RENDERED: JANUARY 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000305-MR

TRAVIS HENDRIX — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 09-CI-00129

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,[1] SENIOR JUDGE.

COMBS, JUDGE: Travis Hendrix, an inmate at Western Kentucky Correctional Complex, appeals from an order of the Lyon Circuit Court dismissing his petition for a declaration of rights arising from a prison disciplinary action. After our review, we affirm.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In 2003, Hendrix was indicted for arson for starting a fire with the intent to destroy or damage the home of a bi-racial couple. The arson was prosecuted as a "hate crime" pursuant to Kentucky Revised Statute(s) (KRS) 532.031. Following a jury trial, Hendrix was convicted of second-degree arson. He was sentenced to serve thirteen-years' imprisonment. His judgment of conviction was affirmed on appeal. He is currently serving his sentence at the Western Kentucky Correctional Complex.

On May 20, 2009, Hendrix was charged with violating Kentucky Corrections Policies and Procedures (CPP) 15.2: possession or promoting of dangerous contraband. A disciplinary hearing was held before the prison's Adjustment Committee on June 2, 2009. The evidence presented against Hendrix during the hearing tended to show that he had arranged for the delivery of 28 narcotic pain-reliever capsules (Lortab) and a bottle of vodka to a location along a fence on the prison's farm. Incriminating statements related to the date of delivery and the specific location of the contraband were captured on a recording of Hendrix's telephone conversation with a third party. Following an inspection of the site referenced in the telephone conversation, the contraband was intercepted by prison staff members.

After the contraband had been secured in an evidence locker, Hendrix was given a copy of the disciplinary report that had been prepared against him. Since criminal charges appeared likely, Hendrix also received *Miranda* warnings in accordance with Kentucky Corrections Policies and Procedures (CPP) 15.6. The

pertinent statute upon which CPP 15.6 is premised is KRS 320.050, which prohibits the knowing possession of dangerous contraband within a detention facility. KRS 520.010(1) defines *contraband* as "any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, departmental regulation, or posted institutional rule or order." KRS 520.010(3) defines *dangerous contraband* as:

> contraband which is capable of use to endanger the safety or security of a detention facility or persons therein, including, but not limited to, dangerous instruments as defined in KRS 500.080, any controlled substances, any quantity of alcoholic beverage, and any quantity of marijuana, and saws, files, and similar metal cutting instruments[.]

Hendrix declined to waive his rights and pled not guilty, and a hearing was scheduled. During the Adjustment Committee's hearing and in accordance with the requirements of CPP15.6, Hendrix was advised that his silence could be held against him in the administrative proceeding. Nevertheless, Hendrix elected not to testify.

After considering the evidence against him, the Adjustment Committee determined that Hendrix was guilty of possession or promoting of dangerous contraband. He was assigned to disciplinary segregation for a period of 90 days and was required to forfeit 180 days of good-time credit. On appeal, Warden Pancake concurred with the Adjustment Committee's decision and concluded that Hendrix had received due process.

Hendrix sought judicial review in the Lyon Circuit Court under the provisions of the Declaratory Judgment Act. KRS 418.040 – 418.090. He alleged that prison officials had violated his constitutional rights by imposing punishment without adequate proof of the charge against him. Hendrix challenged the adequacy of the institution's investigation and its decision to use his silence as evidence against him at the disciplinary proceeding. After reviewing the record before it, the circuit court rejected Hendrix's arguments and dismissed the petition. The circuit court concluded that the adjudication was supported by sufficient evidence and that the institution was permitted to consider Hendrix's decision to remain silent in the face of the allegation against him. This appeal followed.

Before us, Hendrix argues that the circuit court erred in dismissing his action since he was punished without due process of law. Hendrix contends that the evidence presented against him during the disciplinary proceedings was unreliable, that the use of his silence against him was unconstitutional, and the tribunal's decision to prohibit him from calling a witness was arbitrary and capricious. We shall address each of these contentions.

Prisoners possess a liberty interest in their statutorily provided good-time credits. *See Wolff v. McDonnell,* 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The government may not deprive a prisoner of those credits without due process. *Id.* However, "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff,* 418 U.S. at 556, 94 S.Ct. 2963; *see also Webb v. Sharp,*

223 S.W2d 113 (Ky.2007). The decision to revoke a prisoner's good-time credits need only be supported by "some evidence" – even if that evidence might be characterized as meager. *Superintendent, Mass. Corr. Inst., Walpole v. Hill,* 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985).

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of 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…. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact.

Id. at 455, 456, 105 S.Ct. 2768. Thus, a decision to revoke good-time credits violates due process if and only if the record is wholly devoid of evidence and provides no support for the decision of a disciplinary board. *Id.* at 457, 105 S.Ct. 2768.

After considering the evidence of the reporting staff member in this case, the Adjustment Committee found that "there is more than some evidence combine[d] with the fact that [inmate] Hendrix wished to remain silent to find [inmate] Hendrix guilty of . . . [p]ossession or promoting of dangerous contraband while conspiring with another to commit the violation." Hendrix, however, contends that the evidence upon which the committee relied was unreliable. He alleges that the "incident date and time" as recorded in the disciplinary report "happened fifteen (15) minutes after the discovery of evidence" and that there was no indication as to how the investigating staff member verified that it was he

(Hendrix) on the telephone making incriminating statements. He argues that the confiscated pills were not reliably identified and that an adequate chain of custody for the pills was not established. Since Hendrix presents an argument only with respect to the last two contentions, we will limit our discussion to an analysis of those issues.

"Although a prison inmate facing administrative disciplinary proceedings does not have the same procedural safeguards as does a person facing criminal prosecution, fundamental fairness dictates that the evidence relied upon to punish him at least be reliable." (Internal citation omitted). *Byerly v. Ashley,* 825 S.W.2d 286, 288 (Ky.App.1991). In *Byerly,* we held that test results from urine samples could be used against an inmate only if a sufficient chain of custody was established as part of the evidentiary foundation. *Id.* at 288. *Byerly* required proof: (1) that the sample tested was the same as that taken from a particular individual and (2) that the sample was in the same condition at the time of the testing as when it was taken. These criteria were deemed by *Byerly* to be critical in insuring the fundamental fairness of the process.

Similarly, in *Webb v. Sharp*, *supra*, the Supreme Court of Kentucky addressed the requirement that a proper evidentiary foundation be laid by a prison's Adjustment Committee. In *Webb*, at issue was a field test used for the detection of marijuana. In order for its results to be used as "some evidence" of an inmate's violation, *Webb* required the evidentiary foundation while simultaneously reciting that "common sense must not be a stranger in the house of the law."

Cantrell v. Kentucky Unemployment Ins. Comm'n, 450 S.W.2d 235, 236-237 (Ky. 1970). The court analyzed the circumstances surrounding the recovery of the suspected marijuana from prison inmates and concluded that "even with the field test results excluded" there was "some evidence" of record to support the administrative finding that the inmates had been in possession of dangerous contraband -- marijuana. *Webb* 223 S.W.3d at 121. The court observed as follows:

> In addition to the officers' impressions as to the nature of the substance recovered, the hearing officer heard evidence as to the way the inmate reacted when the substance was discovered. In each case the inmate attempted to conceal the substance. In all three of the incidents, the inmates went to great lengths to destroy the substance either by flushing it down the toilet or by swallowing it. In fact, in two of the incidents the inmates openly scuffled with the officers in an attempt to prevent the officers from recovering the substance. Finally, in each of the three incidents involving marijuana, the inmates elected not to testify or assert that the substance was not what the officers believed it to be. As a result, the inmates neither denied ownership nor challenged the nature of the substance recovered.

Id. at 120.

In the case before us, the circuit court noted that a member of the prison's nursing staff had identified the pills as "Lortab" based on the description of the capsules' shape, color, and unique imprint. Despite Hendrix's assertions to the contrary, the court observed that the record included a complete chain of custody with respect to the suspected contraband. We conclude that the standard requiring "some evidence" was met.

Reinforcing that standard of "some evidence" are addition facts regarding the recovery of the pills and the bottle of vodka. The prison's investigation indicated that on May 19, 2009, Hendrix placed two telephone calls (separated in time by more than four hours) to an individual identified by staff members as Charity Cullen. Cullen had visited with Hendrix in person on May 17, 2009. In the second call, it was clear that Cullen was reassuring a frustrated Hendrix that indeed "it was there;" she proceeded to identify a specific location. Her words were transcribed as follows:

> the first double post, you know down there on the farm they put the rain gauge, you know, from like the corner of the fence to the first set of double posts where they are close together, they set the rain gauge there.

Based on the telephone conversations, prison staff members were able to precisely locate the bag of pills and bottle of vodka.

The pills were found in a plastic bag – not in their original container. There was no indication that Hendrix had a prescription for any controlled substance. The vodka would not have been permitted on the premises under any circumstance. The content of the telephone conversations directly linked Hendrix to the intercepted contraband. Finally, Hendrix elected not to testify. He did not deny that he had arranged for the delivery of the contraband; nor did he claim that the items were not what the investigating staff members had concluded them to be.

We now address Hendrix's contention that he was unfairly made to choose between his constitutional right to remain silent and the necessity of

defending himself under circumstances where his silence could – and likely would – be used against him. Hobson's choice though it may be, there is nothing unconstitutional in Hendrix's having to elect a course of conduct. The circumstances and the evidence produced amply sufficed to serve as a basis for his punishment. He cannot premise his punishment on his silence alone. Consequently, we conclude that he was not deprived of due process.

Additionally, although the self-incrimination privilege of the Fifth Amendment (made applicable to the States through the Fourteenth Amendment) is relevant in prison disciplinary hearings, it does not preclude an adverse inference from an inmate's failure to testify at such a hearing. See *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); see also *Welch v. Commonwealth*, 149 S.W.3d 407 (Ky.2004); *Webb v. Sharp*, *supra.* "[A]side from the privilege against compelled self-incrimination, [the Supreme Court of the United States] has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause." *Baxter* at 425 U.S. 308, 319, 47 L.Ed.2d 810, 822. (internal citations omitted).

Finally, Hendrix complains that he was not permitted to call as a witness at his hearing the nurse who identified the contraband as Lortab. However, the administrative record indicates that Hendrix did not request the presence of *any* witness at his hearing. There is no indication that this issue was presented on appeal to Warden Pancake after the disciplinary hearing was concluded. The

failure to raise an issue before the administrative body precludes an inmate-litigant from presenting that issue in an action for judicial review of the agency's action. *O'Dea v. Clark,* 883 S.W.2d 888 (Ky.App.1994), citing *Personnel Board v. Heck,* 725 S.W.2d 13 (Ky.App.1986). Consequently, this argument is not properly preserved for our review.

We affirm the order of the Lyon Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Travis Hendrix, *pro se*
Central City, Kentucky

BRIEF FOR APPELLEE:

J. Todd Henning
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