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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000818-MR

CLIFTON BOARDS-BEY — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 10-CI-00699

RANDY WHITE, WARDEN;
BILLY J. HERRIN, LT.; AND
D. ELLIS, SGT. — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND LAMBERT, JUDGES.

COMBS, JUDGE: Clifton Boards-Bey, acting *pro se*, appeals the order of the Muhlenberg Circuit Court of April 1, 2011, which dismissed his petition for a declaration of rights. Boards-Bey contends that he did not receive the due process

to which he was entitled in a prison disciplinary hearing. After our review, we agree with him and vacate the order of the circuit court and remand.

Boards-Bey was an inmate at the Northpoint Training Center (NTC) in Burgin, Kentucky. A riot occurred on August 21, 2009. After NTC staff suppressed the riot, NTC staff member Stefany R. Thornberry investigated the incident. During the course of her investigation, Thornberry interviewed Lieutenant J. Phillips. Phillips stated that he had observed Boards-Bey yelling and throwing objects at NTC staff in front of Dorm 1 and that Boards-Bey chased him from Dorm 1 to the kitchen.

After the riot, Boards-Bey was transferred to the Green River Correctional Complex in Central City, Kentucky. Sergeant Darime Ellis was assigned Boards-Bey's disciplinary matter. Sgt. Ellis interviewed Boards-Bey concerning the riot at NTC. Boards-Bey denied all the allegations against him and contended that there were two inmates who could verify that Boards-Bey had not chased Lt. Phillips.

Sgt. Ellis subsequently charged Boards-Bey with "Physical Action resulting in the Death or Injury of an Employee or Non-Inmate," a violation of Category VII, Item 4 of Kentucky Department of Correction Policies and Procedures (CPP) 15.2. Boards-Bey received a copy of the disciplinary report on October 25, 2009. At that time, Boards-Bey entered a plea of not guilty to the charge and requested three witnesses to testify on his behalf: Inmate Anthony Anderson, Inmate Robert Powell, and Lt. Phillips.

A prison disciplinary hearing was held on October 28, 2009, presided over by Adjustment Officer Billy J. Herrin. Officer Herrin notified Boards-Bey of his rights pursuant to *Miranda v. Arizona.*[1] The CPP manual provides that an inmate has the right: "To be silent during the hearing but that his silence may be used again him in the hearing." CPP § 15.6(e). Boards-Bey decided that he would remain silent after receiving this warning. Officer Herrin then determined that by electing to remain silent, Boards-Bey had waived his right to call and to question his witnesses. No prison investigator called or questioned the witnesses on his behalf or as a part of the evidence in the investigation upon which the final adjudication was premised. Instead, Officer Herrin simply pronounced Boards-Bey guilty as charged in Thornberry's report. He also relied upon the verified statement by Lt. Phillips that Boards-Bey was yelling and throwing items at the NTC staff in front of Dorm 1 and that he had chased Lt. Phillips from Dorm 1 to the kitchen. As punishment, Officer Herrin assigned Boards-Bey to 365 days of disciplinary segregation, assessed a forfeiture of 199 days of good time, and ordered him to pay restitution for any medical costs due.

Boards-Bey appealed Officer Herrin's findings to Warden Randy White. On November 25, 2009, Warden White amended the offense to "Physical Action against an Employee or Non-Inmate," a Category VII, Item 1 violation, and reduced the penalty to 180 days disciplinary segregation. The forfeiture of good-time credit and restitution portions remained unchanged.

[1] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Boards-Bey filed a Petition for Declaration of Rights pursuant to Kentucky Revised Statute[s] (KRS) 418.040 in the Muhlenberg Circuit Court. He claimed that his right to due process under the Fourteenth Amendment had been violated. On March 21, 2011, Appellees filed a "pre-answer motion to dismiss" under Kentucky Rules of Civil Procedure (CR) 12.02(f), claiming that Boards-Bey failed to state a claim upon which relief could be granted. On April 1, 2011, the circuit court granted the Appellees' motion and dismissed Boards-Bey's petition for declaration of rights. Boards-Bey then filed this appeal.

Boards-Bey first claims that the circuit court erred by not affording him sufficient time to respond to the Appellees' motion to dismiss prior to ruling on the motion. He argues he should have been granted – at a minimum – twenty days to respond. In support of his position, Boards-Bey points to CR 12.01, which provides in pertinent part, "a party served with a pleading stating a cross claim against him/her shall serve an answer thereto within 20 days after the service upon him/her." We cannot agree that CR 12.01 is implicated. Appellees' motion to dismiss was neither a pleading nor a cross-claim to which CR 12.01 might apply.

However, case law has addressed the criteria governing a court's treatment of a motion to dismiss:

> 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) (citations and quotations omitted).

Boards-Bey claims that his due process rights were violated when: (1) Officer Herrin denied Boards-Bey the right to call witnesses to testify during the prison disciplinary hearing on his behalf; and (2) Sgt. Ellis failed to properly investigate the NTC incident by interviewing and obtaining witness statements from Lt. Phillips and Inmates Powell and Anderson in violation of CPP 15.6(II)(C)(4)(b)(2)(c).

Prison disciplinary proceedings are administrative rather than criminal in nature. While inmates retain rights under the Due Process Clause of the United States and Kentucky Constitutions, a defendant in a prison disciplinary proceeding it not entitled to "the full panoply of rights due a defendant" in a criminal proceeding. *See Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974); *Smith v. O'Dea*, 939 S.W.2d 353, 357-58 (Ky. App. 1997). Nonetheless,

> the U.S. Supreme Court has concluded that due process requirements in prison disciplinary hearings, where the loss of good time credit is at stake, include: (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.

Webb v. Sharp, 223 S.W.3d 113, 117-18 (Ky. 2007) (citation omitted).

Under the *Webb v. Sharp* criteria, Boards-Bey did receive advance written notice of the charges and a concluding written statement containing the evidence relied upon and the reasons for the disciplinary action. However, he was denied the second standard: his right to an opportunity "to call witnesses and present documentary evidence in his defense." *Id*. The desire of Boards-Bey not to speak during his disciplinary hearing in no way implied a waiver of his right to have his witnesses properly investigated according to the procedures mandatorily set forth in Kentucky Department of Corrections Policy and Procedure 15.6(C)(4)(B)(2)(c) as follows:

> During the course of the Investigation review, the Investigator ***SHALL interview witnesses***, unless a witness is clearly irrelevant to the issues presented and ***record a brief statement of what the witnesses report.*** (Emphasis added.)

Nor did the silence of Boards-Bey abrogate the ***duty*** of Sergeant Ellis to investigate personally and to record the results of his investigation.

More disturbing, however, is the *Miranda* issue.

After Boards-Bey invoked his Fifth Amendment right to remain silent during the hearing, Officer Herrin, who was conducting the hearing, improperly

construed his assertion of his Fifth Amendment right as a waiver of his right to speak to others in order to interview witnesses. Officer Herrin was neither reasonable nor correct in equating the right to remain silent personally with a waiver of the speech necessary to question witnesses. Instead, the result was an impermissible, retaliatory penalty imposed for the invocation of the constitutionally guaranteed right to be free from self-incrimination.

His final punishment was severe: as amended, imposition of 180 days of disciplinary segregation, loss of 199 days of non-restorable good time, and payment of any restitution that may have been involved. Admittedly, as noted earlier, a defendant in an administrative prison disciplinary proceeding is not entitled to the "full panoply" of due process rights afforded to a criminal defendant at trial (*Wolff,* 418 U.S. at 556). Nonetheless, case law is clear that the restricted due process to which he is entitled must be granted. (*Smith v. O'Dea,* 939 S.W.2d 357-58).

The affronts to due process in this case severely impaired the disciplinary hearing in derogation of the very standards promulgated in the CPP. Consequently, we vacate the holding of the Muhlenberg Circuit Court dismissing the petition for declaration of rights and remand for appropriate proceedings.

LAMBERT, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I must dissent for two reasons. First, contrary to precedent, the opinion elevates failure to follow

state prison policies governing inmate discipline to the level of a federal due process violation. Second, with no support in the record and also contrary to precedent, the majority re-characterizes the hearing officer's determination that the inmate waived participation in the hearing, choosing to call it, instead, retaliation for the inmate's exercise of his right against self-incrimination.

I first consider the majority's holding that the Due Process Clause requires appellees to comply with Kentucky Department of Corrections Policies and Procedures (CPP) 15.6(C)(4)(B)(2)(c). The U.S. Supreme Court has indicated that this is not so. "In short, once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [Kentucky] statute[, regulation, or rule]." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493 (1985).

Loudermill expressed this principle in a case challenging, on federal due process grounds, the constitutionality of an Ohio statute. However, several federal courts have applied the principle specifically to prison disciplinary proceedings.[2] Uniformly, those courts reject the unique view the majority now embraces. As the Eighth Circuit Court of Appeals said, "the Due Process Clause does not federalize

[2] *See*, *e.g.*, *Wilson v. Evans*, 172 Fed.Appx. 227, 230 (10th Cir. 2006)("[A] failure [of prison officials] to adhere to administrative regulations does not equate to a constitutional violation."); *Wheat v. Schriro*, 80 Fed.Appx. 531, 533 (8th Cir. 2003)("[Inmate] cannot base a due process claim on [prison officials'] alleged failure to follow two policies at the disciplinary hearing[.]"); *Russell v. Coughlin*, 910 F.2d 75, 78 fn.1 (2nd Cir. 1990)("Federal constitutional standards rather than state law define the requirements of procedural due process."); *Eleby v. Selsky*, 682 F.Supp.2d 289, 293 (W.D.N.Y. 2010) ("[E]ven if plaintiff could show a deviation from procedures called for under state law or DOCS [Department of Correctional Services] regulations . . . , '[f]ederal constitutional standards rather than state law define the requirements of procedural due process[.]'") (quoting *Shell v. Brzezniak*, 365 F.Supp.2d 362, 376 (W.D.N.Y. 2005)).

state-law procedural requirements." *Kennedy v. Blankenship*, 100 F.3d 640, 643 (8th Cir. 1996). *Loudermill* should have been applied here.

The majority opinion expands the due process protections of inmates in disciplinary proceedings beyond *Wolff v. McDonnell*. Federal jurisprudence tells us that is a bad idea. It was a bad idea when the U.S. Supreme Court held that mandatory language in prison disciplinary procedures created protected liberty interests. *Sandin v. Conner*, 515 U.S. 472, 472-73, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) receding from *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Revisiting its own ill-considered decision, the Supreme Court said *Hewitt*

> impermissibly shifted the focus [to the] language of a particular regulation [and] has encouraged prisoners to comb regulations in search of mandatory language on which to base [their arguments.] . . . *Hewitt* creates disincentives for States to codify prison management procedures . . . , and it has led to the involvement of [the] courts in the day-to-day management of prisons.

Sandin, 515 U.S. at 472-73. The Court then proclaimed, "[t]he time has come to return to those due process principles that were correctly established and applied in *Wolff* [.]" *Id.* at 473.

The majority cites those *Wolff* principles, but then, contrary to the lesson learned in *Sandin*, appends a new rule to *Wolff*: that to satisfy federal due process protections, prison officials must fully comply with prison rules, even where due process protections required by *Wolff* have been fully satisfied already.

In Boards-Bey's case, I would have followed *Wolff* and found, just as did the court in *Wilson v. Evans*, 172 Fed.Appx. 227 (10th Cir. 2006), that:

> [E]ven though the Department of Corrections failed to strictly follow its own regulations[,] . . . he [the inmate] had the requisite twenty-four hours in which to prepare, he had adequate notice of the conduct with which he was charged, he had the opportunity to present evidence, and he received a written statement of the evidence relied upon and the reasons for the disciplinary action.

172 Fed.Appx. at 229.[3] The appellees afforded Boards-Bey every due process protection required by *Wolff*. This Court is wrong to require more.

After expanding Boards-Bey's constitutional protections, the majority turned to the issue it describes as "more disturbing," and what it denominates as the "*Miranda* issue."[4] There are three reasons this section of the majority opinion troubles me: (1) the record shows Boards-Bey refused to participate in the hearing and did not merely exercise his Fifth Amendment right; (2) there is no evidence

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[3] *Wilson* appears in the Federal Appendix and was "Not Selected for publication in the Federal Reporter." However, Federal Rule of Appellate Procedure (FRAP) 32.1 notes, "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished' . . . and (ii) issued after January 1, 1997." While Kentucky courts are not bound by FRAP 32.1, the federal judiciary has determined that all of its opinions rendered after January 1, 1997, have equally persuasive import without regard to their designation as unpublished. We should take no less a view of those opinions.

[4] This is something of a misnomer. While the hearing officer indicated that Boards-Bey was read *Miranda* rights, inmates in disciplinary proceedings are not entitled to all the rights identified in a *Miranda* warning. *See*, *e.g.*, *Baxter v. Palmigiano*, 425 U.S. 308, 315, 96 S.Ct. 1551 (1976) (prisoners do not have a right to either retained or appointed counsel in disciplinary hearings), *and Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007) (prisoner's silence at discipline hearing can be held against him). "*Miranda* warnings are a procedural safeguard rather than a right explicitly stated in the Fifth Amendment." *Neighbor v. Covert*, 68 F.3d 1508, 1510 (2d Cir. 1995). And, being questioned while in prison does not necessarily implicate a custodial situation for purposes of *Miranda*. *Howes v. Fields*, ___ U.S. ___, ___, 132 S.Ct. 1181, 1187, 182 L.Ed.2d 17 (2011). A more appropriate name for the section would have referenced Boards-Bey's refusal to speak, or his exercise of his Fifth Amendment right against self-incrimination.

from which to infer that the hearing officer retaliated against Boards-Bey; and (3) as a matter of law, because this is a prison disciplinary proceeding, Boards-Bey's silence *can* be used against him, although it appears not to have been a substantive factor in the hearing officer's decision.

The record shows that a week before his hearing, after being charged, Boards-Bey was assigned "Legal Aide/Staff Counsel" Donald Violett to assist him. (R.9). He named three persons he would call as witnesses.[5] (R.9). The case was investigated and that report set forth the substance of the witnesses' testimony; two of them would have refuted the charges against Boards-Bey. (R.11).

At the hearing, Lt. Herrin began by identifying the three witnesses Boards-Bey intended to call. (R.13). Boards-Bey's legal assistant, Violett, was present with him at the hearing, (R.13), but Boards-Bey rejected Violett's assistance, stating, "I want[] a real lawyer present." (R.16).[6] He refused to participate until a "real lawyer" was there to represent him. (R.16).

Unfortunately for Boards-Bey, he was not then aware that "inmates do **not** have the right either to retained or to appointed counsel for disciplinary actions." *Houston v. Fletcher*, 193 S.W.3d 276, 279 (Ky. App. 2006) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 315, 96 S.Ct. 1551, 1556–57, 47 L.Ed.2d 810 (1976))

[5] The witnesses were Lt. Phillips, Inmate Anderson, and Inmate Powell. (R.9). The investigation report said Anderson and Powell would have refuted the charges against Boards-Bey. (R.11).

[6] Boards-Bey erroneously argues that his request for an attorney constituted his invocation of his right to remain silent. These are, in fact, separate matters. The right to an attorney is a Sixth Amendment right; the right not to testify against oneself is a Fifth Amendment right.

(emphasis in original). After the hearing, he admitted the reason he refused to participate; "I thought he [the hearing officer] had to wait until my lawyer got there. But that appears not to be the case[.]" (R.16). This is why Boards-Bey remained entirely mute during the hearing.

It is axiomatic that the Fifth Amendment *only* protects a defendant against *self-incrimination*. *Commonwealth v. Nichols*, 280 S.W.3d 39, 45 (Ky. 2009) ("The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination[.]" (citation omitted)). Invoking that right does not allow a defendant to refuse entirely to speak or participate in a trial, hearing, or administrative proceeding, particularly if he is acting *pro se*. *See generally Combs v. Commonwealth*, 74 S.W.3d 738, 745 (Ky. 2002) (explaining "invocation of the privilege against self-incrimination" is not an "all-or-nothing" decision); 9 Leslie W. Abramson, *Kentucky Practice: Criminal Practice and Procedure* § 27:62 (4th ed. 2003) (despite invocation of the Fifth Amendment, the defendant may be compelled to otherwise participate in the case).

Boards-Bey's misunderstanding led him to do more than merely exercise his Fifth Amendment right not to "be a witness against himself[.]" U.S. Const. amend. V. Rather, he squandered his opportunity to call and question witnesses, stating he "<u>would not talk</u> to the Hearing Officer Lt. Herrin." (Appellant's brief, p. 11; emphasis in original). His silence created a small dilemma for the hearing officer.

If Boards-Bey refused to speak at all, how would he present a defense? And what would be the use in calling witnesses?[7]

Even when an inmate actively participates and expressly calls a witness to examine, the hearing officer may decline to do so "on the basis of irrelevance or lack of necessity." *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30 (2d Cir. 1991); *see also Scott v. Kelly*, 962 F.2d 145, 146-47 (2d Cir. 1992) ("It is well settled that an official may refuse to call witnesses as long as the refusal is justifiable."). Obviously, included in Boards-Bey's express refusal to speak at all was his implied refusal to interrogate his own witnesses. Under such circumstances, there was no need to call witnesses.

Boards-Bey's total refusal to speak at the hearing caused the hearing officer to conclude that the call of these witnesses to present live testimony was "waived by Inmate Boards in the hearing[.]"[8] (R.13). The appellees argued, and I agree, that such a conclusion was entirely reasonable and legally proper under these circumstances.

This left the hearing officer with the investigator's report upon which to base the determination of Boards-Bey's guilt. That report included the substance of what Boards-Bey's witnesses would have said, and what Lt. Phillips would have

[7] The majority stated that "[n]o prison investigator called or questioned [Boards-Bey's] witnesses on his behalf." The implication is that it was a prison official's duty to present Boards-Bey's defense. It was not. See CPP 15.6(II)(D)(2)(f) and (g), placing that burden upon the inmate.

[8] The full statement in the report of the hearing was "Witnesses: Lt. Phillips, Inmate Anderson, Inmate Powell- waived by Inmate Boards in the hearing due to Inmate Board[']s stating that he did not want to talk in the hearing and he wanted an attorney." (R. 13).

said. When such evidence, or any evidence, is used in a disciplinary proceeding, the evidence is only required to be deemed reliable or trustworthy based on its sources. *Gilhaus v. Wilson*, 734 S.W.2d 808, 810 (Ky. App. 1987). Investigator's reports, such as were relied upon here, have been held satisfactorily reliable and trustworthy in a number of our unpublished opinions. *See, e.g., Putty v. Morgan*, No. 2002-CA-000489, 2003 WL 21769850, at *1 (Ky. App. Aug. 1, 2003). Therefore, I conclude that the hearing officer's ruling was supported by "some evidence," and that is sufficient. *Foley v. Haney*, 345 S.W.3d 861 (Ky. App. 2011) (citing *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985)("Requiring a modicum of evidence").

It is unfortunate that the majority has attributed the improper motive of retaliation to Officer Herrin. I cannot square that aspersion with either the facts or the law. The fact is that the record is utterly devoid of *any* evidence that Officer Herrin retaliated against Boards-Bey or showed even the slightest animus toward him. Officer Herrin simply did his job.

As for the law, our own Supreme Court has noted,

> [s]ignificantly, the right against self-incrimination contained in the Fifth Amendment of the United States Constitution and the progeny of cases interpreting this right *have not been imposed upon prison disciplinary proceedings*. Thus, *silence, or the failure to assert a claim of innocence, can be considered for purposes of prison disciplinary hearings*.

Webb v. Sharp, 223 S.W.3d 113, 118 (Ky. 2007) (emphasis added).

Webb is based on the decision in *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976). Inmate Palmigiano's circumstances were remarkably similar to those of Boards-Bey.

> The record . . . shows that Palmigiano was provided with copies of the Inmate Disciplinary Report and the superior's investigation report, containing the charges and primary evidence against him, on the day before the disciplinary hearing. At the hearing, Captain Baxter read the charge to Palmigiano and summarized the two reports. In the face of the reports, which he had seen, Palmigiano elected to remain silent. The Disciplinary Board's decision was based on these two reports, *Palmigiano's decision at the hearing not to speak to them*, and supplementary reports made by the officials filing the initial reports. All of the documents were introduced in evidence at the hearing before the District Court in this case.

Palmigiano, 425 U.S. at 320 fn.4 (emphasis added). The Ninth Circuit Court of Appeals, when the case was before that court, interpreted the Fifth Amendment as prohibiting the disciplinary board from holding Palmigiano's silence at the hearing against him. But the Supreme Court disagreed, stating, "[t]he short of it is that permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice; and there is no basis in the record for invalidating it as here applied to Palmigiano." 425 U.S. at 320. To whatever extent the hearing officer in our case based his decision on Boards-Bey's silence (and there is no evidence he did), it was permissible under *Palmigiano* because the record also includes "some evidence" – the investigation report – that supports the ruling. *Palmigiano*, 425 U.S. at 317 (noting "an inmate's

silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board").

With all due respect, the majority misconstrues the record and the law in this case, and groundlessly attributes improper motives to the hearing officer. I would affirm the Muhlenberg Circuit Court's April 1, 2011 order dismissing Boards-Bey's petition for declaration of rights.

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