

RENDERED: OCTOBER 28, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001077-MR

TONY LEE

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 15-CI-00160

DON BOTTOM, WARDEN; AND
KENTUCKY DEPARTMENT OF
CORRECTIONS

APPELLEES

AND

NO. 2015-CA-001093-MR

JOHNNY WILLIAMS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 15-CI-00124

DON BOTTOM, WARDEN; AND
KENTUCKY DEPARTMENT OF
CORRECTIONS

APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** * * * * *

BEFORE: ACREE, D. LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: In this consolidated appeal, both Johnny Williams and Tony Lee appeal from orders of the Boyle Circuit Court denying their petitions for declaration of prisoner's rights, filed against the Kentucky Department of Corrections, Northpoint Training Center, and Don Bottom, Warden of the Northpoint Training Center. For the following reasons, we affirm in part and reverse in part.

Factual and Procedural Background

Williams and Lee are both inmates currently incarcerated at Northpoint Training Center in Burgin, Kentucky. On February 4, 2015, a prison officer noticed Williams and Lee hanging around the prison gym area, and believed that the inmates were waiting for him to leave the area so that they could smoke. The officer made the inmates believe he had left the gym, and then surprised the inmates moments later. Williams yelled out, and Lee ran into the bathroom inside the gym. When the officer searched the bathroom, he found a rolled up piece of paper towel containing a lighter and a substance later identified as synthetic marijuana or "spice." Three days later, the same officer found a sandwich bag containing a green and brown leafy substance outside the boiler room. This substance also tested positive for spice.

As a result of the discovery in the prison gym, an investigation was mounted. Investigators found that Williams had made certain phone calls, purportedly to arrange for contraband items to be dropped off at a garage where other inmates assigned to the road crew worked. One such inmate was to retrieve the package and bring it back to the prison. On February 5, Williams made a phone call at 11:16 a.m. and spoke with a male and female who informed Williams that they were twenty minutes away. Williams called the couple again at 12:00 p.m. and they informed Williams that they were on site. An investigation revealed that the female caused a distraction by asking for directions while the male walked to the location at which he was supposed to drop the contraband. The male later reported to Williams over the phone that he had left the contraband “in the back under the one in the middle in a McDonald’s bag.”

Both Williams and Lee were charged with (1) Smuggling of Contraband Items into/out of/within Institution and (2) Possession or Promotion of Dangerous Contraband. After adjustment hearings, Williams and Lee were each convicted of both charges, smuggling and possession of contraband. For the smuggling charge, both were ordered to serve ninety days in disciplinary segregation and forfeited one hundred eighty days of good time credit. For the possession charge, each was ordered to serve forty-five days in disciplinary segregation and forfeited sixty days’ good time credit. Each inmate appealed the disciplinary committee’s decision to the warden, and the warden affirmed the disciplinary committee’s ruling. Williams and Lee both filed petitions for

declaration of rights with the Boyle Circuit Court, and both petitions were denied.

This consolidated appeal follows.

Williams and Lee share five of the same arguments on appeal: 1) the prison disciplinary committee failed to meet the “some evidence” standard set forth in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985); *Smith v. O’Dea*, 839 S.W.2d 353 (Ky. App. 1997); 2) the charge of “smuggling dangerous contraband” is not a chargeable offense; 3) a prisoner cannot be charged with both “smuggling of contraband” and “possession or promotion of *dangerous* contraband” when only one kind of contraband was involved; 4) breaks in the chain of custody and evidentiary violations violated the inmates’ due process rights; and 5) the prison disciplinary committee failed to adhere to CPP¹ confidential informant policies and those required by case law. In addition, Lee argues that he was denied due process when the prison disciplinary committee violated several other CPP provisions.

Standard of Review

Denial of a petition for declaration of prisoner rights is treated as dismissal for failure to state a claim upon which relief can be granted. “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). Dismissal for failure to state a claim upon

¹ Correctional Policies and Procedures. See 501 KAR (Kentucky Administrative Regulations) 6:020.

which relief can be granted is inappropriate “unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

“Some Evidence” Standard

First, we will address whether the “some evidence” standard was met in each inmate’s disciplinary hearing. We agree with the trial court that in Williams’s case, the evidence presented to the adjustment committee meets the “some evidence” standard required for due process in prison disciplinary actions. Williams’s contention that the phone call evidence was insufficient, or “meager evidence,” is unfounded. The phone calls undoubtedly constitute “some evidence” of Williams’s attempt to smuggle contraband into the prison.

However, we do not believe that the “some evidence” standard was satisfied in Lee’s case with respect to the smuggling charge. Unlike the phone calls in Williams’s case, we find no evidence in the record of Lee’s involvement with any smuggling of contraband into the prison. While Lee’s involvement in the February 4 search and discovery of the rolled spice and lighter constitutes “some evidence” of possession of the contraband, this alone does not constitute “smuggling” as the word is typically understood.²

[I]n the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and

² Merriam-Webster defines “smuggling” as “to import or export secretly contrary to the law[.]” <http://www.merriam-webster.com/dictionary/smuggle>, accessed August 3, 2016.

interpretation. And the most commonly stated rule in statutory interpretation is that the “plain meaning” of the statute controls. Moreover, Kentucky courts have steadfastly adhered to the plain-meaning rule “unless to do so would constitute an absurd result.” Additionally, the plain-meaning rule is consistent with directions provided by the legislature on how to interpret the statutes enacted by it. [KRS 446.015](#).

Alliance for Kentucky’s Future, Inc. v. Env’tl. & Pub. Prot. Cabinet, 310 S.W.3d 681, 687 (Ky. App. 2008) (internal quotations and citations omitted). Accordingly, given the plain meaning of “smuggling,” we do not believe that the evidence supports Lee’s conviction for smuggling contraband, and this conviction should be reversed.

“Contraband” vs. “Dangerous Contraband”

Each inmate next argues that “smuggling dangerous contraband” is not a chargeable offense of CPP 15.2. Category IV-05 of CPP 15.2 lists “Smuggling of contraband items into, out of or within the institution” as a major violation. Williams and Lee were each convicted of this charge; the fact that the charge was described as “smuggling *dangerous* contraband” is inconsequential. Pursuant to CPP 15.2, both “Contraband” and “Dangerous Contraband” are defined by KRS³ 520.010, which states, in relevant part:

- (1) “Contraband” means any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, departmental regulation, or posted institutional rule or order;

....

³ Kentucky Revised Statutes.

(3) “Dangerous contraband” means contraband which is capable of use to endanger the safety or security of a detention facility or persons therein, including, but not limited to, dangerous instruments as defined in [KRS 500.080](#), any controlled substances, any quantity of an alcoholic beverage, and any quantity of marijuana, cell phones, and saws, files, and similar metal cutting instruments[.]

Clearly, synthetic marijuana is banned from the detention facility and is capable of endangering the safety or security of the prison, and thus qualifies as both “contraband” and “dangerous contraband” for purposes of chargeable offenses under CPP 15.2.⁴

Furthermore, this renders Williams and Lee’s argument that a prisoner cannot be charged with both smuggling of contraband and possession or promotion of *dangerous* contraband when only one kind of contraband was involved unsustainable. We agree that certain items may qualify as only “contraband” rather than dangerous contraband. *See Wilson v. Haney*, 430 S.W.3d 254, 258-59 (Ky. App. 2014) (differentiating between suboxone pills found in a fraudulently mailed package, dangerous contraband, and a fraudulently mailed package suspected, but not confirmed, to have contained the same controlled substance, contraband). Still, synthetic marijuana clearly qualifies as both contraband and dangerous contraband under KRS 520.010 and CPP 15.2; thus, Williams and Lee

⁴ In addition, CPP 15.2 Section II also lists “[a]ny amount of a controlled substance or any quantity of marijuana”, “[a]ny intoxicating substance”, and “[a]ny tobacco products, simulated tobacco products, lighters, or matches” as examples of “dangerous contraband” and “[a]nything not authorized for retention or receipt by the inmate and not issue to him through regular institutional channels” as an example of “contraband.” Therefore, synthetic marijuana qualifies as both “contraband” and “dangerous contraband” under CPP 15.2 as well as KRS 520.010.

could be properly charged with both smuggling contraband and possession or promotion of dangerous contraband.

Breaks in the Chain of Custody

Next, each inmate claims that breaks in the chain of custody and a lack of evidentiary foundation violated their due process rights. Despite the fact that the disciplinary report clearly states that the discovered “substance tested positive for spice,” and the fact that the Department of Corrections provided the chain of custody report for the discovered substances, both inmates allege that no evidence exists that the substance found was in fact synthetic marijuana or spice.

However, even if we assume an issue exists with the chain of custody of the discovered substances, neither inmate provides this court with any law in support of his contention that this violated his due process rights. Prison disciplinary proceedings are not criminal prosecutions, and “the full panoply of rights due a defendant in such proceedings does not apply.” *Wolff*, 418 U.S. at 556, 94 S.Ct. at 2974. Due process, in the context of prison disciplinary proceedings, requires: 1) advance written notice of the disciplinary charges; 2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and to present evidence in defense; and 3) a written statement by the fact finder of the evidence relied upon and the reasons for the disciplinary action. *Walpole*, 472 U.S. at 454, 105 S.Ct. at 2773, citing *Wolff v. McDonnell*, 418 U.S. 539, 563-67, 94 S.Ct. 2963, 2978-80, 41 L.Ed.2d 935 (1974). The record does not

show, and neither inmate contends, that any of these three requirements were not met, and therefore, no due process was denied either inmate.

Violations of Correctional Policies and Procedures

Finally, both Williams and Lee allege that failure to comply with procedures concerning confidential informants constitutes a due process violation. Moreover, Lee alleges several violations of CPP policies and procedures that he claims also resulted in a due process violation. Both inmates are correct that a disciplinary committee must make a determination that the evidence provided by the confidential informant has been found reliable and give a reason for the determination of reliability, unless such a statement would jeopardize the confidential informant. *Haney v. Thomas*, 406 S.W.3d 823, 828 (Ky. 2013); *Foley v. Haney*, 345 S.W.3d 861, 865-66 (Ky. App. 2011). However, we find no instance in the disciplinary report, and the inmates point to no other place in the record, in which the disciplinary committee or investigating officers refer to a confidential informant. Even if one or more confidential informants were used in this case, based on the evidence presented, such information was hardly relied upon as the basis for Williams and Lee's convictions. Thus, we find no reversible error.

With respect to Lee's other alleged CPP violations, an inmate claim of a due process violation must demonstrate a deprivation of a protected liberty or property interest through governmental action. *Williams v. Bass*, 63 F.3d 483, 485 (6th Cir. 1995). A state's implementation of procedures to guide prison

administrators does not create a protected liberty or property interest. *Levine v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996). Prison regulations designed to guide correctional officials in prison administration are not designed to confer rights on inmates. *Sandin v. Conner*, 515 U.S. 472, 481-82, 115 S.Ct. 2293, 2299, 132 L.Ed.2d 418 (1995). Hence, an inmate has not been deprived of due process by virtue of the prison disciplinary committee not strictly adhering to the policies and procedures outlined in the CPP. Lee's assertion that the prison disciplinary committee failed to follow many of the CPP provisions, relating specifically to calling witnesses,⁵ access to the phone record evidence, and the timeliness of the hearing, is therefore insufficient to demonstrate a deprivation of due process.

Conclusion

For the foregoing reasons, the order of the Boyle Circuit Court is affirmed in part, and reversed in part with respect to the smuggling contraband charge against Lee.

ALL CONCUR.

⁵ Lee was permitted to call witnesses, but one of his witness was released on parole before he was able to testify at Lee's hearing. We find no reversible error on the part of the disciplinary committee, particularly since other evidence supports the possession or promotion charge.

BRIEFS FOR APPELLANT
TONY LEE:

Tony Lee, *pro se*
Burgin, Kentucky

BRIEFS FOR APPELLEES:

Angela E. Cordery
Frankfort, Kentucky

BRIEFS FOR APPELLANT
JOHNNY WILLIAMS:

Johnny Williams, *pro se*
Burgin, Kentucky