 (Ky.App. 1987); *Gaston v. Coughlin,* 249 F.3d 156 (2nd Cir. 2001). Inmates have no absolute due process right to information possibly exposing the identity of the confidential informant because of the legitimate need to prevent retaliation. *See, e.g.*, *Wells v. Israel,* 854 F.2d 995, 998-99 (7th Cir. 1988); *Stanford, supra.* Thus, a disciplinary committee may consider confidential information even though the inmate has not been permitted access to it. However, testimony of confidential informants cannot be given any weight unless there has been a determination that the informants are reliable. *See Brown v. Smith,* 828 F.2d 1493, 1495 (10th Cir. 1987); *Taylor v. Wallace,* 931 F.2d 698, 701 (10th Cir. 1991); *Williams v. Fountain,* 77 F.3d 372, 375 (11th Cir. 1996).

The federal courts have held that there is no single mandatory method for determining and documenting the reliability of the confidential informant in a prison setting. *Taylor,* 931 F.2d at 698; *Freitas v. Auger*, 837 F.2d 806, 810 n.9 (8th Cir. 1988). Generally, where the disciplinary committee relies on confidential sources, there must be sufficient information *in the record* to convince the reviewing authority that the disciplinary committee undertook an independent inquiry and correctly concluded that the confidential information was credible and reliable. *Taylor,* 931 F.2d at 702; *McKinny v. Meese,* 831 F.2d 728, 731 (7th Cir. 1987); *Ortiz v. McBride,* 380 F.3d 649, 655 (2nd Cir. 2004).

For instance, the Seventh and Ninth Circuits have identified four non-exclusive methods for establishing informant reliability: 1) the oath of the investigating officer as to the truth of his report containing confidential information along with his appearance before the disciplinary committee; 2) corroborating evidence or testimony; 3) a statement on the record by the disciplinary committee of knowledge of the sources of the information and their reliability in prior instances; or 4) *in camera* review of material documenting the investigator's assessment of the reliability of the confidential informant. *See Henderson v. U.S. Parole Commission,* 13 F.3d 1073, 1078 (7th Cir. 1994)(*citing Mendoza v. Miller,* 779 F.2d 1287, 1298 (7th Cir. 1985)); *Zimmerlee v. Keeny,* 831 F.2d 183, 187 (9th Cir. 1987). The Second Circuit has noted several factors relevant to determining the reliability of an informant based on the totality of the circumstances approach, including the informant's motive for giving the information, the specificity of

the information, the reliability of the informant in prior situations, and the degree to which the information is corroborated by other evidence. *See Sira v. Morton,* 380 F.3d 57, 78-79 (2nd Cir. 2004); *Gaston,* 249 F.3d at 163-64.

In *Hensley v. Wilson,* 850 F.2d 269 (6th Cir. 1988), the Sixth Circuit held that in cases where the prisoner is found guilty of misconduct based on evidence consisting entirely or substantially on the statements of a confidential informant, the disciplinary committee could not rely only on the investigator's opinion that the informant was credible and must make an independent assessment of the informant's reliability. The court indicated that due process required the disciplinary committee have "some evidentiary basis . . . upon which to determine for *itself* that the informant's story is probably credible." 850 F.2d at 277. (Emphasis in original). It further stated:

> At a very minimum the investigator must report that a particular informant has proved reliable in specific past instances or that the informant's story has been independently corroborated on specific material points. Such information although skeletal would enable the committee to come to a reasonable conclusion that the informant is reliable and therefore that the story he has related to the investigating officer is likely to be true.

*Id.* The court held that prison authorities must make a contemporaneous record of the evidence that can be made available to a reviewing court. In addition, "[a]lthough due process does not require that the committee's findings and reasonings [on the reliability of the confidential sources] also be recorded contemporaneously, this is a better practice." *Id*. at 283.

Conversely, other courts have recognized that where there is sufficient evidentiary basis under the "some evidence" standard, independent of the information

from confidential sources, to support the disciplinary action, there is no due process violation despite the disciplinary committee's failure to independently assess or make a finding on the informant's reliability.

> However, because the overarching due process concern is whether "some evidence" supports the disciplinary decision, a reviewing court must examine the reason for non-disclosure and the reliability of the confidential informant only in cases where the confidential information is needed to satisfy the some evidence standard . . . . When there is other evidence supporting the disciplinary decision, due process is satisfied "without determining the reliability of the confidential informant" or the institutional reasons for non-disclosure. Any other rule would violate the core principle that the some evidence standard "does not require examination of the entire record, independent assessment of the credibility of the witnesses or weighing of the evidence."

*Espinoza v. Peterson,* 283 F.3d 949, 952 (8th Cir. 2002) (internal citations omitted). *See also Turner v. Caspari,* 38 F.3d 388, 393 (8th Cir. 1994); *Broussard v. Johnson,* 253 F.3d 874, 877 (5th Cir. 2001); *Young v. Jones,* 37 F.3d 1457, 1460 (11th Cir. 1994) (stating that the independent inquiry by the disciplinary committee into the reliability of informants may be diminished or eliminated where there is corroborating evidence of the confidential information).

In the current case, the Adjustment Officer relied in part on information from confidential informants. The Investigation Report states that Conn's role in the incident was determined from circumstantial evidence and information obtained from confidential informants who were deemed reliable in the past. This report indicates that a

list of the confidential informants was submitted to the hearing officer. The Hearing Report states that Conn admitted he had given the gloves to Nickell and York and that other sources provided information that he had hidden the gloves and rags under his shirt and had given them to the other two inmates.

Conn contends that the disciplinary action violates due process because the Adjustment Officer failed to perform an independent assessment or provide a specific reference or statement in the Hearing Report on the reliability of the confidential informants.[2] Unfortunately, this court's review is hampered by the fact that the record on

[2] Conn also maintains that the disciplinary action violated the prison regulations related to the handling of confidential information from informants as set out in CPP 9.18 (effective date February 3, 2006). CPP 9.18 (II) (E) (3) states: "Ordinarily, an Adjustment Committee decision that an inmate committed a prohibited act shall be supported by more than one reliable confidential source, unless the circumstances of the incident and the knowledge possessed by the confidential informant convince the committee that the confidential informant's information is reliable (see Section II, E(6) for establishing reliability of an informant). If there is only one source, the confidential informant information shall be corroborated by independently verified factual evidence linking the inmate charged to the prohibited act." Confidential information generally is to be presented to the committee in writing with a signed statement of the informant or the investigating officer that includes factual information and a description of the manner in which the informant arrived at the knowledge of those facts. CPP 9.18 II (E)(4). The identity of the confidential informant shall be known by at least the committee chairperson and may be revealed to the other members, while the substance of the information shall be available to all of the committee members. CPP 9.18 II (E)(5). "Reliability may be determined by a record of past reliability or by other factors that reasonably convince the Adjustment Committee of the confidential informant's reliability." CPP 9.18 II (E)(6)(a). The investigating officer providing the confidential information shall also provide a written statement describing: 1) the frequency with which the confidential informant has provided information; 2) the time period that the confidential informant has provided information; and 3) the degree of accuracy of the information. CPP 9.18 II (E)(6)(b). If reliability is based on factors other than a history of reliability, the investigating officer shall specify those other factors. CPP 9.18 II (E)(6)(c). The committee hearing report shall identify the specific information relied on for the decision, a summary of the confidential information, and a statement on the rationale for a decision that is supported solely by information given by a single confidential informant. CPP 9.18 II (E)(7)(b), (c), and (d). The committee chairperson shall include in the record of the hearing a statement of the basis for finding the information provided by a confidential informant reliable. CPP 9.18 II (E)(7)(a). If the committee determines that the disclosure of information in the hearing report may reveal the identity of the informant(s), a separate confidential report should be prepared that

appeal contains only the Investigation Report and the Hearing Report. It does not include the audiotape of the hearing or any other documents produced in association with the disciplinary action. Moreover, the circuit court denied Conn's motion for an *in camera* view of the documentation related to the confidential informant information. The better practice would have been for the Department of Corrections to submit these documents to the circuit court for *in camera* appellate review with their response and motion to dismiss given Conn's complaints concerning the use of confidential information in a disciplinary proceeding. Nevertheless, we believe that Conn's petition was properly dismissed.

Although the Adjustment Officer failed to make an explicit reference in the Hearing Report revealing an independent assessment of the reliability of the confidential sources, the record does suggest that the Adjustment Officer was given information on the reliability of the confidential informants and the information they provided.[3] The Hearing Report indicates that the confidential information was corroborated in significant aspects by Conn's admission that he gave the gloves and rags to Nickell and York. An

contains a copy of the confidential informant's statements and a statement identifying the specific information relied on by the committee. CPP 9.18 II (E)(8).

[3] Conn asserts that the disciplinary action violated CPP 9.18 because the hearing report failed to include a statement and make specific findings that show the Adjustment Officer performed an independent assessment of the confidential informants' reliability. The hearing report does include a summary of the confidential information and the specific information relied on for the decision. Since the record on appeal does not include the complete administrative record of the investigation and hearing, we are unable to determine if it contains a more specific statement by the hearing officer on his independent assessment of the reliability of the confidential information. Additionally, because the hearing officer did not rely solely on the information from a single confidential informant, the Hearing Report did not have to include a specific statement on the reliability of the confidential informant. Moreover, the Hearing Report contains findings including Conn's admissions that corroborate the confidential information and provide a rationale for the decision. Thus, Conn has not shown that the disciplinary action Hearing Report did not substantially comply with CPP 9.18.

extensive analysis of the confidential informant's reliability was unnecessary. While a more specific statement would have been preferable, the reference to the corroborating testimony in the disciplinary reports suggests that the Adjustment Officer made an independent assessment of the reliability of the confidential information, which was sufficient for appellate review.

Moreover, there was sufficient evidence independent of the confidential information to support the disciplinary action. The Adjustment Officer found Conn guilty of the inchoate offense of aiding in the assault, rather than direct participation. It is undisputed that the gloves and rags were used in the assault in an attempt to conceal the identity of the assailants. Conn admitted giving the gloves and rags to the other inmates the very night of the incident. While he adamantly contends that he had no prior notice that an assault was planned, that is a question of fact bearing on his credibility. Appellate review of prison disciplinary actions are differential, especially in respect to the assessment of the credibility of witnesses. Conn testified at the disciplinary hearing and had several witnesses testify on his behalf. Although not extensive, there is enough evidence to support the Adjustment Officer's decision under the "some evidence" standard regardless of the confidential information. Accordingly, Conn has not demonstrated that he was deprived of due process.

For the foregoing reasons, we affirm the order of the Boyle Circuit Court.

ALL CONCUR.

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