

STATE OF MICHIGAN
COURT OF APPEALS

DONALD ALAN WELKY,

Petitioner-Appellee,

v

DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

UNPUBLISHED

October 22, 2009

No. 287032

Ingham Circuit Court

LC No. 08-000029-AA

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Respondent appeals by delayed leave granted a circuit court order vacating the decision of the hearing officer that found petitioner guilty of the major misconduct “accomplice to escape.” We affirm.

The MDOC Policy Directive 03.03.105A defines “Accomplice,” as “A prisoner who assists another to commit a specific misconduct or, after it is committed, conceals the violation from the authorities.” The major misconduct of “Escape” is defined by Directive 03.03.105B as:

Leaving or failing to return to lawful custody without authorization; failure to remain within authorized time or location limits (a) while on a public works crew; (b) while under electronic monitoring; or (c) during an authorized absence from work, school, or other activity while residing in a community corrections center.

The hearing officer found petitioner guilty of accomplice to escape because he failed to report to the authorities information concerning a planned escape attempt:

On 3-28-07 while interviewing prisoner Welky 186974 he admitted to Inspector [H]arwood and Inspector Newland that he was aware that other prisoners had removed floor ties [sic] from a cell room, broke through th [sic] concrete floor and were digging a tunnel toward the perimeter fence. He states that three or four months ago prisoner Murphy 183248 asked him if he knew how they could get a car. Prisoner Welky at no time did report this to authorities until after the tunnel was discovered[] and was confronted. I find that prisoner Welk[y] did assist others to commit a specific misconduct [escaping] from a secure facility by leaving through a tunnel and concealed the violation from the authorities

becasue [sic] the tunnel was through the outer fence. Inspector Harwood and inspector Newland are clear and detailed in their statements and found credible.

Petitioner appealed, and the circuit court reversed and vacated the hearing officer's decision.

Respondent's decision is REVERSED, however, with respect to the accomplice to escape citation. That determination by the agency is hereby VACATED as unsupported by competent, material and substantial evidence on the whole record. The evidence reveals no active involvement on Petitioner's part in any escape. At most he is guilty of passive concealment of information relating to an escape. However, his claimed defense of duress is established indisputably. Record, 8.

Respondent's Hearings Handbook, at 43, requires that, "In deciding whether a prisoner has a valid defense of duress, the hearing officer must examine all the evidence to determine whether the facts show that the prisoner was threatened, was so fearful of harm that his or her free will was overcome, and committed the misconduct because of that fear." Further, "If a prisoner presents the defense of duress and is found guilty of misconduct, the hearing officer must give reasons for rejecting that defense in the 'Reasons' portion of the hearing report." *Id.* Here the hearing officer never addressed the issue. Record, 1. Neither did the hearings administrator in the request for hearing. Record, 3. In sum, the accomplice charge is not supported by substantial evidence.

On appeal, respondent notes that this Court's review of the circuit court's decision is to determine whether the court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). The standard "is indistinguishable from the clearly erroneous standard of review." *Id.* at 234-235. Respondent then argues that the circuit court misapplied the substantial evidence test and substituted its discretion for that of the agency.

Petitioner's actions do not satisfy the definitions of "Accomplice" to "Escape." There is no indication that petitioner was involved in the other prisoners' escape efforts. Petitioner's awareness of the plans does not show that he "assist[ed]" them in the commission of escape. There is also no indication that he "conceal[ed] the violation from the authorities" "after it [was] committed." Respondent fails to offer a cogent explanation for how failure to inform authorities of other prisoners' plans or activities in preparation for escape satisfies the requisite definitions of "Accomplice" to "Escape." Therefore, we do not agree with respondent's contention that the circuit court misapplied the substantial evidence test when it concluded that the evidence did not satisfy that standard.

Respondent also argues that, although the agency's decision did not discuss the duress defense proffered by petitioner, the circuit court abused its discretion by vacating the decision, rather than remanding for the agency to make a determination.

However, the court vacated the agency determination “as unsupported by competent, material and substantial evidence on the whole record,” not because the agency failed to address duress. The court’s discussion of duress follows its statement, “At most he is guilty of passive concealment of information relating to an escape.” The discussion of the defense is significant only if that conduct would meet the definition of “accomplice” to “escape.” For the reasons previously stated, the conduct does not meet those definitions. Therefore, the court’s discussion of duress was dicta, and this Court declines to further analyze its significance.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Pat M. Donofrio