

RENDERED: OCTOBER 30, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000509-MR

STEVEN JOHNSON

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 13-CI-00395

DON BOTTOM, WARDEN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; STUMBO AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Steven Johnson, *pro se*, appeals the Boyle Circuit Court's December 20, 2013, order denying his petition for a declaration of rights.

We must determine if Johnson received sufficient due process during his prison disciplinary hearing. Concluding that Johnson received all the due process to which a prisoner is entitled in a prison disciplinary proceeding, we affirm.

## **I. Facts and Procedure**

Johnson is an inmate at Northpoint Training Center. On July 20, 2013, Officer Justin Bryant observed Johnson smoking a cigarette. Smoking is prohibited at Northpoint. While investigating, Officer Bryant noticed a green lighter on the ground near Johnson. Officer Bryant stated in his report that Johnson admitted that the lighter was his, and that he [Johnson] had the lighter in his hand hidden under his ID card when Officer Bryant was patting him down.

Johnson was charged with three violations: (1) possession or promoting of dangerous contraband; (2) use/possession of tobacco products in an unauthorized area; and (3) smuggling of contraband items into/out of/within an institution. A prison disciplinary hearing was held on July 31, 2013. The hearing officer considered the incident reports and found Johnson guilty of all three accusations. His punishment was ninety days disciplinary segregation (suspended for ninety days) and the loss of one-hundred-eighty days good-time credit. The Warden denied Johnson's appeal of the dangerous contraband charge. Johnson did not appeal the use/possession of tobacco products violation, and the record is silent as to any appeal of the smuggling contraband charge.

Johnson filed a Petition for Declaration of Rights pursuant to Kentucky Revised Statute (KRS) 418.040 in the Boyle Circuit Court. He challenged the result of the prison disciplinary hearing, claiming his Fourteenth Amendment due process rights were violated because: (1) the hearing officer did not have enough evidence to convict him of possession or promoting of dangerous

contraband, and (2) he was punished twice for one incident. By order entered on December 20, 2013, the circuit court denied Johnson's petition, finding Johnson was afforded all his due process rights and there was sufficient evidence to support the disciplinary decision. Johnson appealed.

## **II. Standard of Review**

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.

*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.*

### **III. Analysis**

Johnson advances the same two arguments on appeal that he presented to the circuit court: (1) based on the definitions of “contraband” and “dangerous contraband” in effect at the time, there was not even “some evidence” to find him in violation of the prohibition against possession or promoting of dangerous contraband, and (2) he was punished twice for one incident. Having considered both arguments, we are persuaded by neither.

The law governing this case can be found in KRS 520.010, the definitions section of the chapter generally addressing prison discipline, and Kentucky Corrections Policies and Procedures (KCPP) 9.6, a regulation promulgated by the Department of Corrections (DOC) pursuant to legislative authority. KRS 197.020 (DOC shall “[p]romulgate administrative regulations for the government and discipline of the penitentiary”); *see also* KRS 196.035.

Johnson’s first argument is grounded in the distinctions between the definitions of “contraband” and “dangerous contraband.” The underpinning of his

argument is that, at the time of his offense and hearing, KCPP 9.6(II)(B)(9)<sup>1</sup> defined lighters as “contraband”; however, the list of “dangerous contraband” in KCPP 9.6(II)(A) did not explicitly include lighters. Because lighters are not explicitly listed in the DOC’s regulation as “dangerous contraband,” so goes the argument, he could not have violated the prohibition against possession or promoting of dangerous contraband.

Appellee’s brief in response misses the point of Johnson’s argument.

The entire response is a single sentence, as follows:

Appellant admitted that the cigarette lighter was his (Appendix Tab 3), thus there was “some evidence” of his guilt, making it sufficient under Superintendent, Mass. Correctional Institution, Walpole v. Hill 472 U.S. 445 (1985).

(Appellee’s brief, p. 2). This response from the Commonwealth is of no use in helping to justify our decision to affirm. However, an appellant’s victory cannot be based on an appellee’s weak argument; the appellant’s own argument must be meritorious. Here, it is not. Here, we conclude that the circuit court correctly interpreted the statutes and regulations in dismissing the declaration of rights petition.

We begin by noting what Johnson has readily acknowledged – a lighter is contraband.<sup>2</sup> KCPP 9.6(II)(B)(9). As the circuit court noted, “it is clear that a lighter is potentially dangerous.” (Order, Record (R.) 60). That is a finding

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<sup>1</sup> The effective date of this version of KCPP 9.6(II)(B)(9) was August 6, 2012, as shown in the Record (R.) at page 8.

<sup>2</sup> Even if Johnson had not acknowledged that the lighter is contraband, we would conclude that it is, as a matter of law, by simple interpretation of KRS 520.010(1) and KCPP 9.6(II)(B)(9).

of fact which we cannot dispute. Kentucky Rules of Civil Procedure (CR) 52.01 (“Findings of fact, shall not be set aside unless clearly erroneous . . . .”); *see also* Kentucky Rules of Evidence (KRE) 201(b)(1), (c). “Dangerous” is defined as “likely to cause serious bodily harm[.]” Black’s Law Dictionary, dangerous (9th ed. 2009). The lighter, then, is contraband likely to cause bodily harm. And that description of the lighter comfortably fits the legislature’s definition of “dangerous contraband.” KRS 520.010(3) (“‘Dangerous contraband’ means contraband which is capable of use to endanger the safety or security of a detention facility or persons therein . . . .”).

The fact that lighters, at the time of Johnson’s hearing,<sup>3</sup> were listed among the definition of contraband but not dangerous contraband does not prohibit the application of KRS 520.010(3) to items the DOC has defined as contraband by the general authority of KRS 197.020 and by the specific authority of KRS 520.010(1).

In sum, once the DOC, by regulation, identifies an item of contraband, it should be deemed “dangerous contraband” if it factually fits the legislature’s criterion that it is “capable of use to endanger the safety or security of a detention facility or persons therein[.]” KRS 520.010(3).

While disputed now, the hearing officer found credible Officer Bryant’s statement that Johnson admitted to possessing the lighter. Therefore, there was

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<sup>3</sup> The effective date of this version of KCPP 9.6(II)(B)(9) was August 6, 2012, as shown in the Record (R.) at page 8.

“some evidence” supporting the hearing officer’s conclusion that Johnson possessed dangerous contraband.

Based on the foregoing, we reject Johnson’s first argument.

This brings us to Johnson’s second argument. As did the circuit court, we find Johnson’s claim that he was punished twice for the same incident void of merit. Johnson asserts the warden erroneously amended the charge of smuggling contraband down to use/possession of tobacco products, thereby finding him twice guilty of the same violation arising out of a single incident or occurrence. Johnson has introduced no proof to support his claim. As the record stands, Johnson was found guilty of smuggling contraband, possessing dangerous contraband, and using/possessing tobacco products in an institution. Absent an evidentiary foundation, we decline to accept as true Johnson’s factually unsupported and legally defective claim that he was punished twice for a single act. There must be something more. Johnson failed to attach to his declaratory petition a copy of an appeal to the Warden relating to the smuggling contraband charge, thereby prompting the trial court’s decision and appellee’s argument that Johnson did not exhaust his administrative remedies. We agree with both.

In an attempt to circumvent the trial court’s ruling on this issue, Johnson affixed to the appendix of his appellant’s brief the “Part II – Hearing/Appeal” form related to the smuggling charge. Even if we were to consider this document, which we decline to do, CR 76.12(4)(c)(vii) (“materials and documents not included in the record shall not be introduced or used as

exhibits in support of briefs”), the form does not support Johnson’s argument or entitle him to the relief he seeks. While it contains the hearing officer’s decision finding Johnson guilty of smuggling contraband, it does not include the Warden’s review and decision, if there was one at all, to amend the smuggling charge to use/possession of tobacco products. The document is of no persuasive value to this Court.

#### **IV. Conclusion**

For the foregoing reasons, we affirm the Boyle Circuit Court’s December 20, 2013, order denying Johnson’s declarations petition.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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