RENDERED: SEPTEMBER 13, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000592-MR

MARCUS GREENE APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 17-CI-00146

RANDY WHITE, WARDEN,
KENTUCKY STATE PENITENTIARY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Marcus Greene, *pro se*, appeals from the Lyon Circuit Court's order of dismissal of his petition seeking a declaration of rights for failure to state a claim on which relief can be granted. The circuit court determined Greene failed to exhaust his administrative remedies in challenging a finding of

guilt in a prison disciplinary matter, which resulted in a restriction of his visitation privileges with his wife and adult daughter.

On March 28, 2017, a disciplinary report form was filed on Greene in KSP-2017-00709. Internal affairs supervisor Sergeant James Beavers completed an investigation of Greene and another inmate and determined through information provided by a confidential informant and recorded telephone calls between Greene and his wife and Greene and his daughter that Greene conspired with his daughter to smuggle narcotics into the Kentucky State Penitentiary via the visitation room and Greene conspired with his wife for her to collect money outside of the prison from the sale of the narcotics to other inmates. Sergeant Beavers determined that the other inmate had his mother send Greene's wife $100 to pay for narcotics.

On May 26, 2017,[1] the adjustment committee held a hearing on KSP-2017-00709. Greene was charged with Corrections Policies and Procedures (CPP) 15.2(II)(C)(Category VI)(3), more informally known as category 6-03, "[p]ossession or promoting of dangerous contraband[.]" By virtue of CPP 15.2(II)(E)(1)(c), which provides that "[a] person may be found to have committed

[1] Greene states he had an initial hearing on April 11, 2017, was found guilty and then sentenced to thirty days of restrictive housing with his visitation privileges restricted as a result, but was then given a second hearing on May 26, 2017, and had the identical penalty imposed. He presumes that a rehearing was ordered due to the adjustment committee not listening to recorded phone calls during the first hearing, which we assume was the subject of a previous appeal to the warden.

the violation listed in this policy if he . . . [c]onspires with another or others to commit the violation[,]" the charge was amended to category 6-03 inchoate.

The adjustment committee reviewed the initial report, the recorded phone calls and the confidential report. Greene admitted to making the calls and during one call referring to money as "whatchamacallit" and "dust." Greene also admitted to making the statement that he was going to "get him to give her a bet too" and that this statement was about money. The adjustment committee deemed the confidential informant reliable and relied upon the information contained in the confidential report to establish that there was some evidence of guilt.

The adjustment committee found Greene guilty and punished him by assigning him to thirty days of disciplinary segregation (restrictive housing), which had already been completed at the time of the hearing. Greene did not lose any "good time" credit.

Separate from the committee's punishment, Greene's wife and daughter were restricted from visiting Greene.[2] Greene claims this was based on the outcome of Greene's hearing, by which we interpret him to mean that this was done pursuant to CPP 16.1(II)(L)(1), which provides that "[a]n inmate receiving

[2] We accept as true Greene's allegation that this occurred, although he has not provided any written proof of such a decision. Greene's wife and daughter should have received notification of a decision to restrict their visitation. *See* CPP 16.1(II)(K)(1) ("A violation of the visiting procedures or laws may result in visitation restrictions. If this is necessary, a written notice shall be sent to the visitor describing why and how long the restriction will be.")

disciplinary action in accordance with CPP 15.2 for the following rule violations shall not have visiting privileges reinstated: 1. Smuggling or attempting to smuggle dangerous contraband into an institution[.]"[3]

Greene filed a petition for declaration of rights and injunctive relief against Warden Randy White (the warden). Greene argued he was denied due process where there was no evidence he conspired to possess or promote dangerous contraband and the subsequent action of restricting his visitation with his wife and daughter was disproportionate. He argued that the prison did not follow its own regulations as to how information by a confidential informant is to be used in order to support a finding of guilt pursuant to CPP 9.18 (II)(D)(3), (6) and (7). Greene argued that for this reason, the confidential informant's information could not be relied upon and, therefore, there was no information from which to conclude that Greene's slang references to money were connected to a conspiracy to introduce dangerous contraband into the prison. Greene argued the denial of his visitation privileges created "an atypical and significant hardship"

[3] We note that the suspension of visitation could have also been done on the basis of CPP 16.1(II)(K)(4) which provides in relevant part as follows: "An individual involved in the following rule violations shall not be approved as a visitor or have visiting privileges reinstated: a. smuggling or attempting to smuggle dangerous contraband into an institution[.]" We assume for the purposes of this appeal that Greene's wife and daughter are permanently suspended from visiting him, although this is unclear from Greene's wording that their visitation is "restricted." *See* CPP 16.1(II)(K)(3) ("A visitor may be suspended permanently for violation of institutional policies and procedures or violations of law.") Assuming Greene's wife and daughter are permanently restricted from engaging in visitation with him, it appears he should still be able to engage in video visitation with them. *See* CPP 16.5(II)(C)(4) and (D)(3).

when it resulted from unproven accusations and there was no real threat to security at the prison.

The warden filed a motion to dismiss Greene's petition for "failure to state a claim upon which relief can be granted" pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f), on the basis of Greene's failure to exhaust his administrative remedies or attach proof of such exhaustion as required by Kentucky Revised Statutes (KRS) 454.415.

In Greene's response, he argued he did exhaust his administrative remedies and the warden was aware of that fact because he had access to his case file. Greene claimed he attached a copy of his legal documents to the petition when he mailed it.[4] Greene then attached portions of his disciplinary reports and a copy of the letter which constituted his appeal.

On the final page of Greene's disciplinary report, it stated that the appeal was received on June 6, 2017, and that on June 7, 2017, the warden concurred with the adjustment committee because he "found sufficient evidence to support their decision of guilt."

In the letter from Greene to the warden, incongruously dated April 21, 2017, Greene stated he was appealing the adjustment committee decision, KSP

[4] There are no attachments to Greene's petition in the record.

2017-00709, hearing date May 26, 2017.[5] The substance of this letter is specific to these charges and how Greene believed the recorded phone calls were insufficient for a finding of guilt.

The circuit court granted the warden's motion to dismiss. In its order of dismissal, the circuit court noted that Greene's response to the warden's motion to dismiss included the attachment of partial copies of the disciplinary reports and an unsigned letter dated April 21, 2017, which predated the hearing held on May 26, 2017, and indicated that he was "once again appealing" from an adjustment committee decision. The circuit court stated, "[d]espite the additional opportunity to supplement the record with proof of exhaustion of administrative remedies, [Greene] has failed to do so" and dismissed Greene's petition with prejudice.

After the motion to dismiss was granted, but apparently before the warden received his copy of the order, the warden filed an amended motion to dismiss. The warden acknowledged that Greene provided sufficient proof of his exhaustion of administrative remedies and raised the new argument that Greene still failed to state a claim upon which relief can be granted because he received due process when there was "some evidence" of record to support the disciplinary action taken by the adjustment committee.

[5] It appears Greene earlier appealed from the April 11, 2017 decision resulting in a new hearing being held in May and then used the previous letter as a template to appeal again after the May 26, 2017 decision was reached.

On appeal, Greene argues the circuit court abused its discretion by failing to correctly apply the due process requirement that there be "some evidence" to support the adjustment committee's finding of guilt. Greene argues there was no basis provided as to how Sergeant Beavers concluded that Greene was conspiring to bring narcotics into the prison because there were no conversations detailing how any alleged drugs were supposed to be smuggled into the prison. Greene argues it was never established that he possessed any contraband and his phone conversations were not sufficient to establish he instructed his wife or daughter to bring in any contraband. He attempts to use Kentucky statutory provisions which relate to committing crimes to argue that he could not be found guilty. Finally, Greene argues the circuit court abused its discretion by granting the warden's motion to dismiss after he provided proof that he exhausted his administrative remedies.

The warden argues that affirmance is appropriate not because Greene failed to exhaust his administrative remedies but because Greene failed to state a claim upon which relief could be granted where there was "some evidence" to support the discipline imposed on him.

We agree with Greene that the circuit court erred in dismissing for failure to exhaust administrative remedies. Greene provided uncontested proof that he appealed to the warden, and the warden made a ruling on this appeal.

Therefore, because exhaustion was established, the circuit court should not have dismissed Greene's petition on this basis. However, that does not end our inquiry.

As an appellate court, we are authorized to affirm the lower court's decision for any reason supported by the record. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009). Therefore, if Greene's petition could properly be dismissed pursuant to CR 12.02(f) for failure to state a claim upon which relief can be granted for another reason, we may affirm.

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? 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) (omitting internal quotation marks and citation footnotes).

It is well established that while "prisoners do not shed all constitutional rights at the prison gate, . . . [that] [d]iscipline by prison officials in

response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law." *Sandin v. Conner*, 515 U.S. 472, 485, 115 S.Ct. 2293, 2301, 132 L.Ed.2d 418 (1995). Therefore, when a prisoner establishes a valid liberty interest that is entitled to protection, "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).

When due process protection is warranted based upon the consequences of inmate discipline, pursuant to *Wolff v. McDonnell*, 418 U.S. 539, 563-67, 94 S.Ct. 2963, 2978-80, 41 L.Ed.2d 935 (1974), the inmate is entitled to receive:

> (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.

Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). "[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board[.]" *Id.* at 455, 105 S.Ct. at 2774.

In *Sandin*, the United States Supreme Court traced the evolution of the application of the Due Process Clause in prison discipline cases through

approximately twenty years of Supreme Court decisions starting with *Wolff*, 418 U.S. at 557, 94 S.Ct. at 2975 (which held that because a statute created a liberty interest in a shortened prison sentence earned through good time credits, a prisoner was entitled to Due Process protections before such credits could be revoked for serious misconduct) and *Meachum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538-39, 49 L.Ed.2d 451 (1976) (which held that the Due Process Clause did not itself create a liberty interest to be free from intrastate transfers even though this could have a substantial adverse impact on the prisoner). *Sandin*, 515 U.S. at 477-79, 94 S.Ct. at 2297. The Court determined its cases had veered off course since then and receded from the methodology espoused in *Hewitt v. Helms*, 459 U.S. 460, 471-72, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983), that when a State "used 'language of an unmistakably mandatory character' . . . the State . . . created a protected liberty interest[]" which represented a "shift[] [in] the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation," resulting in "[c]ourts . . . draw[i]ng negative inferences from mandatory language in the text of prison regulations." *Sandin*, 515 U.S. at 480-81, 115 S.Ct. at 2298-99. The Court determined:

> The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom

> from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 483-84, 115 S.Ct. at 2300 (footnote and citations omitted). Consistent with *Sandin*, the Kentucky Supreme Court has noted:

> 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 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 v. Boards-Bey, 426 S.W.3d 569, 575 (Ky. 2014).

Greene does not complain about his disciplinary segregation, and indeed disciplinary segregation much longer than his does not implicate the Due Process Clause as such punishment is not an atypical and significant hardship. *See Marksbury v. Chandler*, 126 S.W.3d 747, 751, n.16 (Ky.App. 2003) (collecting cases establishing that terms of disciplinary segregation for much longer than thirty days did not create a liberty interest entitling an inmate to due process). Instead, Greene contends that there is not "some evidence" to establish that his wife and

daughter were conspiring with him to bring narcotics into the prison and, thus, it was unjust for him to be deprived of visitation with them.

Before we consider whether "some evidence" was provided to impose this discipline, we consider whether Greene was entitled to procedural due process before visitation with his wife and adult daughter could be restricted. Initially, we note there is no independent constitutional basis for limiting the denial of inmate visitation to particular visitors. "The denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence and therefore is not independently protected by the Due Process Clause." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 461, 109 S.Ct. 1904, 1909, 104 L.Ed.2d 506 (1989) (citation and quotation marks omitted). Similarly, the constitutional right of freedom of association is not violated by restrictions on visitation in prison.

> The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.

Overton v. Bazzetta, 539 U.S. 126, 131, 123 S.Ct. 2162, 2167, 156 L.Ed.2d 162 (2003) (citations omitted). Because "[d]rug smuggling and drug use in prison are intractable problems[,]" the "[w]ithdrawing visitation privileges is a proper and

even necessary management technique to induce compliance with the rules of inmate behavior[.]" *Id.* at 134, 123 S.Ct. at 2168-69. *See Block v. Rutherford*, 468 U.S. 576, 586-89, 104 S.Ct. 3227, 3232-34, 82 L.Ed.2d 438 (1984) (discussing how contact visits can jeopardize the security of a facility by allowing drugs and other contraband into the facility and holding there is no due process violation in a blanket prohibition on pretrial detainees being allowed contact visits in jail, even with family members).

Therefore, we must examine whether the administrative regulations associated with visitation can provide a due process right to Greene. CPP 16.1(II)(K)(4) states that individuals involved in smuggling or attempting to smuggle dangerous contraband into an institution "shall not be approved as a visitor or have visiting privileges reinstated" and CPP 16.1(II)(L) states that inmates receiving disciplinary action in accordance with CPP 15.2 for smuggling or attempting to smuggle dangerous contraband into an institution "shall not have visiting privileges reinstated[.]" However, as explained in *Sandin*, this mandatory language is not enough to confer due process rights in a liberty interest through the negative implication that the smuggling or attempted smuggling (or conspiring to smuggle) must be proven before visitation can be withheld. Instead, we must determine whether the exclusion of visitors for misconduct is or is not an "atypical

and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484, 115 S.Ct. at 2300.

In applying this test and ruling that the prisoner had no right to due process before he was subjected to thirty days of disciplinary segregation, the Court in *Sandin* determined that the prisoner's punishment through disciplinary segregation "mirrored those conditions imposed upon inmates in administrative segregation and protective custody[,]" and "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction." *Id.* at 486, 115 S.Ct. at 2301 (footnote omitted). Thus, it is appropriate for us to consider on what other bases prison officials may exclude visitors for misconduct without having to prove that an inmate that they are coming to visit violated any prison rules.

In reviewing CPP 16.1, it quickly becomes apparent that prison officials are granted wide discretion in excluding visitors both temporarily and permanently for a wide variety of reasons using the permissive language of "may." CPP 16.1(II)(C)(1)(b) states "[a]ny visitor may be barred for security reasons[.]" CPP 16.1(II)(E) states:

> A visitor may be excluded from the institution if:
>
> 1. The presence of the visitor in the institution constitutes a probable danger to institutional security or interferes with the orderly operation of the institution;

2. The visitor has a past record of disruptive conduct;

3. The visitor is under the influence of alcohol or drugs;

4. The visitor refuses, upon request from the officers, to show proper photo identification. If it is an initial visit, the visitor may be permitted entry without proper identification; however, any subsequent visit shall not be permitted unless photo identification is provided;

5. The visitor refuses upon request from a correctional officer to submit to a search; or

6. The visitor is directly related to the inmate's criminal behavior.

In *Thompson*, the United States Supreme Court reviewed similar discretionary language of an earlier version of CPP 16.1(II)(E). The Court held that these regulations did not establish a liberty interest entitled to the protections of the Due Process Clause. *Thompson*, 490 U.S. at 465, 109 S.Ct. at 1911. The Court explained:

> The overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials.

Id. at 464-65, 109 S.Ct. at 1911 (footnote omitted).

CPP 16.1(II)(H), (I) and (J) provide a variety of visitation rules which prohibit various types of conduct including engaging in more than brief physical contact, bringing a communication device, failing to control children, and not adhering to the dress code. Pursuant to CPP 16.1(II)(K)(1), "[a] violation of the visiting procedures or laws may result in visiting restrictions." Pursuant to CPP 16.1(II)(K)(3), "[a] visitor may be suspended permanently for violation of institutional policies and procedures or violations of law." Therefore, there were a variety of regulations which provided prison officials with the discretion to exclude Greene's wife and adult daughter from visiting.

Visitors are also mandatorily excluded for a variety of reasons without any necessity for proving that the inmate they came to visit did anything wrong. Pursuant to CPP 16.1(II)(K)(4):

> An individual involved in the following rule violations shall not be approved as a visitor or have visiting privileges reinstated:
>
> a. smuggling or attempting to smuggle dangerous contraband into an institution;
>
> b. assisting or aiding in the planning of an escape or attempted escape; or
>
> c. an employee or volunteer who developed a relationship with an inmate that was unrelated to correctional activities.

While such rule violations may normally be associated with wrongdoing on the part of the inmate, there is no requirement that any disciplinary action be taken against such inmate before individuals shall be excluded. Therefore, Greene's wife and daughter could have also been excluded simply for their own actions pursuant to CPP 16.1(II)(K)(4)(a) without there being any need to resort to excluding them based upon a finding of guilt for Greene's category 6-03 inchoate offense. If a visitor has her visitation privileges suspended under CPP 16.1(II)(K)(4), this restriction is not a penalty against the inmate through the prison disciplinary process but a consequence to the visitor for her actions. *Meredith v. Taylor*, 2015-CA-001080-MR, 2017 WL 65597, *4-5 (Ky.App. Jan. 6, 2017) (unpublished).[6]

It is unclear whether Greene's wife and daughter were restricted from visiting with Greene based on his behavior, their behavior, or a combination of the two. CPP 16.1(II)(L)(1) is virtually a mirror image of CPP 16.1(II)(K)(4)(a) with the distinction of CPP 16.1(II)(L) requiring that the inmate receive disciplinary action in accordance with CPP 15.2. However, even if the restriction of their visitation was purely pursuant to the adjustment committee finding Greene guilty of conspiring to smuggle contraband into the prison, Greene cannot demonstrate a

[6] We cite this unpublished opinion pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c) because there are no published decisions that adequately address this issue.

due process violation because the restriction of visitation was the same as what could be done based on his wife's and daughter's actions themselves regardless of his involvement and similar to what could have occurred based on a risk they posed or if they had failed to follow other visitation rules.[7]

Finally, in the interest of addressing Greene's main argument, that there was not "some evidence" of his guilt because the adjustment committee was deprived of the confidential informant's information by failing to properly follow the regulations pertaining to use of confidential informants in adjustment decisions, we note that even if the *Wolff* protections did apply, minimum due process requirements do not require compliance with regulations. Instead, due process is satisfied with a statement that the evidence provided by a confidential informant has been reviewed, found reliable and an explanation for why is provided. *See Foley v. Haney*, 345 S.W.3d 861, 865 (Ky.App. 2011); *Gilhaus v. Wilson*, 734 S.W.2d 808, 810 (Ky.App. 1987). These standards were met,[8] so the adjustment committee could properly rely on the confidential information. Additionally, the

[7] We note, however, that procedural due process protections were certainly required when this disciplinary action was before the adjustment committee as Greene was facing a possible penalty of the loss of good-time credit.

[8] The adjustment committee found the confidential report to be "credible, factual and reliable in that the information relied upon to establish some evidence of guilt was consistent in content, context and the details corroborated and supported one another due to specificity." It found the confidential informant was reliable based on past reliable information provided and noted the information provided here "was specific in content, context, dates and times, corroborating and supporting one another due to the specificity of the details provided."

record demonstrates that Greene's argument is also without merit because adjustment committee properly complied with CPP 9.18(II)(D)(3), (6) and (7).

Accordingly, we affirm the Lyon Circuit Court's order of dismissal of Greene's petition seeking a declaration of rights for failure to state a claim on which relief can be granted.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Marcus Greene, *pro se* Eddyville, Kentucky	Brenn O. Combs Frankfort, Kentucky