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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000689-MR

JAMES M. HOPE — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 15-CI-00019

RAVONNE SIMS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

D. LAMBERT, JUDGE: James M. Hope, appearing *pro se*, appeals from the Boyle Circuit Court's dismissal of his petition for a declaration of rights following a prison discipline action. Having reviewed the record and finding no error, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In January 2014, an internal affairs investigation was conducted inside the Roederer Correctional Complex. "[M]ore than [three] but less than [seven]" confidential informants reported that Correctional Officer Jose Santos had introduced dangerous contraband (tobacco, suboxone and roxycodone) into the prison, in a scheme that involved Hope and three other inmates. Santos admitted to Captain Joy Keifer-Waford and a Kentucky State Police Trooper that he had delivered dangerous contraband to one inmate, with the understanding that the inmate would distribute it to other inmates, including Hope. After Keifer-Waford obtained a search warrant for Santos' phone records, a review of those records revealed six instances of contact between Santos and Chantelle Castro, Hope's wife.[1] Consequently, Hope was charged with "possession or promoting of dangerous contraband" pursuant to CPP[2] 15.2(II)(C)(VI)(3).

Adjustment Officer ("AO") Deborah K. Payne presided over the initial hearing on this matter on February 26, 2014. The disciplinary report was read into the record, and Hope admitted that Castro is his wife. Payne determined that the confidential informants were reliable, "based on the fact that the information was corroborated." Hope was found guilty. He appealed this decision to Warden Ravonne Sims, who granted Hope a second hearing.

[1] Hope refers to Castro as his "significant other" in his brief, although he stated at both hearings that she is his wife.

[2] Kentucky Correctional Policies and Procedures.

The rehearing took place on April 10, 2014. During the second hearing, Hope again stated that Castro is his wife. Hope requested to call Santos as a witness, but Angela G. Hampton, the presiding AO of his second hearing, denied Hope's request on the grounds that Santos would present "cumulative" testimony "and the condition for Mr. Santos[']s release [in Santos' own criminal proceedings] was that he had no communications with the DOC or any inmates within the DOC." Hampton also denied Hope's request for phone records "due to the sensitive information contained in them." Hampton found the evidence sufficient to convict Hope. As a result, Hope lost 90 days of good time credit and received a sentence of 60 days in disciplinary segregation. Sims denied Hope's second appeal.

Hope then filed a petition for declaration of rights in Boyle Circuit Court on January 15, 2015. On March 2, 2015, the circuit court entered an order denying Hope's petition on the grounds that Hope had waived his right to call witnesses and that "some evidence" existed in the record sufficient to support Hope's conviction. This appeal follows.

On appeal Hope argues that 1) the confidential informants in his case were not reliable; 2) he was denied his right to call witnesses when Payne refused to permit to call Santos; and 3) insufficient evidence existed against him to sustain a conviction.[3]

[3] Although Hope appears to state that the findings of fact in his case were insufficient in his brief's third heading, he does not argue that separately in the body of his argument. Regardless, we believe that the court's findings of fact were sufficient. *See Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003).

II. ANALYSIS

A. STANDARD OF REVIEW

Procedural due process in the prison disciplinary context requires: "(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." *Id.,* 472 U.S. at 455, 105 S. Ct. at 2769.

B. THE RECORD ADEQUATELY REFLECTS THE AO'S FINDINGS REGARDING THE RELIABILITY OF THE CONFIDENTIAL INFORMANTS AND THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION

The Department of Corrections contends that no confidential informants were used against Hope, and that the information from the confidential informants were used to support a finding of guilt only as against Santos.[4] We agree. Certainly, the introduction of some evidence of Santos' guilt must be introduced in order to inculpate Hope. "[W]hen the evidence is only the hearsay repetition of

[4] We consider Hope's first and third arguments together, as both arguments concern the sufficiency of the evidence in Hope's case.

information supplied by otherwise unidentified confidential informants … the committee [must determine] for itself, on some reasoned basis, that the informants and their information were reliable." *Hensley v. Wilson*, 850 F.2d 269, 277 (6th Cir. 1988).

Indeed, if the AO had solely relied upon the information supplied by the confidential informants in determining that Santos had smuggled dangerous contraband into the prison, without a separate determination as to the reliability of these informants, the evidence would have been insufficient to support a conviction. However, the record also states that Santos "admitted under [a] Miranda warning to Captain Kiefer-Walford and [a] Kentucky State Police Trooper that he had previously met with [two] female subjects, obtained contraband and delivered it to [an inmate] in unit records." This admission by Santos, though hearsay, does not require a finding of reliability under *Ramirez* because Santos' identity was stated in the record. Considering this evidence in light of the fact that Santos' own telephone records reflected that he contacted Hope's wife, we believe that an independent basis existed in the record as to Santos' guilt. Therefore, the identity of the confidential informants that led to that admission is immaterial.

We acknowledge the circumstantial nature of this evidence. However, circumstantial evidence alone is sufficient to satisfy the "some evidence" standard in the prison disciplinary context, as the administrative fact-finder is permitted to draw inferences from the record. "The primary inquiry [in a prison disciplinary

action] is whether there is *any evidence* in the record that could support the conclusion reached by the disciplinary board[,]" and "[e]ven meager evidence will suffice." *Ramirez*, 424 S.W.3d at 917 (emphasis added) (internal quotation marks omitted).

In *Smith v. O'Dea*, 939 S.W.2d 353 (Ky. App. 1997), a small bag of marijuana was found on one of the children visiting an inmate in prison, leading to the inmate receiving a charge of attempted introduction of contraband to the prison. *Id.* at 355. We found that "[a]lthough the evidence of Smith's involvement in the attempted smuggling is not compelling, the inference is reasonable that he, at some time, communicated to his daughters a willingness to receive such contraband." *Id.* at 357.

Furthermore, the Supreme Court of the United States has previously held circumstantial evidence sufficient to uphold a conviction in the prison discipline context. *Walpole*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356. In *Walpole*, the only evidence introduced in the appellant's discipline hearing indicated that the appellant was one of three inmates who had been seen fleeing from an enclosed area shortly after a commotion, and the victim inmate was found there alone, lying badly beaten on the ground. *Id.*, 472 U.S. at 447-48, 105 S. Ct. at 2770.

Given that circumstantial evidence is sufficient to satisfy the "some evidence" standard, Santos's admission that he had smuggled contraband into the prison, coupled with the revelation in Santos' phone records of multiple instances

of contact with Hope's wife, we conclude that "some evidence" existed in the record sufficient to uphold Hope's conviction.

C. HOPE'S RIGHT TO CALL WITNESSES WAS NOT VIOLATED

Hope next argues that the AO erred when refusing permit him to call Santos as a witness at his hearing. The Department of Corrections argues that Hope failed to comply with the Kentucky Correctional Policies and Procedures, and has therefore waived this argument. "In the prison setting, the right to call witnesses is limited based on the legitimate needs and concerns of the prison." *Ramirez*, 424 S.W.3d at 917. However, an "AO [is required] to offer up an explanation [as to his refusal to allow an inmate to call witnesses] at some point in the proceedings[,]" *Id.* at 919. Further, "[t]he sole requirement is that the decision to refuse witnesses or evidence must be 'logically related to preventing undue hazards to institutional safety or correctional goals.'" *Id.* at 918 (quoting *Ponte v. Real*, 471 U.S. 491, 497, 105 S.Ct. 2192, 85 L.Ed.2d 553 (1985)). CPP 15.6(II)(C)(5)(a)(2), provides that "[i]f the inmate has not done so during the course of the investigation, the inmate shall[… i]dentify to the Adjustment Committee or Adjustment Officer what witnesses he has selected not less than twenty four (24) hours prior to the initial hearing." CPP 15.6(II)(C)(5)(b) continues that the "[f]ailure to identify an assigned legal aide, staff counsel or witnesses in accordance with this procedure shall constitute a waiver."

The record in the present case indicates that Hope did not request that Santos be called as a witness until the hearing. Though Hope contends in his brief

that he has complied with all of the CPP, he never affirmatively states (or, more importantly, provides any evidence) that he requested to call Santos 24 hours prior to the date of the hearing, as required under CPP 15.6(II)(C)(5)(b). On February 25, 2014, Hope signed a form stating "I have been advised of my right to call witnesses…" That form listed no witnesses Hope wished to call at his hearing.

In *Yates v. Fletcher*, 120 S.W.3d 728 (Ky. App. 2003), this court found that the appellant had waived his right to receive 24 hours' notice of his hearing in nearly identical factual circumstances. *Id.* at 730. Much like the circuit court, which found that Hope waived his right to call this witness, we are confined to the record. "The focal point for … judicial review 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)). Because the record reflects that Hope waived his right to call witnesses and he never affirmatively stated that he called the witness more than 24 hours prior to his hearing, he is not entitled to relief because was not permitted to call Santos as a witness.

III. CONCLUSION

Based on the foregoing, we hold that the circuit court did not err when finding Hope had waived his right to call Santos as a witness, or in its finding that "some evidence" existed in the record sufficient to support his conviction. We therefore AFFIRM the order of the Boyle Circuit Court.

ALL CONCUR.

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