RENDERED: AUGUST 24, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2017-CA-001048-MR

JAMES BLACK APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 17-CI-01570

DEPARTMENT OF CORRECTIONS,
OFFICE OF LEGAL SERVICES APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James Black, *pro se*, appeals from the order of the Fayette Circuit Court denying his petition for a declaration of rights regarding his prison disciplinary proceedings. Black argues his procedural due process rights were violated and there was not "some evidence" to find him guilty of possession or promoting of dangerous contraband, marijuana. Because there was no reliable

evidence to conclude that the substance discovered was marijuana, we reverse and remand for the circuit court to grant Black's petition for a declaration of rights.

On February 18, 2017, officers at Blackburn Correctional Complex (BCC) engaged in a targeted area search of Dorm 2, D-Bay in beds 189-192. BCC is a minimum-security prison and more than forty inmates have access to this dorm area. Black was not present when the search took place.

According to the disciplinary report form write up and investigation, officers discovered a "green leafy substance wrapped in clear plastic" in the pocket of a coat with the label "James Black" and his prison number. The coat was hanging in the locker area for that bay. The substance was discovered by Officer Helm who gave it to Sergeant Bates. Sgt. Bates turned it over to Sgt. Lotter, who tested it at security using a NARK II field test. The substance tested positive for marijuana. It was photographed and placed into a dangerous contraband locker. The officers also discovered tobacco in Black's cooler.

When Black was asked where he received the marijuana, he stated that it was not his and he did not know it was in his coat. When asked where he received the tobacco, he admitted to receiving it from another inmate in the yard. Black was placed in segregation.

The occurrence reports each officer submitted consistently stated that Ofc. Helms located "a green leafy substance" wrapped in plastic and gave it to Sgt. Bates, who gave it to Sgt. Lotter. This same order in the chain of custody is shown

on a photograph of the evidence bag, which indicated by name which officer had it and to whom it was turned over with their signed initials.

On February 20, 2017, Black's hearing was held and he was represented by a legal aide. The disciplinary report form for the hearing contained the following findings: Black was represented by a legal aide and waived his twenty-four-hour notice. Black's legal aide requested the report be amended or dismissed due to them not having a full color copy of the evidence showing the NARK II test.[1] Black denied possessing marijuana in the investigation. At the hearing, Black testified and denied the substance was his but admitted possessing the tobacco, which was also found during the search. The report of Sgt. Lotter was that a substance which was identified as marijuana was discovered inside of inmate Black's jacket. Based on the reports of the officers which they confirmed were true and accurate, the adjustment officer found Black guilty of the charge of possession or promoting of dangerous contraband for the marijuana.

Black was disciplined through the loss of 180 days of good time. Later, Black was transferred to a medium security prison.

Black filed an adjustment appeal. He raised several claims alleging his rights were violated and the "some evidence" standard was not met. He requested the warden discipline him for the tobacco instead.[2] On the issue of

[1] Apparently, the NARK II test changes color when exposed to marijuana.

[2] Black requested that the warden amend his write up to Category III, subsection twenty-five for the tobacco. Although both marijuana and tobacco are defined in Kentucky Corrections Policies and Procedures (CPP) 9.6(II)(A)(3) and (8) as dangerous contraband, CPP 15.2(II)(C)(Category III)(25) provides that "[u]se or possession of tobacco products in a minimum custody facility" will subject an inmate to penalties two through seven, while CPP 15.2(II)(C)(Category VI)(3)

whether there was some evidence to prove substance was marijuana, Black argued that BCC should have lab tested the substance to confirm it was marijuana, the picture of the field test did not prove a positive test, the field test was not proven reliable and it should not just be believed that the substance was marijuana based on an officer's report of a positive field test. Black's adjustment appeal was denied by the warden.

Black filed a petition for a declaration of rights. The Department of Corrections (DOC) filed a motion to dismiss for failure to state a claim on which relief may be granted. The circuit court denied Black's petition, determining that his due process rights were satisfied and there was some evidence to support the disciplinary action taken for possessing marijuana:

> In addition to the field test that revealed that substance found in [Black's] coat pocket was marijuana, the officers who conducted the search recorded their first-hand impression of the substance, including color and texture, the way that the substance was stored, and that it was found in [Black's] coat pocket. The officers' impressions alone, even without the results of the field test, provide some evidence to support the adjustment officer's determination that [Black] committed a disciplinary infraction.

Black appealed.

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"[p]ossession or promoting of dangerous contraband" will subject an inmate to penalties six through ten. The maximum penalty Black faced for possessing tobacco, a penalty seven, was the loss of sixty days of good time. CPP 15.2(II)(G)(7). The maximum penalty for possessing marijuana, a penalty ten, was the loss of 180 day of good time and thirty days of segregation. CPP 15.2(II)(G)(10). Black lost the maximum amount of good time possible for possessing the marijuana.

As an inmate undergoing a disciplinary hearing, the procedural process Black was entitled to receive is limited, as is our role in reviewing whether the evidence was sufficient for a finding of guilt. While due process applies to prison disciplinary hearings which could result in the loss of good time credit, inmates are not entitled to the same protections as during a criminal prosecution because a balance must be reached between the prison's need for security and the inmate's constitutional rights. *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Under these circumstances, inmates are entitled to:

> (1) advance[d] 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.

*Superintendent, Mass. Correctional Inst., Walpole v. Hill,* 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). *See Smith v. O'Dea,* 939 S.W.2d 353, 357 (Ky.App. 1997) (applying these requirements in Kentucky).

The United States Supreme Court and the Kentucky Supreme Court have determined "the implementation of procedural safeguards in the punishment for rule infractions must be tempered by the serious concern for prison security and the safety of both inmates and staff." *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007). Minimum due process requirements are met if "the findings of the prison

disciplinary board are supported by some evidence in the record." *Hill,* 472 U.S. at 454, 105 S.Ct. at 2773.

> In applying the "some evidence" standard, the Court in *Hill* noted that the analysis "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of evidence." 472 U.S. at 455, 105 S.Ct. 2768. Nor does the "some evidence" standard require that the evidence logically preclude any conclusion but the one reached by the disciplinary board. *Id.* at 457, 105 S.Ct. 2768. Rather, the "relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.* at 455–56, 105 S.Ct. 2768.

*Webb*, 223 S.W.3d at 118.

Black raises various arguments why his due process rights were violated. Because it is dispositive, we focus on his argument that the DOC failed to satisfy the "some evidence" test regarding whether the substance discovered in his pocket was in fact marijuana where: (1) this substance was only field tested rather than tested at a lab, the chain of custody was inadequate and there was no mention of the procedures used while conducting the test, thus providing no foundation for admitting the test results; and (2) there was not an appropriate foundation for the officers' personal impression that the substance was marijuana.

*Webb* is controlling. In *Webb*, the Kentucky Supreme Court evaluated four prison disciplinary cases involving field testing for marijuana. It ruled that there must be some evidence in the record to support a claim that the field tests used are reliable and a proper foundation must be provided for admitting the test results through a valid chain of custody and proving that proper testing procedures

were followed. *Id.* at 119. When this was not done and where the field test was the principal evidence relied upon, the "some evidence" standard was not satisfied. *Id.*

Regarding the substance identified in field testing as marijuana here, although there was an adequate basis to establish the chain of custody based upon the officers' reports and the evidence bag with their initialed signatures, there was no evidence to establish whether Sgt. Lotter followed the proper procedure for the NARK II field test or that the NARK II field test is reliable. Under these circumstances, the field testing cannot be the basis for the adjustment officer's finding.

However, in *Webb*, the Supreme Court went on to consider whether there was other evidence besides the field test to establish the substance was marijuana. In three other cases, the "officers observed and reported their first-hand impressions of the substance recovered; including odor, texture, and color[,]" there was evidence that when the substances were recovered, each inmate attempted to conceal the substance and destroy it; and "the inmates elected not to testify or assert that the substance was not what the officers believed it to be." *Id.* at 120. *See White v. Boards-Bey*, 426 S.W.3d 569, 576 (Ky. 2014) (explaining that a prisoner's silence can be considered against a prisoner in a prison disciplinary hearing). Under these circumstances, the Supreme Court ruled that even with the field tests excluded it was "common sense" that there was "some evidence" to support the decision reached by the hearing officers. *Webb*, 223 S.W.3d at 121.

While the circuit court concluded the officers' impressions were sufficient to provide some evidence that the substance was in fact marijuana, we disagree that an adequate foundation was laid for such a conclusion. In the officers' reports, they neither asserted that they had prior experience in detecting marijuana through their senses, nor identified the substance as marijuana based on its appearance. The officers never reached the conclusion based on viewing the substance that it was in fact marijuana rather than another similar substance such as a cooking spice or tea leaves. Although marijuana is known to have a distinctive smell, there is no indication that when Sgt. Lotter opened the plastic to test it, he observed it to smell like marijuana. The substance was only referred to as being marijuana based on the field test results.

Unlike the prisoners in *Webb* whose disciplinary actions were affirmed because common sense showed their reactions to the substances being discovered indicated contraband and they did not testify in their own defense, there is nothing similar in Black's conduct to show the substance was contraband. He denied possession of the substance and challenged the field testing results during his hearing.

We are not convinced that the substance's mere location in Black's coat pocket and being wrapped in plastic was sufficient without any foundation being laid, to conclude this constituted some evidence it was marijuana. His pocket contained numerous innocuous items so finding it there did not constitute the type of concealment which indicated guilt. *Compare with Bailey v.*

*Commonwealth*, No. 2016-CA-000439-MR, 2017 WL 464785, 4 (Ky.App. 2017) (unpublished) (finding some evidence to support the disciplinary action for contraband where "officers discovered several baggies of substances that 'appeared to be drugs' concealed inside [the prisoner's] television RF modulator.").

As to Black's other claims, we disagree that there was any due process violation. Initially, we note that a violation of a prison regulation does not necessarily offend due process:

> 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 [Kentucky Correctional Policies and Procedures] 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*, 426 S.W.3d at 575. Therefore, Black's claims regarding violations of the CPP as to the use of information from a confidential informant and deprivation of his right to sufficient time with a legal aide cannot, in and of themselves, show a violation of his due process rights, and their violation does not implicate the due process rights prisoners have in the disciplinary process as set out in *Wolff*.

While we understand Black's frustration that a confidential informant's tip may have resulted in a targeted search of his area, because any information from that confidential informant was not relied upon to find him guilty

of the infraction, the use of a tip in this manner does not violate the CPP. *See* CPP 15.6(II)(D)(3)(f) (requiring certain evidence of the reliability of information of a confidential informant "[i]f information from a confidential informant is relied upon in the findings of fact[.]")

As to Black's claim that he had a right to receive representation from a legal aide twenty-four hours prior to his hearing, the lack of such representation does not offend due process. As discussed in *Wolff*, 418 U.S. at 570, 94 S.Ct. at 2981–82, and *White*, 426 S.W.3d at 576, there is no right to counsel in the prison disciplinary process.

Additionally, although there is no case law determining whether waiver of the twenty-four hour notice prior to the hearing of the disciplinary report and supporting documentation also waives the twenty-four hour period to have the availability of a legal aide, we determine it defies logical sense for an inmate to assert that he was waiving his twenty-four hour notice of the charges but not his twenty-four hour access to a legal aide before his hearing. *See* CPP 15.6(II)(B)(3); CPP 15.6(II)(C)(5); CPP 15.6(II)(D)(2)(b).

As to Black's argument that the DOC failed to prove he possessed the substance located in his coat pocket, *Yates v. Fletcher*, 120 S.W.3d 728 (Ky.App. 2003), is controlling. In *Yates*, a prisoner housed in an open wing argued he did not have possession of a stolen tuna can found in his laundry bag stored under his bed because other inmates also had access to his laundry bag. The Court upheld the disciplinary action against him holding that constructive possession was

sufficient and, "[t]herefore, a laundry bag that belongs to Yates is considered under his control (even though it may be stored in a common area) and is in Yates's possession." *Id*. at 730. While other inmates did have access to the area in which Black's coat was hanging, his situation was sufficiently analogous to that in *Yates* for the determination that Black had constructive possession of its contents.

Accordingly, we reverse and remand the order of the Fayette Circuit Court denying Black's petition for a declaration of rights regarding his prison disciplinary proceedings on the basis that there was not "some evidence" to find him guilty of possession or promoting marijuana.

COMBS, JUDGE, CONCURS.

KRAMER, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

KRAMER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with majority's decision that there was not a due process violation and that Black had constructive possession of the substance located in his coat pocket. I respectfully dissent from that portion of the majority opinion that reverses the decision of the circuit court regarding the "some evidence" standard necessary to find Black guilty of possession of or promoting dangerous contraband, marijuana. I agree with the well-reasoned decision of the circuit court that the officer's impressions of the substance provide for "some evidence" to support the determination that Black committed a disciplinary infraction. For illustrative

purposes only, I cite *Hendrix v. Commonwealth,* 2010-CA-000305-MR, 2011 WL 113257, at *3 (Ky. App. Jan. 14, 2011), wherein the Court held that:

> In the case before us, the circuit court noted that a member of the prison's nursing staff had identified the pills as "Lortab" based on the description of the capsules' shape, color, and unique imprint. Despite Hendrix's assertions to the contrary, the court observed that the record included a complete chain of custody with respect to the suspected contraband. We conclude that the standard requiring "some evidence" was met.
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> Consequently, I would affirm the circuit court on all grounds.

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