

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000797-MR

ODIS ARNOLD

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 09-CI-00315

CHRISTOPHER RAKES
AND
ARVIL CHAPMAN

APPELLEES

OPINION AND ORDER
AFFIRMING
GRANTING APPELLEES' MOTION TO STRIKE
EXHIBITS AND ARGUMENTS NOT SUPPORTED BY THE RECORD

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Odis Arnold, an inmate at the Marion Adjustment Center, appeals from an order of the Marion Circuit Court dismissing his petition for a declaration of rights. Arnold filed the petition at the conclusion of a prison disciplinary proceeding. After reviewing the entirety of the record before us, the

arguments of the parties, and the applicable law, we affirm. We also grant the appellees' motion to strike a specific exhibit and any arguments not supported by the record.

On May 12, 2009, inmate James Young was severely beaten by a fellow inmate. He suffered an orbital fracture, a mandibular fracture, and a zygomatic arch fracture. Young was transported outside the prison medical facility to a local hospital in Marion County and then on to University of Louisville Hospital for surgery. An investigation followed.

Lola Cox, an investigator working with Corrections Officer Lieutenant Hacker, prepared an incident report entitled "Disciplinary Report Form-Write-up and Investigation." This report included Cox's conclusion that Arnold had assaulted Young near the institution's weight-lifting equipment. On May 18, 2009, Arnold was charged by the institution with committing a Category VII, Item 2 violation of Kentucky Corrections Policies and Procedures: physical action resulting in the death or serious injury of another inmate.

A disciplinary hearing was held before the chairman of the institution's adjustment committee on May 29, 2009. The evidence presented during the hearing consisted of Arnold's denial of the charge, written statements prepared by eleven inmate-witnesses requested by Arnold, a statement provided by Investigator Cox, a report that summarized statements provided by nine or ten confidential informants, and a detailed confidential report that included the name of the each of

the informants.¹ Evidence from a surveillance camera was requested by Arnold, but it was not utilized “due to the position and performance of the camera.”

Disciplinary Report Form Part II -- Hearing/Appeal at 1.

After considering the evidence, the adjustment committee chairman decided that Arnold was guilty of the charged offense. He was assigned to disciplinary segregation for a period of 180 days and was required to forfeit 730 days of good-time credit. On appeal, Warden Arvil Chapman concluded that Arnold had been provided due process, and he concurred with the Chairman’s adjudication.

Arnold sought judicial review in the Marion Circuit Court under the provisions of the Declaratory Judgment Act. Kentucky Revised Statutes (KRS) 418.040 – 418.090. He alleged that prison officials had violated his constitutional rights by refusing to compel Young’s participation in the hearing and by failing to insure the reliability of the confidential informants. After reviewing the record before it, the circuit court rejected Arnold’s arguments and dismissed the petition. The court noted that “[t]hese confidential informants were familiar to Investigator Cox and the Adjustment Chairman as they had been used in the past and had been found to be reliable. Their information corresponded to the injuries sustained by Young and the area of the facility in which the incident occurred.” Order at 2. The court concluded that the decision of the chairman of the adjustment committee was

¹Of the eleven inmate-witnesses requested by Arnold, one inmate indicated that he had not seen anything involving the incident; another inmate indicated that he was not there; two inmates indicated in their written statements that they did not want to give a statement, refusing to elaborate. The remaining inmates provided lengthy statements but admitted that they had not witnessed the incident. Some of the statements gave Arnold conflicting alibis.

supported by sufficient evidence and that Arnold had not been denied due process.

This appeal followed.

On appeal, Arnold argues that the circuit court erred by failing to grant his petition because the decision to exclude Young's testimony violated his constitutional rights. Arnold also contends that the prison's investigation was inadequate since it failed to meet CPP standards. Finally, he contends that the reliability of the confidential informants was not properly established.

The due process requirements for prison disciplinary proceedings were established in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), where the Court held that prisoners possess a liberty interest in their statutorily provided good-time credits. While the government may not deprive a prisoner of those credits without due process, “[p]rison disciplinary proceedings. . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.” *Id.* at 562. Consequently, “the full panoply of rights due a defendant [in a criminal prosecution] does not apply.” *Id.* at 556. Instead, an inmate is entitled to receive: advance written notice of the disciplinary charges against him; an opportunity to appear before a sufficiently impartial hearing body and to call witnesses and to present documentary evidence – provided that to do so will not jeopardize institutional safety or correctional goals; and a written statement by the fact-finder detailing the evidence relied upon and the reasons for the disciplinary action taken. *Wolff, supra.*

In his first argument, Arnold challenges the decision not to permit evidence from Young. Arnold contends that the chairman abused his discretion and deprived him of due process of law. We disagree.

Inmates do not have an unfettered right to call witnesses from the prison population because of the sound institutional policy interest in reducing the risks of reprisal and the accused's access to other inmates. *Wolff* 418 U.S. at 566.

Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses... *they must have the necessary discretion without being subject to unduly crippling constitutional impediments.*

Id. at 567. (Emphasis added). Prison officials may also exclude witnesses because of irrelevance, lack of necessity, or the hazards presented by a particular set of circumstances. *Wolff* 418 U.S. at 566.

In this case, the chairman of the adjustment committee presented at the hearing a detailed record underlying the committee's decision to deny Arnold's request to call Young as a witness. The chairman determined that the seriousness of the incident – along with safety and security concerns – precluded Young's participation in the hearing. Young had been severely beaten less than three weeks before the hearing. At least nine confidential informants declared that Arnold had beaten Young so savagely that he was rendered unable to defend himself. Additionally, the chairman knew that Arnold had been involved in three other physical assaults. Finally, Arnold was permitted to present the evidence of

the remaining inmate-witnesses that he requested. The committee chairman did not abuse his discretion in this matter. Arnold was not deprived of due process.

Next, Arnold contends that the investigation of the matter was conducted in an “in different” (sic) and “highly suspicious” manner. Appellant’s Brief at 4. He alleges that the investigator assigned to the incident refused to interview any of his inmate-witnesses. He also asserts that the investigator failed to assess the credibility of the several confidential informants involved in the case and failed to transmit to him a proper summary of the confidential report submitted to the adjustment committee as required by the provisions of the CPP. Arnold contends that the cumulative effective of these errors meant that he was “precluded from mounting a defense.” Appellant’s brief at 5.

The record before us does not support Arnold’s allegations regarding the investigator’s alleged failures or omissions. Written statements were collected from eleven inmate-witnesses requested by Arnold. Furthermore, Investigator Cox specifically noted in her report that the reliability of the confidential informants had been verified. During the administrative hearing, Arnold admitted that he had received copies of all the written materials to which he was entitled. He objects to the investigator’s failure to indicate on the disciplinary report that the report comprised the “summary” required by relevant provisions of the CPP. However, we cannot conclude that this editorial omission rose to the level of a denial of due process.

In his brief, Arnold asks this Court to take judicial notice of the institution's "refusal" to submit the entirety of the confidential report to the Marion Circuit Court for inspection. He asks that we "not condone such behavior from a private prison" and suggests that "their (sic) refusal to do so should alert this Court to their (sic) unorthodox practices in matters involving confidential informants." Appellant's brief at 7.

The responsibility for obtaining the administrative record and submitting it to the trial court lies with the inmate seeking relief. Even confidential records which were not made available to the inmate during the disciplinary proceedings are maintained and available for "purposes of later administrative or judicial review." CPP 9.18(VI)(A)(8). These confidential documents can be presented to the trial court *in camera* to assure their continued confidentiality, but the inmate is responsible for properly requesting them. If Arnold believed that a review of the confidential report relied upon in this case was critical to his appeal, he bore the burden of seeking out and submitting the entire administrative record. Arnold's failure to do so cannot be characterized as a failing of the prison or of the trial court that reviewed the matter in the first instance.²

Finally, Arnold contends that his right to due process was violated because the chairman of the adjustment committee failed to make an independent assessment of the reliability of the confidential informants before relying on their

² Arnold also insinuates that Investigator Cox ignored the surveillance camera footage in an attempt to avoid plainly exculpatory evidence. However, we note that the chairman of the adjustment committee determined that the footage was not useful due to the position and performance of the camera itself.

statements against him. He argues that the chairman merely accepted the word of Investigator Cox and presumed that the statements of the confidential informants could be trusted.

Wolff did not address the issue of an unsworn, hearsay statement of a confidential informant; *i.e.*, whether there must be some indication of the reliability of the informant before his statement may be considered as evidence against an inmate. However, in *Hensley v. Wilson*, 850 F.2d 269, 276-77 (1988), the United States Court of Appeals for the Sixth Circuit established some ground rules regarding the use of confidential informants' statements in prison disciplinary matters:

In cases in which prisoner misconduct is found upon evidence consisting entirely, or even substantially, of the statement of an investigating officer that he has been told by confidential informants that the misconduct occurred, and that the investigator believes the informant to be reliable, there must be some independent determination by the committee of the informant's reliability. In such cases, unless the committee makes an independent determination about what the facts of the alleged misconduct are by deciding, minimally, that the hearsay information has been supplied by a reliable informant, it is merely recording the findings made by the investigation officer who has made a determination about the informant's reliability, without making any determination for itself about the informant's reliability or even the basis for the investigator's opinion that the information is reliable. To proceed in that fashion is not fact finding. It is recordkeeping.

In its best light, such a procedure is an unwarranted delegation to the investigator of a key aspect of the committee's adjudicative function; in its worst, it suggests a willful reluctance to probe the possibly flawed foundation of the charges against inmates. Reliance upon an investigating officer's statement that an informant is reliable is not necessarily a fatal procedural flaw, but if the committee does not discover, and assess, the investigating officer's *basis* for concluding

that the informant is reliable, it cannot be said that the committee has made reasoned choices about the truth of the information provided to it, as minimum due process requires it to do. While the Due Process Clause does not, in prison discipline cases, require the appearance of the confidential informant before the adjudicating committee, or that the informant's identity be disclosed to the accused, or even to the disciplinary committee members, it requires at the very least that the committee have some evidentiary basis, even hearsay, upon which to determine for *itself* that the informant's story is probably credible.

The *Hensley* Court rejected the proposition that a prison adjustment committee must make written detailed findings regarding "why or to what extent each witness was believed or disbelieved." *Id.* at 278. Instead, it held that the adjustment committee or officer is required to make a contemporaneous record of the evidence relied upon. If some evidence is withheld from the inmate in order to protect the identity of a confidential informant, "more detailed evidence, sufficient to meet constitutional standards, must be placed in a nonpublic record." *Id.* at 283. However, the written statement to the inmate need only contain "some reference to verification" of the reliability of the confidential informant's statement. *Gilhaus v. Wilson*, 734 S.W.2d 808, 810, *citing Goble v. Wilson*, 577 F.Supp. 219, 220 (W.D.Ky.1983).

In this case, the chairman of the adjustment committee relied primarily on information provided by confidential informants. Investigator Cox reported that Arnold's part in the incident had been determined from information obtained from confidential informants "who have been deemed reliable." She also indicated that a complete and detailed confidential report had been submitted to the adjustment committee chairperson. During the hearing, the chairman stated that he had

reviewed the contents of the confidential report and confirmed that the information contained therein was derived from several confidential sources. The chairman indicated that he was familiar with the sources and regarded them as reliable based on their assistance in other matters. In his written report, the chairman included his findings that the evidence provided by confidential informants had been used to confirm Investigator Cox's conclusions and that the informants had been deemed reliable.

We are persuaded that the chairman of the adjustment committee undertook a *bona fide* evaluation of the credibility and reliability of the confidential informants that were identified to him in this matter. Despite Arnold's assertions to the contrary, the chairman's independent assessment of the informants and his written conclusion that they were reliable comported with the requirements of *Hensley*. Arnold's rights were not violated.

We affirm the order of the Marion Circuit Court.

ALL CONCUR.

ENTERED: February 11, 2011

/s/ Sara W. Combs
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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