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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002231-MR

WILLIAM DUNCAN — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 08-CI-00107

ROCKY ROBERTS; CHAD KNIGHT;
HARLAN MARTIN; DANIEL CARTER;
AND THOMAS SIMPSON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: William Duncan brings this *pro se* appeal from a November 10, 2008, order of the Lyon Circuit court dismissing his petition for declaration of rights. We affirm.

Appellant was an inmate at Kentucky State Penitentiary in September 2007. Via a prison security camera, appellant was observed receiving a package

from Correctional Officer Timothy Short. Thereupon, appellant was escorted by Correction Officer Brad Driver to the yard office for a strip search. Appellant then pulled a package from his shirt and threw the package to another inmate, Michael Craig. Officer Driver recovered the package. However, appellant lunged at Officer Driver thereby striking him in the arm. Subsequently, the contents of the package proved to be 2.94 ounces of marijuana.

Ultimately, a prison adjustment committee found appellant guilty of possession of promoting dangerous contraband and penalized him with disciplinary segregation as punishment. Also, a prison adjustment committee found appellant guilty of physical action against a prison employee and penalized him 180 days in disciplinary segregation and one-year forfeiture of nonrestorable good-time credit.

Appellant filed a petition for declaration of rights in the Lyon Circuit Court. Therein, appellant argued that his constitutional due process rights were violated and sought restoration of his good-time credit and monetary damages against various prison employees. By order entered November 10, 2008, the circuit court denied appellant relief and dismissed his petition. This appeal follows.

Appellant raises some seven allegations of error:

I. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the prison disciplinary board's refusal to call Internal Affairs Investigator Ray, Officer Cooper, and Lieutenant Shaw as witnesses at the prison disciplinary hearing.

II. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the prison disciplinary board's refusal to call Internal Affairs Investigator Ray, Officer Cooper, and Lieutenant Shaw as witnesses at the prison disciplinary hearing.

III. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the reliability of the field test had not been established prior to the use of the field test results as evidence of guilt.

IV. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the undocumented State Police lab test results referenced at the hearing could not be used to support a decision of guilty.

V. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the veracity of Sergeant Driver and Lieutenant Shaw was so lacking [that] their testimony could not be used to support a decision of guilt.

VI. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the prison disciplinary board retaliated against him.

VII. The trial court erred, to appellant's substantial prejudice when it failed to grant relief on appellant's claim that the written findings of the prison disciplinary board did not meet minimum due process standards.

Appellant's Brief at ii – iv.

It is well settled that a defendant is not entitled to the "full panoply" of due process rights in a prison disciplinary proceeding. *Wolff v. McDonnell*, 418

U.S. 539, 556, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974). Rather, a defendant is merely entitled to the following minimum procedural requirements:

> (a) [W]ritten notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Wolff, 418 U.S. at 559, 945 S. Ct. at 2976 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972)). Moreover, the prison adjustment committee's decision will be upheld upon judicial review if supported by "some evidence." *Webb v. Sharp*, 223 S.W.3d 113 (Ky. 2007).

Having reviewed the record and having considered appellant's allegations of error, we conclude that appellant was afforded the minimum due process procedural requirements and that some evidence supports the committee's decision. In particular, we adopt the circuit court's sound analysis as our holding:

> First, KRS [Kentucky Revised Statutes] 454.405 denies [appellant] compensation in the present case. "No inmate may maintain a civil action for monetary damages in any state court for mental or emotional injury without a prior showing of physical injury." *See* KRS 454.405(5). The record shows that [appellant] did not suffer any physical injury during this period.
>
> Second, [appellant] fails to allege any facts demonstrating a due process violation. Under *Sandlin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d

418 (1995), a confinement to disciplinary segregation must present an "atypical, significant deprivation" that is substantially and fundamentally different than typical conditions of incarceration before an interest implicating the due process rights is at stake. Not every "state action taken for punitive reason encroaches upon a liberty interest under the Due Process Clause. . . ." *Also see Marksberry v. Chandler*, 126 S.W.3d 747 (Ky. App. 2004).

The United States Constitution does not make an inmate's freedom from segregation a protected liberty interest. *Montanye v. Haynes*, 427 U.S. 236, 242 (1976). A prisoner's placement in administrative segregation does not involve a liberty interest protected by the Due Process clause. *Hewitt v. Helms*, 459 U.S. 460, 468, 74 L. Ed. 675, 103 S. Ct. 864 (1983). [Appellant] fails to demonstrate that his segregation assignment constitutes a liberty interest to which constitutional due process protections apply.

Third, in prison disciplinary matters, the Circuit Court is a Court of review only. *Smith v. O'Dea*, 839 S.W.2d 353 (Ky. App. 1997). The Court will review the record to determine whether some evidence supports the disciplinary finding and whether the prisoner received notice of the charges, a reasonable opportunity to be heard, and a brief written explanation of the Adjustment Committee's decision. The Court will not view the evidence of [appellant's] alleged infraction *de novo*, but rather will only review the record as an appeal to determine whether "some evidence" exists to support the Adjustment Committee's decision. *See Webb v. Sharp*, 223 S.W.3d 113 (Ky. 2007).

It is not the Circuit Court's prerogative to substitute its judgment for that of the Adjustment Committee where there is some evidence to support the decision. Prison officials are afforded broad discretion. *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003).

Fourth, the Respondents [Rocky Roberts, Chairman KSP Adjustment Committee, et al.] complied

with due process requirements in the prison disciplinary context under *Wolff v. McDonnell*, 418 U.S. 539, 563-567, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1994) and *Superintendent Mass. Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985). As mentioned previously, the three prong test of *Wolff* requires (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and to present documentary evidence in defense; and (3) a written statement by the factfinder of the evidence relied upon and the reasons for disciplinary actions. The record shows Respondents met the three prong test of *Wolff* and provided due process to [appellant].

In the present case, the only relevant questions are whether [appellant's] rights were violated by not being allowed to question certain officers or to view the video of the incident. As noted by the Respondent, the KSP [Kentucky State Penitentiary] adjustment committee properly denied [appellant's] attempt to confront the reporting officer based on Correctional Policy and Procedure 15.6(D)(2)(g)(2) while remaining consistent with the principles of *Wolff*. In fact, Correctional Policy and Procedure 15.6 goes beyond these principles. The Supreme Court in *Wolff* did not require a committee to state a reason for refusing to allow access to a witness. *Wolff* at 566. Correctional Policy and Procedure 15.6 requires justification, in writing, on an institutional report.

It should be noted, the Supreme Court in the often mentioned *Wolff* stated at page 566-567:

> The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being

> subject to unduly crippling constitutional impediments.
>
> The record reflects that the Kentucky State Penitentiary acted within its discretion while reaching the some evidence standard.

In sum, we are of the opinion that the circuit court properly denied appellant's relief and dismissed his petition for declaratory relief.

For the foregoing reasons, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

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