

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000667-MR

DAVID TIDWELL

APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 13-CI-00730

MARTIN GRANADO, WARDEN;  
JOY KIEFER-WAFORD, ADJUSTMENT  
OFFICER; LADONNA THOMPSON,  
COMMISSIONER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CAPERTON, KRAMER,<sup>1</sup> AND STUMBO, JUDGES.

CAPERTON, JUDGE: David Tidwell appeals from the denial of his motion seeking expungement of his Department of Corrections (“DOC”) disciplinary proceeding and requesting the restoration of all good time credit forfeited as a result of the proceedings. The Oldham Circuit Court dismissed Tidwell’s motion

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<sup>1</sup> Judge Joy A. Kramer, formerly Judge Joy A. Moore.

pursuant to CR 12.02(f), for failure to state a claim upon which relief could be granted. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm.

The facts of this case were testified to at Tidwell's disciplinary proceeding. On December 5, 2012, Officer Rebecca Watts was making a standard patrol along the F-wing of the Roederer Correctional Complex where Tidwell resided. During the wing walk, Officer Watts stopped in the middle of the hallway with ample room on each side of her and continued to observe the activity in the F-wing. Tidwell deviated from the path he had been walking, which would have allowed him to pass Officer Watts with plenty of space, and instead deliberately altered his path to bump into Officer Watts. Kentucky Corrections Policy and Procedures ("CPP") 9.6 and 15.2 prohibit inmates from taking any physical action against an employee or non-inmate while incarcerated.

Officer Watts told Tidwell to report to the Captain's office because of the intentional contact he had made. When questioned, Tidwell became agitated and had to be escorted out of the office. Investigating Officer Lt. Fannin was tasked with uncovering the facts. He reviewed the surveillance video and determined that it was clear that Tidwell had intentionally run into Officer Watts.

On January 8, 2013, Adjustment Officer Joy Keifer-Waford conducted a proceeding on the charge of taking "physical action against an employee or non-inmate." Alonzo Martin, Anthony Wiseberst, and Lt. Fannin all testified that Tidwell had walked down the wing walk and purposefully altered his

path to bump into Officer Watts; Officer Watts jumped as if startled when Tidwell bumped into her. Adjustment Officer Keifer-Waford considered the testimony and the video footage and determined that Tidwell was guilty of the charge.<sup>2</sup> She sentenced him to 90 days of non-restorable good time loss and 60 days of disciplinary segregation. Tidwell appealed this sentence to Warden Granado.

Upon review, the warden determined that due process had been afforded Tidwell and that the finding of guilt was supported by the evidence. Tidwell also appealed to Commissioner Thompson, who agreed with the finding of guilt. Tidwell then filed the underlying action with the Oldham Circuit Court which determined that the action failed to state a claim upon which relief may be granted. It is from this that Tidwell now appeals.

At the outset, we note that 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

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<sup>2</sup> Tidwell claims that he accidentally brushed against Officer Watts.

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).

On appeal, Tidwell argues that he was denied due process because: (1) his chosen legal aide was not at his disciplinary hearing; and (2) he was not permitted to view the security camera footage. The Commonwealth argues that the court properly dismissed the action as there were no due process violations.<sup>3</sup> We now turn to these arguments in turn.

First, Tidwell alleges that he was denied due process because he was denied the ability to select the legal aide of his choosing. Tidwell repeatedly asserted that he wanted his chosen legal aide at the hearing, not the one assigned to him the day of the final hearing.<sup>4</sup> It is uncontested that Tidwell received the assistance of a trained legal aide during his disciplinary hearing, even if it was not the legal aide Tidwell wanted.

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<sup>3</sup> The Commonwealth additionally argues that there was some evidence to support the Adjustment Officer's findings and notes that Tidwell does not argue to the contrary. We agree with the Commonwealth that the findings are supported by some evidence given the testimony presented and the security camera footage. *See In Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985).

The Commonwealth also argues that Tidwell's motion should have been dismissed for failure to join necessary parties as Tidwell named Lt. Keifer-Waford, the Adjustment Officer, Martin Granado, Warden of Roederer Correctional Complex, and LaDonna Thompson, Commissioner of the DOC, but failed to name the DOC, the entity that would be responsible for enforcing the adverse Adjustment Committee determination. The Commonwealth argues that the named parties do not have the authority to remedy any damages Tidwell claims, whereas, the DOC does. We note that this argument was not addressed by the trial court.

<sup>4</sup> We are unclear whether Tidwell complied with CPP 15.6(II)(C)(5)(a)(1) and identified to the Adjustment Committee or Adjustment Officer what assigned legal aide he has chosen within twenty-four (24) hours of his receipt of the completed disciplinary report.

At issue, CPP 15.6(II)(D)(2)(b) states that at the hearing the inmate shall be entitled to:

Assistance by a chosen assigned legal aide or appointed staff counsel who has been given an opportunity to confer with the inmate at least twenty-four (24) hours in advance of the hearing unless denied under provisions of C.4b.2.f. If a legal aide or staff counsel is denied, the reason for denial shall be stated in writing on Part II of the report.

We are unclear whether the appointed legal aide was able to confer with Tidwell 24 hours in advance; however, it is clear that Tidwell received the assistance of a trained legal aide, even if it was not the one whom Tidwell wanted.

Assuming for the sake of argument that the substitution of Tidwell's legal aide 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 by the Kentucky Supreme Court recently:

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.

*White v. Boards–Bey* at 575; 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. Given that Tidwell was provided the assistance of a legal aide at his hearing, the failure to comply with the CPP, if any such failure indeed occurred, did not in and of itself result in a violation of Tidwell's due process rights. On this issue, we find no error.

Last, Tidwell argues that his due process rights were violated because the Adjustment Officer viewed the relevant security camera footage outside his presence. We agree that permitting inmates to view the camera footage *could* create substantial safety and security concerns for the DOC. See KRS 197.025 and *Ramirez v. Nietzel*, 424 S.W.3d 911, 920 (Ky. 2014) (“The circuit court should review the security footage in camera, assuming, of course, a legitimate reason is provided for prohibiting Ramirez from viewing the tape.”).

However, by reviewing the footage *in camera*, this does not transform the Adjustment Officer into an investigating officer as argued by Tidwell. We note that Tidwell requested the footage to be viewed by the Adjustment Officer; we are not persuaded that by doing so this violated Tidwell's due process rights.

Accordingly, we decline to reverse on this basis.

Finding no error, we affirm.

STUMBO, JUDGE, CONCURS.

SEPARATE OPINION.

KRAMER, JUDGE: I write separately only to point out that in my view, this case should be dismissed pursuant to *Watkins v. Fannin*, 278 S.W.3d 637(Ky. App. 2009), for lack of jurisdiction because Tidwell failed to name an indispensable party as argued by the Appellees. Consequently, I would summarily dismiss this appeal.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Stafford Easterling  
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