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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000196-MR

KYLE STRINKO — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-03521

STEVE HANEY, WARDEN;
CAPT. ERIC SIZEMORE;
AND LT. DUNCAN KENDALL OF
BLACKBURN CORRECTIONAL COMPLEX — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND STUMBO, JUDGES.

D. LAMBERT, JUDGE: In this prisoner disciplinary matter, Kyle Strinko appeals *pro se* from an order of the Fayette Circuit Court dated January 15, 2015. The order denied Strinko's motion to alter, amend or vacate a December 8, 2014 order

dismissing his petition for declaration of rights wherein he alleged due process violations. After a careful review of the record and the applicable law, we affirm.

I. BACKGROUND

Staff at the Blackburn Correctional Complex received an unsigned letter stating that a cell phone was hidden at the Kentucky Horse Park. Officer Marcus Christison and Sergeant Kevin Carter searched the area of the Kentucky Horse Park where inmates were assigned to work detail and found a cell phone charger and a small bag of tobacco-related items. This discovery prompted Captain Eric Sizemore to begin listening to the phone calls of inmates assigned to work at the Kentucky Horse Park. After listening to two phone calls made from Strinko to his stepbrother,[1] Alex Kenny, Captain Sizemore conducted an investigation. Upon conclusion of the investigation, Strinko was charged with "possession or promoting dangerous contraband" for possession of a cell phone and "violating a condition of any outside work detail."

On July 11, 2014, Adjustment Officer Duncan Kendall ("AO") found Strinko guilty of both violations after a disciplinary hearing, citing Strinko's inculpatory phone calls to his stepbrother and Captain Sizemore's report. As a result of his conviction for "possession or promoting dangerous contraband[,]" Strinko received a 90-day disciplinary segregation sentence, a 180-day reduction in good time credit, and a 180-day restriction on his phone privileges. For "violating

[1] Alex Kenny is referred to alternatively in the record as Strinko's half-brother and his stepbrother. As the record predominately refers to Kenny as Strinko's stepbrother, we use that designation here.

a condition of any outside work detail[,]" Strinko forfeited an additional 60 days of good time credit and received another 180-day restriction on his phone privileges. Strinko appealed this decision to Warden Steve Haney.

On August 13, 2014, Warden Haney affirmed the decision of the AO. On October 27, 2014, Strinko filed a declaratory judgment action in the Fayette Circuit Court wherein he asserted that the appellees violated his due process right to receive notice of a disciplinary hearing at least 24 hours before the hearing. On December 2, 2014, the circuit court granted Strinko's petition. The circuit court later vacated this decision on December 8, 2014, after the appellees submitted evidence that Strinko had waived his right to 24-hour notice. The circuit court granted the appellees' motion to dismiss in the same order. This appeal followed.

II. DISCUSSION

On appeal, Strinko first claims that the circuit court erred when it allowed the appellees to attach additional evidence in their motion to alter, amend or vacate. He next claims that the AO improperly relied on an uncorroborated letter from a confidential informant. Finally, Strinko claims that the evidence against him was insufficient to support a conviction. For the following reasons, we disagree.

In prison disciplinary proceedings "the full panoply of rights due a [criminal] defendant . . . does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556, 945 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Furthermore, the United States Supreme Court has stated that procedural due process in this context requires only:

"(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 defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *Superintendent, Mass. Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). These due process requirements are generally met "if some evidence supports the decision by the prison disciplinary board." 472 U.S. at 455, 105 S.Ct. at 2774. Furthermore, "the Adjustment Committee and prison officials are afforded broad discretion." *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003).

1. The Appellees' Motion to Alter, Amend or Vacate

A trial court's ruling on a CR[2] 59.05 motion to alter, amend or vacate is reviewed under an abuse of discretion standard. *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Hall v. Rowe*, 439 S.W.3d 183, 186 (Ky. App. 2014) (quoting *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004)). Moreover, "[t]he focal point for . . . judicial review [of prison disciplinary proceedings] should be the administrative record already in existence, not some new record made initially in the reviewing court." *Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky. App. 1997) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985)).

[2] Kentucky Rules of Civil Procedure.

Strinko first argues that the circuit court erred when it granted the appellees' motion to alter, amend or vacate on the basis of Strinko's signed waiver, which had not been presented to the circuit court previously. The circuit court initially granted Strinko's petition for a declaration of rights, finding that the record was unclear as to whether Strinko waived his right to 24-hour notice.[3] Subsequently, the appellees filed a motion to alter, amend or vacate that order, and attached Strinko's signed waiver of notice to their motion. The appellees argued that the signed waiver proved that Strinko affirmatively waived the notice requirement, and that alternatively Strinko waived the requirement by failing to raise it during the administrative review process. The circuit court granted the appellees' motion, finding that Strinko waived the notice requirement on both grounds.

"A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). Strinko's signed waiver was apparently available to the appellees prior to the filing of the motion to alter, amend or vacate, and so the appellees should have brought this waiver to the trial court prior to that time. *Hopkins v. Ratliff*, 957 S.W.2d 300, 302 (Ky. App. 1997) ("The evidence simply cannot be characterized as 'newly

[3] In the circuit court's order granting Strinko's motion for summary judgment, the court relied on the inconsistencies in the record regarding Strinko's waiver of the 24-hour notice requirement, noting that there was no proof of any waiver available in the record and that the forms signed by Strinko indicated that he did not waive the requirement.

discovered.' Thus, relief was not available to [the appellant] under either CR 59.05 or CR 60.02."). Strinko is therefore correct that the trial court erred by considering Strinko's signed waiver. However, because the circuit court correctly ruled that Strinko waived this issue by failing to raise it during the pendency of the administrative proceedings, this error was harmless.

This Court has previously held that "[j]ust as the prisoner has a right to the 24–hour notice, he also has the right to waive this right." *Yates*, 120 S.W.3d at 730. Strinko's disciplinary report provides that Strinko stated on record that he waived his right to notice of the proceedings, and Strinko did not raise the issue in his appeal to the warden. Because "[t]he failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of the agency's action," *O'Dea v. Clark*, 883 S.W.2d 888, 892 (Ky. App. 1994), Strinko's failure to raise this issue during his administrative review process constitutes a waiver of that argument, and he is not entitled to relief.

1. **Confidential Informant and Sufficiency of the Evidence**[4]

Our Supreme Court held in *Haney v. Thomas* that, when a statement is provided from a confidential informant in a prison disciplinary action, prison administrators are required "to simply state for the record, without divulging identities, why witnesses are reliable. It is needful that we be reminded that taking

[4] For convenience, we consider Strinko's argument that the record was not supported by "some evidence" together with his argument pertaining to the nonexistence of corroborating factors. Logically, if corroborating factors exist for the confidential informant, then there must be "some evidence" in the record. "Our ultimate inquiry, therefore, is what amount of particularized findings must the Adjustment Committee make in order for the 'some evidence' standard to be met while also protecting the safety and security of inmates who become witnesses?" *Haney v. Thomas*, 406 S.W.3d 823, 826 (Ky. 2013).

non-restorable good time from a prisoner essentially adds time to his or her sentence." *Haney*, 406 S.W.3d. at 828. In *Haney*, the Kentucky Supreme Court affirmed this Court's decision to reverse the trial court, stating that it searched for and was unable to find "some corroborating factors, however small[]" in order to confirm the confidential informant's statements. *Id.* at 827-28. The Court listed the following methods of establishing a confidential 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.

Id. at 827 (quoting *Mendoza v. Miller*, 779 F.2d 1287, 1293 (7th Cir. 1985)). The Supreme Court also stated that the reliability of a confidential informant could be established by "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." *Id.* (quoting *Henderson v. Carlson*, 812 F.2d 874, 879 (3d Cir. 1987)).

Here, the information from the confidential letter was reliable though no officers explained for the record why the person who provided the unsigned letter was reliable. The confidential informant in the present case apparently stated that one of the inmates had a cell phone in the Kentucky Horse Park, and when the

officers searched the area they discovered a cell phone charger. Additional corroborating evidence existed in the form of Strinko's recorded phone calls with his stepbrother, Alex Kenny. On June 23, 2014, Strinko called Kenny and during the conversation Kenny told him, "I got that thing. I have not set it up yet." Strinko responded, "You are doing too much explaining right now." Further, when Strinko called Kenny again on July 8, 2014, the following conversation took place in part:

> Strinko: Listen to me and don't really say too much. You know that thing, not the babies, the other thing. A [expletive] stole the [expletive] from me. Man, I am tore up over the [expletive]. They would not let me go out, so when I got out there, you know, because it was the Fourth of July weekend, it just, man I'm tore up over the [expletive]. But look you have to shut the [expletive] off!
>
> Kenny: All right.
>
> Strinko: I mean, like tomorrow, shut that [expletive] off!
>
> Kenny: I don't know how to do that.
>
> Strinko: Go to wherever you got it from and tell them to shut the [expletive] off. How much did you pay for it?
>
> Kenny: It was like $75 all together.
>
> Strinko: For everything! For the month and everything?
>
> Alex: Yeah.
>
> Strinko: Man, that was good, man. Try and figure something out because man I have been stressing like a [expletive].

At the end of the call, Strinko also reminded Kenny "do that tomorrow with that thing because I am stressing over that [expletive]."

In addition to the corroborating evidence of the phone charger and telephone calls, Strinko also gave inconsistent answers during both the investigation and the disciplinary hearing. During the investigation, Strinko admitted that Kenny had bought the object that had been stolen from him, and when asked what that object was, Strinko declined to comment. Later on, however, Strinko explained that the recorded conversation related to a Facebook account that he was setting up. Furthermore, when asked about the stolen objects at the hearing, Strinko answered that the objects were "energy drinks, wife beaters and tv dinners." He later added that he had arranged for Kenny to pay for Strinko's child's mother's cell phone, but that he wanted to have the cell phone shut off because she was calling his current girlfriend.

Despite this corroborating evidence, a review of the record shows that the AO did not explicitly rely on the confidential letter in providing the following conclusion:

> Due to the report from Captain Sizemore that he confirmed during the investigation was true and accurate, and the evidence of the cell phone charger which was recovered from the landscape shed, and the recorded and stored conversation that is cited in the report about inmate Strinko having had something stolen, and his statement during the investigation stating that his brother had bought what was stolen, and his statement on the hearing that he had his brother purchase a cell phone or cell phone minutes, and his statement to Captain Sizemore, his conflicting [] story during the

> investigation, and his third conflicting story made on the record during the adjustment hearing, I do find inmate Strinko guilty of the charge of possession or promotion of dangerous contraband.

The AO similarly relied on Captain Sizemore's report in concluding that Strinko violated a condition of any outside work detail.

In conclusion, the evidence in the record was sufficient to find both that the informant was reliable and that "some evidence" existed against Strinko to deprive him of his constitutionally protected interests. The AO may draw reasonable inferences from the record, *see Smith v. O'Dea*, 939 S.W.2d 353, 357 (Ky. App. 1997) ("the inference is reasonable that [the appellant], at some time, communicated to his daughters a willingness to receive such contraband."), and in light of Strinko's statements to Kenny that he wanted Kenny to have the object stolen from him "shut off" and that "for the month" the object cost him $75, the AO reasonably inferred that Strinko possessed contraband.[5] Accordingly, the Fayette Circuit Court's order dismissing Strinko's prison disciplinary action is hereby affirmed.

ALL CONCUR.

[5] Strinko separately argues that the evidence against him is insufficient because the appellees did not specify the type of cell phone charger found, and that there was no affirmative evidence that any tobacco was recovered. Strinko concedes that he was not charged for the tobacco product. These arguments do not alter our analysis of whether "some evidence" exists in the present case.

BRIEF FOR APPELLANT:

Kyle Strinko, *pro se*
Burgin, Kentucky

BRIEF FOR APPELLEE:

Allison R. Brown
Department of Corrections
Frankfort, Kentucky