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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-516

Pyotr Shmelev, petitioner,
Appellant,

vs.

Joan Fabian, Commissioner of Corrections,
Respondent.

Filed August 31, 2010
Affirmed
Johnson, Judge

Washington County District Court
File No. 82-C9-06-005209

Pyotr Shmelev, Bayport, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Angela Behrens, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Minge, Presiding Judge; Johnson, Judge; and Harten, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Pyotr Shmelev's 30-year term of imprisonment was extended by six days because he possessed contraband in his prison cell. Shmelev challenged the extension of his incarceration in a petition for a writ of habeas corpus, which the district court denied. On appeal, Shmelev makes two arguments. First, he argues that the district court erred by concluding that the evidence introduced at the prison disciplinary hearing was sufficient to support the hearing officer's finding that Shmelev violated prison rules. Second, he argues that the district court erred by concluding that prison officials' denial of his request to call a prison employee at the prison disciplinary hearing was harmless error. We affirm.

FACTS

In 2001, Shmelev was convicted of second-degree intentional murder. *See State v. Shmelev*, No. C2-02-302, 2002 WL 31867453, at *1 (Minn. App. Dec. 24, 2002), *review denied* (Minn. Mar. 18, 2003). Shmelev stabbed his wife to death and dismembered her body. *Id.* He was sentenced to 360 months of imprisonment. *Id.*

In March 2006, Shmelev was an inmate of the Stillwater Correctional Facility, where he remains today. On March 1, 2006, prison officials searched Shmelev's cell and found the following items: (1) a file of 68 items referring to online stock trading, (2) discipline information showing that appellant was removed from a work assignment in 2004 for misuse of facility computers, (3) "[i]tems that include computer language and programs designed to bypass computer security," (4) "[a] box of Sudafedrine containing

20 tablets and three items containing chemical compounds and mixtures," (5) a file with computer-generated items "in Russian dialect," and (6) "[a] pencil sharpener."

On March 2, 2006, Shmelev was charged with violations of (1) Department of Corrections (DOC) rule 170, governing interference with security procedures; (2) DOC rule 190, governing unauthorized control, theft, possession, transfer or use of property; (3) DOC rule 381, governing "possession of contraband -- drugs"; and (4) DOC rule 386, governing "possession of contraband -- other."

On March 7, 2006, a prison hearing officer held a disciplinary hearing and found Shmelev guilty of violating DOC rules 170, 190, and 386. The hearing officer imposed a penalty of 20 days of segregation for Shmelev's violations of rules 170, 190, and 386, and six days of extended incarceration for a second violation of rule 386. Shmelev appealed to the warden, who denied the appeal. The charge alleging a violation of DOC rule 381 was withdrawn.

In July 2006, Shmelev petitioned the district court for a writ of habeas corpus on the ground that his incarceration was extended in violation of his right to procedural due process. In March 2008, the district court denied the petition without an evidentiary hearing. On appeal, this court rejected Shmelev's argument that the prison hearing officer was biased. *Shmelev v. Fabian*, No. A08-1121, 2009 WL 1374805, at *5 (Minn. App. May 19, 2009). But we reversed the district court's denial of the petition on two grounds and remanded for an evidentiary hearing. *Id.* at *5, *7. We concluded that the district court erred by not conducting an evidentiary hearing on Shmelev's claim that prison officials failed to produce a witness for the prison disciplinary hearing. *Id.* at *5-7.

We also determined that the district court erred by concluding that the evidence was sufficient to support the prison hearing officer's finding that Shmelev violated prison disciplinary rules despite the fact that the DOC's allowable-property list was not introduced at the prison disciplinary hearing. *Id*. at *4-5.

In October 2009, the district court held an evidentiary hearing. In December 2009, the district court denied the petition. The district court found that Shmelev's right to call witnesses for the prison disciplinary hearing was denied but that the error was harmless. The district court also concluded that the evidence was sufficient to support the prison hearing officer's findings of guilt. Shmelev moved for a new trial or amended findings, and the district court denied the motion. Shmelev again appeals.

D E C I S I O N

Shmelev argues that the district court erred by denying his petition for a writ of habeas corpus. A writ of habeas corpus is a statutory remedy that allows a person to seek "relief from imprisonment or restraint," Minn. Stat. § 589.01 (2006), in situations in which the postconviction remedy is inapplicable, *Kelsey v. State*, 283 N.W.2d 892, 894-95 (Minn. 1979). A petitioner is entitled to a writ of habeas corpus if his or her imprisonment or restraint is caused by a violation of constitutional or statutory rights. *Roth v. Commissioner of Corr.*, 759 N.W.2d 224, 227 (Minn. App. 2008); *Loyd v. Fabian*, 682 N.W.2d 688, 690 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004). We apply a *de novo* standard of review to questions of law, and we review a district court's findings of fact to determine whether "they are reasonably supported by the evidence." *Roth*, 759 N.W.2d at 227 (quotation omitted).

Shmelev contends that prison officials extended the duration of his incarceration in violation of his right to procedural due process. The United States Constitution provides that no person may be deprived of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. To determine whether an inmate has been given due process in the prison-discipline process, a court should ask (1) whether the offender has a protected liberty or property interest and (2) whether the procedures used to deprive the offender of that liberty interest were sufficient to satisfy the requirements of the Due Process Clause. *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005). In the context of a prison disciplinary hearing, an inmate with a protected liberty interest is entitled to:

> (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 Inst. v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2273 (1985) (citing *Wolff v. McDonnell*, 418 U.S. 539, 563-567, 94 S. Ct. 2963, 2978-80 (1974)). The third of these requirements is not satisfied "unless the findings of the prison disciplinary board are supported by some evidence in the record." *Id.*

In this case, Shmelev has a protected liberty interest in the extension of his supervised-release date. *See Johnson v. Fabian*, 735 N.W.2d 295, 302 (Minn. 2007); *Carrillo*, 701 N.W.2d at 773. Thus, the pertinent question is whether Shmelev received the process to which he was due. Shmelev's arguments implicate the second and third requirements of *Wolff* and *Hill*.

I. Sufficiency of the Evidence

Shmelev argues that the district court erred by concluding that the evidence introduced at the prison disciplinary hearing was sufficient to support the prison hearing officer's finding that he violated DOC rule 386, which prohibits inmates from possessing contraband. In prison disciplinary proceedings, the Due Process Clause requires a hearing officer to apply a preponderance-of-the-evidence standard. *Carrillo*, 701 N.W.2d at 777. On judicial review, courts seek to determine whether the hearing officer's findings are supported by "some evidence." *Id*. at 775-76 & n.8; *Hill*, 472 U.S. at 455-56, 105 S. Ct. at 2774; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38, 124 S. Ct. 2633, 2651 (2004).

DOC rule 386 states, "No offender shall possess any stolen or unauthorized property." Another DOC rule defines contraband:

> Contraband is defined as any items which have been altered, anything unauthorized, authorized items in excess of allowed limits, items for which a specific offender does not have authorized possession, items in other than an authorized area and/or items specifically directed by staff to be removed from the facility or stored for safe keeping.

DOC Rule 380. The prison hearing officer found that Shmelev possessed documents "that may have the potential to interfere with the security of the institution and may have the potential to circumvent the institution's current telephone system and the institution's ability to monitor offender telephone conversations." The prison hearing officer found that the documents were "from a company/service called 'Skype,' which included several pages outlining the terms of service from the company." The prison hearing officer

found "that it is more likely than not that [Shmelev] was trying to interfere with the institution's current phone system. As a result, he is found in violation based [on] a preponderance of evidence."

In our prior opinion, we concluded that the district court erred in two respects in its analysis of Shmelev's challenge to the sufficiency of the evidence. First, we stated that the district court improperly relied on DOC division directive 302.250, which provides that inmates may possess personal property only if it is included in a list of allowable property published by the DOC, because the allowable-property list was not part of the district court record. *Shmelev*, 2009 WL 1374805, at *4. Second, we stated that the district court erred by relying on DOC division directive 301.030, which provides that contraband consists of items "not specifically authorized by the warden," because the district court "did not address Shmelev's argument that he was authorized to receive the web-generated materials by the facility's mailroom policies." *Id*. at *4-5.

On remand, the district court conducted an evidentiary hearing. The district court clarified that the two violations of rule 386 were based on Shmelev's possession of "28 pages of computer-generated material" of two types: first, documents explaining how to place telephone calls over the internet through Skype.com, which apparently were printed off the internet, and, second, documents "discussing how to by-pass security systems." The district court found that the documents possessed by Shmelev were not included on the DOC's allowable-property list. The district court acknowledged that division directive 301.030 provides an exception for materials that are specifically allowed by the warden. But the district court also found that Shmelev did not introduce any evidence

that the documents he possessed were specifically allowed by the warden. These findings by the district court are supported by some evidence in the district court record. The allowable-property list was introduced into evidence in the district court, and the prison hearing officer testified about her application of DOC rule 386, division directive 302.250, and the allowable-property list to the facts presented to her. This evidence supports the hearing officer's finding that the documents possessed by Shmelev are contraband.

With respect to the second reason for our remand, the district court addressed Shmelev's argument that the documents in his possession were not contraband on the ground that they were not confiscated by the prison mailroom when they were sent to him by a friend outside the prison. On remand, the district court received testimony from the prison mailroom supervisor. She explained that she is not a security officer. She testified that the mailroom, which receives "voluminous" quantities of mail, is the "first level of inspection" to determine if an item complies with DOC policies. But she also testified that mailroom personnel may not identify every item of contraband upon receipt and agreed that it is "possible that some items may come through the mailroom that are contraband when viewed in another context or when taken with other items." Relying on the testimony of the prison mailroom supervisor, the district court found that "the fact that the mailroom staff did not recognize multiple pages of detailed computer print-outs to be contraband did not mean that they were not." This finding by the district court is supported by some evidence in the district court record.

After addressing the two issues identified in this court's prior opinion, the district court concluded that the evidence introduced in the prison disciplinary hearing was sufficient to support the hearing officer's finding that the documents possessed by Shmelev were contraband. As a result of that conclusion, the district court further concluded that the prison was authorized to extend Shmelev's incarceration by six days and that the prison discipline proceedings satisfied due process requirements. The district court did not err in its findings or in its legal analysis. Whenever there is tension between prison regulations and inmates' constitutional rights, courts must consider whether the regulation "is reasonably related to legitimate penological interests," which helps ensure that "'prison administrators . . . , and not the courts, . . . make the difficult judgments concerning institutional operations.'" *Turner v. Safley*, 482 U.S 78, 89, 107 S. Ct. 2254, 2261 (1987). This principle recognizes that "judgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials.'" *Id.* at 86, 107 S. Ct. at 2260.

II. Failure to Produce Witness

Shmelev also argues that the district court erred by concluding that prison officials' failure to produce a witness for his prison disciplinary hearing was harmless error.

The witness at issue was Shmelev's former supervisor in a work program within the prison. Shmelev alleged in his petition that he requested the attendance of the supervisor at his prison disciplinary hearing so that he could elicit testimony from him but that prison officials failed to produce him at the hearing. The district court rejected

the claim without an evidentiary hearing. In our prior opinion, we stated that "the record remains unclear about why DOC did not call [the former supervisor] as a witness at the disciplinary hearing" and that "we cannot determine whether DOC's failure to call [the witness] violated Shmelev's due-process right to call a witness at the disciplinary hearing." *Shmelev*, 2009 WL 1374805, at *7. Thus, we reversed and remanded for an evidentiary hearing on that issue. *Id*.

On remand, the district court received testimony from Shmelev's former supervisor, among other persons. The district court found that the supervisor was not notified of Shmelev's hearing before it occurred. The district court concluded that the failure of prison officials to produce the witness at Shmelev's prison discipline hearing interfered with Shmelev's right "to call witnesses . . . in his defense." *Hill*, 472 U.S. at 454, 105 S. Ct. at 2273. But the district court concluded that the violation of Shmelev's right to call witnesses was harmless error because the former supervisor's testimony would not have changed the outcome of the prison disciplinary proceedings.

On appeal, Shmelev contends that his former supervisor's testimony at the disciplinary hearing "would have been instrumental in showing [the hearing officer] that Skype printouts were not a security risk." The district court found, however, that the witness's testimony would have established only that Shmelev could not have accessed Skype on his work computer and that Shmelev's work computer was on a secure internal system. The district court also found that the former supervisor had neither authority nor expertise to determine whether the documents Shmelev possessed were contraband. Accordingly, the district court reasoned that the former supervisor's testimony would not

have affected the outcome of the hearing. The district court's findings are supported by some evidence in the district court record. The witness testified that he has knowledge of Shmelev's job but that he has no authority to determine whether a particular document constitutes contraband.

Shmelev emphasizes the witness's testimony that inmates do not have access to the internet and, thus, cannot access Skype from computers within the prison. From these facts he argues that the documents he possessed do not constitute a security risk. As the district court pointed out, however, a document need not be a security risk to be considered contraband. The district court found that the documents in Shmelev's possession are not included in the list of permitted material and were not specifically permitted by the warden. In light of those findings, it did not matter whether Shmelev could access the internet. Thus, the former supervisor's testimony at the disciplinary hearing would have been irrelevant.

Given the fact that the former supervisor's testimony would not have changed the outcome of the prison discipline hearing, the district court did not err by concluding that prison officials' failure to produce the witness for the hearing was harmless error. *See* Minn. R. Civ. P. 61; *see also Howard v. United States Bureau of Prisons*, 487 F.3d 808, 815 (10th Cir. 2007) (remanding for determination whether violation of inmate's procedural due process rights in prison disciplinary proceeding was harmless error); *Elkins v. Fauver*, 969 F.2d 48, 53 (3d Cir. 1992) (applying harmless-error test to violation of inmate's procedural due process rights in prison disciplinary proceeding).

Before concluding, we note that Shmelev makes two additional arguments. He argues that the prison's restriction on his receipt of mail violates his First Amendment rights and that prison officials failed to disclose exculpatory evidence to him. Neither of these claims, however, was alleged in Shmelev's original habeas petition or his amended habeas petition. Thus, Shmelev has not properly preserved the issues for our review. *See, e.g.*, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Affirmed.