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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000648-MR

DION MUCKER — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 13-CI-00541

WARDEN ALAN BROWN;
AND ADJUSTMENT OFFICER
RICKY CARY — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

ACREE, CHIEF JUDGE: Dion Mucker, *pro se*, appeals the Muhlenberg Circuit Court's March 25, 2014 order dismissing his petition for a declaration of rights. The issue before us is whether Mucker received sufficient due process during his prison disciplinary hearing. Finding Mucker received all process due, we affirm.

I. Facts and Procedure

Mucker is an inmate at the Green River Correctional Complex. In February 2013, Sergeant Jason Westerfield received confidential information that Mucker was taking property from inmate Trey Skaggs by force. The matter was assigned to Sergeant Joshua Manley for further investigation. During the course of his investigation, Sergeant Manley received additional confidential information that Mucker had assaulted Skaggs after Skaggs failed to "pay" Mucker to stay on the prison yard. Mucker was ultimately charged with the offense of taking property by force or threat of force.

A prison disciplinary hearing was held on February 13, 2013; Appellee Ricky Cary, an Adjustment Committee Officer (ACO), presided. Skaggs testified at the hearing that Mucker neither took his property nor assaulted him. Even so, the ACO found Mucker guilty of the offense charged. The ACO based its decision on the confidential information, which he deemed reliable, and on photographs of injuries to Mucker's hands taken contemporaneously with the incident. The ACO penalized Mucker with sixty days of disciplinary segregation and the forfeiture of sixty days of good-time credit.

Mucker appealed to Appellee Alan Brown, Warden. Warden Brown upheld the ACO's decision.

Mucker then filed a Petition for Declaration of Rights pursuant to Kentucky Revised Statute (KRS) 418.040 in the Muhlenberg Circuit Court. He challenged the result of the prison disciplinary hearing, claiming a violation of his

right under the Fourteenth Amendment to due process and to a fair prison disciplinary hearing. Appellees responded with a pre-answer motion to dismiss under Kentucky Rules of Civil Procedure (CR) 12.02(f), claiming Mucker had failed to state a claim upon which relief could be granted. In an order entered on March 25, 2014, the circuit court granted the Appellees' motion and dismissed Mucker's petition. Mucker appealed.

II. Standard of Review

The standards governing the grant or denial of a motion to dismiss, and those dictating our review, have been repeated often. They are as follows:

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (citations and quotations omitted).

III. Analysis

Mucker claims his due process rights were violated when: (1) Sergeants Westerfield and Manley failed to collect all physical evidence of the alleged assault upon Skaggs in violation of Kentucky Department of Correction Policies and Procedures (KDOCPP) 8.6[1] and 15.6(II)(C)(4)(b)(3)(c)[2]; and (2) the ACO relied upon unreliable and unverified information obtained from confidential informants in adjudging Mucker guilty.

Prison disciplinary proceedings are administrative, rather than criminal, in nature. While inmates retain rights under the Due Process Clause of the United States and Kentucky Constitutions, a defendant in a prison disciplinary proceeding is not entitled to "the full panoply of rights due a defendant" in a criminal proceeding. *See Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974); *Smith v. O'Dea*, 939 S.W.2d 353, 357-58 (Ky. App. 1997). Instead:

> the U.S. Supreme Court has concluded that due process requirements in prison disciplinary hearings, where the loss of good time credit is at stake, include: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.

[1] KDOCPP 8.6 requires an Extraordinary Occurrence Report be filed when certain institutional instances, such as the death of an inmate, escape, assault, etc., occur.

[2] This rule states that, when the investigation is complete, the investigator shall "provide the inmate with a copy of all documents to be used by the Adjustment Committee or Adjustment Officer unless the disclosure of those documents constitutes a threat to the safety and security of an inmate, the public, or the institution. . . . Documents include reports, photographs, tests, tape recordings or other written materials to be used as evidence." KDOCPP 15.6(II)(C)(4)(b)(3)(c).

Webb v. Sharp, 223 S.W.3d 113, 117-18 (Ky. 2007) (citation omitted).

In *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L. Ed. 2d 356 (1985), the United States Supreme Court added a fourth requirement, holding "the revocation of good time does not comport with the minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record." *Id.* at 454, 105 S.Ct. at 2773 (citation and internal quotation marks omitted). The "some evidence" review "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of evidence." *Id.* Instead, the "relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id*.

A. Failure to Follow KDOCPP

Mucker alleges that his due process rights were offended when Sergeants Westerfield and Manley failed to take photographs of the victim's injuries, thereby violating the policies and procedures promulgated by the Department of Corrections. Assuming for the sake of argument that the sergeants, in fact, failed to comply with the mandates of KDOCPP, we still "cannot conclude that such a violation rises to the level of a denial of procedural due process." *White v. Boards-Bey*, 426 S.W.3d 569, 575 (Ky. 2014). As explained in a recent decision of the Kentucky Supreme Court:

> Prison regulations, even those which include mandatory language such as "shall," do not automatically confer on the prisoner an added procedural due process protection.

> This Court refuses to render a prison official's failure to comply with the DOC's own regulations as a *per se* denial of procedural due process. To do so would be to expand the protections outlined in *Wolff* to include the extensive procedural requirements set forth in the CPP and other countless prison regulations and policies, a deviation from which would render that divergence a violation of a prisoner's due process rights.

Id.; *see also Black v. Parke*, 4 F.3d 442, 448 (6th Cir. 1993) ("There is no constitutional violation when state actors fail to meet their own regulations, so long as the minimum constitutional requirements have been met.")

The reasoning of *Boards-Bey* is directly on point and controlling. Accordingly, Sergeants Westerfield's and Manley's failure to comply with KDOCPP, if any such failure indeed occurred, did not, in and of itself, result in a violation of Mucker's due process rights. On this issue, we find no error.

B. Confidential Informant

Mucker also argues that the confidential information relied upon by the ACO was not sufficient to support a guilty finding because the ACO did not independently verify or corroborate the information. This allegation of error relates to the "some evidence" requirement of due process previously described. Again, the "some evidence" standard simply requires some basis in the record on which the reviewing court can deduce the reasons for the disciplinary board's finding. *Boards-Bey*, 426 S.W.3d at 577. It is a rather low evidentiary threshold.

In *Haney v. Thomas*, 406 S.W.3d 823 (Ky. 2013), the Kentucky Supreme Court addressed what qualifies as "some evidence" in relation to confidential informants in the framework of prison disciplinary proceedings. The Supreme Court expressed its concern that, in some cases, "the supporting evidence is based entirely on confidential information which is neither supplied to the reviewing court, nor discussed in the Adjustment Committee's report or findings. This comes disturbingly close to the inmate being adjudged guilty simply because the investigating officer says he or she is guilty." *Id.* at 826. Before confidential information may qualify as "some evidence" to support an ACO's conclusion, the ACO must verify that the information provided by the confidential informant is reliable. *Id.* at 826-27. The Supreme Court identified numerous ways by which an ACO may accomplish this task.

> The Seventh Circuit has relied on the following methods of establishing an informant's reliability:
>
> > (1) the oath of the investigating officer as to the truth of his report containing confidential information and his appearance before the disciplinary committee; (2) corroborating testimony; (3) a statement on the record by the chairman of the disciplinary committee that he had firsthand knowledge of the sources of information and considered them reliable on the basis of their past record of reliability; or (4) in camera review of material documenting the investigator's assessment of the credibility of the confidential informant.
>
> . . . .

> The Third Circuit requires underlying factual information to support the informant's reliability, in addition to a finding that "the informant spoke with personal knowledge of the matters contained" in the disciplinary report. *Henderson*, 812 F.2d at 879 (quoting *Gomes v. Travisono*, 510 F.2d 537, 540 (1st Cir.1974)). . . .
>
> Nonetheless, the previous examples illustrate several possibilities and even those are non-exhaustive. For example, reliability may be confirmed by the fact that there are multiple unnamed informants whose stories are consistent and corroborate one another.

Id. at 827.

Unlike *Haney*, in which the Supreme Court searched in vain for "some corroborating factors, however small[,]" to support the Adjustment Committee's finding of reliability as to the information provided by the confidential informant, *id.*, there was corroborating evidence in the case before us: photographs of injuries to Mucker's hands. The ACO stated in his report that he deemed reliable the confidential information that Mucker was taking property by force. This alone would not have satisfied *Haney*. *Id.* ("A simple statement in the Adjustment Committee's findings that 'the Committee believes the informant is credible and the information reliable' is not enough to satisfy the some evidence standard."). We also cannot say that the confidential statements corroborate one another because neither the ACO nor the warden said so. It is unclear from the record whether the information came from the same informant on multiple occasions, or if there are multiple unnamed informants. *Id.* ("[R]eliability may be confirmed by the fact that there are multiple unnamed informants whose stories are consistent

and corroborate one another."). Nevertheless, the ACO based its decision not only on the confidential information received, but also on the photographs of injuries to Mucker's hand, which suggested that Mucker had been in an altercation. The photographs corroborate the particulars of the informant's statement that Mucker had used force against Skaggs when Skaggs failed to pay Mucker to visit the prison field.

We would be remiss in concluding this case without pointing out that the ACO's findings were dangerously close to falling short of the low, "some evidence" threshold. The better practice in this case – and in all future prison-disciplinary matters – would have been for the ACO to state *why* and *on what basis* it deemed the informant's information reliable, regardless of the existence of corroborating evidence. "We do not consider it an unreasonable burden on prison administrators to simply state for the record, without divulging identities, why witnesses are reliable." *Haney*, 406 S.W.3d at 828.

IV. Conclusion

For the reasons explained, we affirm the March 25, 2014 order of the Muhlenberg Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dion Mucker, *Pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

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