RENDERED: AUGUST 1, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000897-MR

JASON TAYLOR — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 12-CI-00540

STEVE HANEY, WARDEN,
DON BOTTOMS,
JASON PERKINS,
ANDREW EPPERSON,
CHRISTINA COLEMAN,
TRACEY NIETZAL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE AND MOORE, JUDGES.

MAZE, JUDGE: The Appellant, Jason Taylor, appeals an order of the Boyle Circuit Court denying his petition for a declaration of rights. Taylor asserts that his due process rights were violated by prison disciplinary proceedings that resulted in

him losing 180 days of good time credit and receiving 90 days segregation. We disagree and the decision of the circuit court is affirmed.

On August 4, 2012, Taylor was disciplined for Possessing Dangerous Contraband. The action arose from the discovery of a package by Sergeant Jerry Whitlock while conducting a search of the "day room" and "day room bathroom" after visiting hours in the Marion County Detention Center. After discovering the package under a vending machine, Sergeant Whitlock reviewed the room's video surveillance record and witnessed Taylor's guest enter the bathroom with a package. After his visitor exited the bathroom, Taylor entered the bathroom, emerged with a package, and hid it under the vending machine.

The disciplinary report form, prepared by Officer Christina Coleman, summarized the video's contents and indicated that the unopened package contained twenty Newport cigarettes, three packages of tops rolling papers, five packages of "Dr. Feelgood (2G Joosy Fruit)," one package of "Grim Reaper," and one package of "2G Chronic Hypnotic." Investigating Officer Andrew Epperson referred the action to the adjustment committee. Taylor acknowledged that he received a copy of the report, but declined to comment. A hearing was conducted and Taylor was found to have been in possession of dangerous contraband. Taylor appealed the adjustment officer's decision, but the warden denied his appeal.

Taylor then filed a petition for declaration of rights in Boyle Circuit Court. The court denied Taylor's petition finding sufficient evidence to support the disciplinary action and that Taylor received adequate due process. We agree.

On appeal, Taylor once again avers that he was denied due process and that the evidence was not sufficient to meet the "some evidence" standard set forth in *Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997).[1] Specifically, Taylor claims that the correction facility's regulations were not followed, that he was denied the opportunity to question witnesses, and that he was denied the opportunity to review the surveillance video. Taylor also alleges that the hearing officer failed to view the video. Lastly, Taylor claims the evidence was insufficiently reliable to meet the "some evidence" standard because the officer failed to establish a chain of custody.

When examining the proceedings we must do so in light of the fact that "[p]rison disciplinary proceedings are not part of the criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Webb v. Sharp*, 223 S.W.3d 113, 117 (Ky. 2007) (quoting *Wolff v. McDonald*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1985)). Courts are reluctant to hold that prison regulations, in and of themselves, create liberty interests for prisoners. Indeed, the United States Court of Appeals for the Sixth Circuit, in reliance on United States Supreme Court precedent, has stated that "[t]here is no constitutional violation when state actors fail to meet their own regulations, so long as the minimum constitutional requirements have been met." *Black v. Parke*, 4 F.3d 442, 448 (6th Cir. 1993).

[1] Taylor briefly argues that his right to equal protection was violated, but this argument was not raised in his appeal to the warden. As a result, the argument is waived because he did not exhaust his administrative remedies as to that claim. *See Houston v. Fletcher*, 193 S.W.3d 276, 278 (Ky. App. 2006).

> [I]n prison disciplinary proceedings where a prisoner's good behavior credit is a stake, the Due Process Clause . . . is implicated, but the process due is no more than notice of the charges, a reasonable opportunity to be heard, and a brief written finding suitable for judicial review. The Court [in *Wolf v. McDonnell*,] approved these minimal procedures after balancing the prison administration's profound interest in maintaining order against the inmate's relatively minor interest in avoiding a portion of his sentence.

Smith, 939 S.W.2d at 357 (citing *Wolf*, 418 U.S. at 539).

When determining if there is sufficient evidence, we must consider "whether there is *any evidence* in the record that could support the conclusion reached by the disciplinary board." *Walpole v. Hill*, 472 U.S. 445, 455-56, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985) (emphasis added). If "some evidence" exists, the decision must be affirmed. *Smith*, 839 S.W.2d at 358. When determining if "some evidence" exists, we are not required to examine the entire record, to conduct an independent assessment of the witness's credibility, or to weigh the evidence. *Webb*, 223 S.W.3d at 117.

First, we turn to the procedural due process requirements. Taylor does not dispute that he received advance written notice of the charges. However, Taylor claims he was denied the opportunity to question witnesses and to review the video surveillance footage. Taylor's assertion that he was denied the opportunity to question the reporting officer is not supported by the record. Instead, the record indicates that Taylor did not request any witnesses at the hearing. Furthermore, in these circumstances, institutional safety is paramount and due process does not

require that Taylor be provided with the surveillance footage. Taylor did, however, receive a summary of the video's contents and, had he not waived the right to do so, could have questioned the officer regarding the tape. Likewise, Taylor could have denied the allegations. Taylor also received a written statement by the fact finder that set forth the reason for the disciplinary action. As a result, his procedural due process rights were not violated.

Lastly, we turn to the sufficiency of the evidence. While the hearing is not contained in the record, the circuit court order notes the correctional officer's testimony that after he discovered a package containing dangerous contraband under the vending machine, he watched the surveillance video which showed Taylor entering the restroom after his guest. Taylor then returned with a package and hid it under the vending machine. The officer's testimony also reported the contents of the package, unopened cigarettes, packages of a "green leafy substance," and rolling papers. Taylor chose not to deny any of this at the hearing.

When determining if there was "some evidence" to support the disciplinary action, both Taylor's attempts to conceal the package, as well as his decision not to comment during the investigation are relevant. *See Webb*, 223 at 120 (inmate's election not to testify or assert that the substance was not what the officers believed it to be was relevant to the "some evidence" analysis). Even absent field tests confirming the nature of the package's contents, an officer's observations are sufficient. *See id*. Furthermore, the cigarettes, which are considered dangerous

contraband in prisons, were unopened and labeled. Thus, there was "some evidence" that Taylor possessed dangerous contraband.

For the reasons set forth above, the decision of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jason Taylor, *pro se*
Burgin, KY

BRIEF FOR APPELLEE:

Allison Brown
Department of Corrections
Frankfort, KY