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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000039-MR

MAURICE SMITH

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 08-CI-00035

CAROLINE MUDD AND
CHRISTOPHER RAKES

APPELLEES

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: FORMTEXT LAMBERT AND VANMETER, JUDGES; HARRIS,
SENIOR JUDGE.

LAMBERT, JUDGE: Maurice Smith, *pro se*, appeals from an order of the Marion Circuit Court, entered November 26, 2008, affirming Smith's conviction by a prison disciplinary committee for inciting a riot (a category 6.1 infraction on the Department of Corrections schedule of offenses). Because the prison disciplinary committee failed to make any written reference to the reliability of the confidential

information used to find Smith guilty of the infraction referenced above, we must vacate the Marion Circuit Court's order and remand this matter for additional proceedings.

On September 25, 2007, Smith was charged with a category 6.1 prison infraction (inciting a riot) resulting from a disturbance which occurred on September 21, 2007. A hearing was held on September 28, 2007, before a prison disciplinary committee.

According to the administrative record, the disciplinary committee was presented with the following facts: On September 21, 2007, Smith was an inmate at the Marion Adjustment Center. On that night, Smith and other inmates in his area were kept locked down longer than usual. This caused the inmates to become agitated. One of the inmates was finally permitted to go to the shower area. Once in the shower area, this inmate encouraged the other inmates to beat on their doors. Several inmates did so and also yelled at the corrections officer assigned to Smith's area. The corrections officer felt threatened by this disturbance and declared a "Code Yellow." Immediate supervisory assistance was dispatched to the area and an investigation ensued.

Investigator Lola Cox testified before the committee and submitted a report. Cox's testimony is not set forth in the record. Cox's report, however, is contained in the record. The report indicates that she interviewed approximately thirty inmates in Smith's area. Most of the inmates admitted that the incident occurred, but stated that they did not know who caused the disturbance. Four of

the inmates stated that they did know who caused the disturbance and each one independently named the same three inmates, one being Smith. When asked how they were able to identify specific inmates, these inmate informants stated that they knew the inmates' voices and that the noise was coming from where those inmates were located. Investigator Cox also noted that other inmates unable to identify who caused the disturbance also named these three inmates as being recently disruptive and disrespectful due to being transferred into a program to which these inmates were resistant.

Smith testified that he did not participate in or cause the disturbance. Smith's cellmate stated the same. The corrections officer who declared the "Code Yellow" testified that he was not sure if Smith was being disruptive. The disciplinary committee concluded that "[b]ased on testimony and information[,] committee believes that [Inmate] Smith is guilty, 6-1 Inchoate D." Smith was sentenced to ninety days in segregation and lost 180 days of good time credit.

Smith appealed to the Warden, Appellee Caroline Mudd, who affirmed the committee's judgment. On January 11, 2008, Smith petitioned the Marion Circuit Court for a declaratory judgment invalidating the prison's actions in this case. *See Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997) ("A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever Habeas Corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department.").

On May 29, 2008, Smith filed a motion for an evidentiary hearing. Thereafter, the record reflects that a hearing was conducted on July 28, 2008. No transcript or video of this hearing is contained in the record. Thereafter, the trial court entered an order on November 26, 2008, affirming the prison's disciplinary actions against Smith. In its order, the trial court found that Smith's participation in the disturbance was based on information provided to Investigator Cox by more than one but less than five confidential informants. According to the trial court, Investigator Cox "deemed these informants reliable based on information provided in the past by them at Marion Adjustment Center and based on information that these inmates had provided in the past while at Lee Adjustment Center." An appeal from this order to this Court now follows.

Smith sets forth two arguments on appeal. First, he claims that he was deprived of due process of law when the prison adjustment committee failed to set forth any indication on the administrative record that it made an independent assessment of the reliability of the information provided by the confidential informants in this case. Second, he argues that the trial court's creation of and reliance upon an alternative record, instead of relying solely on the administrative record, was in error. We agree.

While prisoners are entitled to due process of law pursuant to both the United States and Kentucky constitutions, these rights are greatly diminished in prison disciplinary proceedings. *O'Dea*, 939 S.W.2d at 355. Both federal and

Kentucky due process standards are satisfied if there is “some evidence” on the administrative record to support the prison's disciplinary decision. *Id.* at 356-58.

Due to these diminished standards, prison disciplinary authorities are generally not required to make detailed findings in order to support their decisions. *See Hensley v. Wilson*, 850 F.2d 269, 277 (6th Cir. 1988) (citing *Superintendent v. Hill*, 472 U.S. 445, 455-56, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985)).

However, in cases “when the evidence is only the hearsay repetition of information supplied by otherwise unidentified confidential informants,” due process requires demonstration on the record “that the committee determined for itself, on some reasoned basis, that the informants and their information were reliable.” *Id.*

In *Goble v. Wilson*, 577 F.Supp. 219 (W.D. Ky. 1983), the court held that, at a minimum, prisoners are “entitled to a statement [on the record] that the committee has determined that the informants are trustworthy” *Id.* at 220.

This Court modified the above rule in *Gilhaus v. Wilson*, 734 S.W.2d 808 (Ky. App. 1987), holding that such a statement “need not be comprehensive,” but rather due process can be satisfied so long as “some reference to verification” is made on the record by the disciplinary committee. *Id.* at 810.

In this case, we agree with Smith that the prison disciplinary committee made absolutely no reference whatsoever to any independent assessment of the reliability of the confidential information in this case. In fact, the extent of the adjustment committee’s fact finding was as follows:

I/M Smith pled not guilty. Legal aid is present. I/M Smith stated that he was not beating on the door or screaming. [Smith's cellmate] stated that I/M Smith was not beating on the door or screaming. [The corrections officer assigned to Smith's area] stated that he was not sure if I/M Smith [was] being disruptive. Investigator Cox stated that she concluded that I/M Smith was screaming and beating on his door after [another inmate] encouraged him to do so. Based on testimony and information committee believes that I/M Smith is guilty .

...

The plain inference from the above fact finding is that the committee simply accepted Investigator Cox's conclusion that Smith participated in the disturbance. No further reference is made to the confidential information which led Cox to make this conclusion or to the committee's assessment of this information's reliability. Such a cursory record is not sufficient to satisfy the minimum standards of due process in these types of prison disciplinary proceedings. *See Hensley*, 850 F.2d at 276 (simply accepting investigating officer's conclusion that information is reliable is not sufficient to meet committee's obligations). Rather, because Smith was convicted solely on information provided by confidential informants, it was necessary for the disciplinary committee to provide, at the very least, "some reference" on the record to the committee's independent assessment of the confidential information. *Gilhaus*, 734 S.W.2d at 810.

Appellees argue that additional information is contained in the record from which the committee could have based an assessment of this information's trustworthiness. First, there is a report by Investigator Cox to the committee in

which she details the fact that Smith was independently identified by four confidential informants. Second, this report notes that other inmates additionally identified Smith as being in the area of the disturbance and that he had been recently disruptive and disrespectful. Further, there is information from the hearing conducted by the trial court in which Investigator Cox testified that she had deemed these particular informants reliable based on information provided by them in the past both at Marion Adjustment Center and at Lee Adjustment Center.

Regarding Cox's testimony about past reliable information given by these confidential informants that was elicited during the trial court's hearing on the matter, we agree with Smith that it was error for the trial court to permit or rely on such new information to support its order in this case.¹ As set forth in *O'Dea*, the trial court's role in these types of proceedings is "to act as a court of review." 939 S.W.2d at 355. Thus, making a new record in the trial court for its review of the matter was not the proper course. *Id.* Rather, in cases where "the administrative record does not permit meaningful review, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* (internal quotation and citation omitted).

As for the information set forth in Cox's report which was transmitted to the disciplinary committee for its review, we agree that such information is

¹ Appellees argue in their brief that Smith failed to preserve this argument for review since he is the one who requested the evidentiary hearing at which the trial court accepted this new evidence. Maybe so, but whether the trial court was acting outside its jurisdiction in creating an alternative record, rather than reviewing the record before it, in matters where the court acts as a court of review is a question that can be raised and addressed at any time, even by the court on its own initiative. See *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 47 (Ky. 1996).

likely sufficient to support an independent assessment of reliability or trustworthiness of the information provided by the confidential informants in this case. However, the constitutional flaw here is not the absence of information on the record to support the reliability of the information used to convict Smith, but rather it is the failure of the disciplinary committee to make some reference on the record to indicate that it made an actual independent assessment of the confidential information and its reliability. *Hensley*, 850 F.2d at 276 states:

[U]nless the committee makes an independent determination about what the facts of the alleged misconduct are by deciding, minimally, that the hearsay information has been supplied by a reliable informant, it is merely recording the findings made by the investigating officer who has made a determination about the informant's reliability, without making any determination for itself about the informant's reliability or even the basis for the investigator's opinion that the informant is reliable

Because there is no indication whatsoever on this record that the prison disciplinary committee made an independent assessment of the confidential information used to convict Smith of the infraction in this case, the trial court committed reversible error when it failed to remand this matter to Appellees for said assessment. We, therefore, must vacate the trial court's November 26, 2008, order affirming Appellees' disciplinary proceedings and remand this matter to the trial court with instructions that it remand this case to Appellees for an independent assessment determining the reliability or trustworthiness of the information used against Smith.

HARRIS, SENIOR JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

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