RENDERED: JULY 8, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001026-MR

ONTARIO THOMAS — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 09-CI-00186

STEVE HANEY;
WALTER GRIBBINS;
BRIAN TAYLOR; DON DRURY;
AND CARL GEFFUL — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Ontario Thomas, proceeding *pro se*, appeals the Lyon Circuit Court's order dismissing his Petition for Declaration of Rights. After a careful review of the record, we reverse because there is no evidence supporting the

disciplinary charge against Thomas. We accordingly reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts as found by the circuit court are as follows:

> On or about April 17, 2009, Inmate Jeffery Elam was assaulted while housed at the North Point Training Center [NTC]. After two vacated Adjustment Committee decisions and a third hearing, [Thomas] was ultimately charged with and convicted of a Category 7, Item 2 institutional infraction, "physical action resulting in death or injury of an inmate." As a result of this decision, [Thomas] received one hundred eighty (180) days of disciplinary segregation, forfeited two (2) years of non-restorable good time credit, and was ordered to pay fifteen hundred ($1,500) in restitution for medical expenses.
>
> By way of relief, [Thomas] asks this Court to remand this case by vacating the NTC Adjustment Committee findings, restore good-time credits, and restore what has been forfeited as a result of this action.
>
> As noted by the Respondents in their motion to dismiss and supported by additional materials provided by [Thomas] in his response, the underlying action that is the basis of this petition, was rewritten in accordance with the Kentucky Corrections Policies and Procedures (CPP 15.6(II)(F)(8)). This particular CPP grants the Warden the authority to order a disciplinary report *vacated* upon justification and may allow it to be re-investigated or reheard, or both. Further, it is prudent at this juncture to note that Black's Law Dictionary defines vacate as "to render an act as void."
>
> Since the basis of this petition, the underlying Adjustment Committee decision, was vacated and re-investigated or reheard, [Thomas] received the relief he sought in his initial Petition. However, since that time and as noted above and presented in [Thomas's]

> subsequent motions, [Thomas] has been re-tried and convicted of the same institutional infraction resulting in the same penalties.

Thus, citing "judicial efficiency and economy" as its reasons, the circuit court decided to address the issues presented in the case.

The court found that "a review of the record shows that the Adjustment Committee did in fact read the confidential information gathered by the investigating officer and believed it to be true in accordance to" CPP 9.18. The court noted that the "confidential information is not part of the record as revealing this information creates the possibility of retaliatory action against the confidential informants." Ultimately, the court granted the motion to dismiss Thomas's Petition for Declaration of Rights after finding that "the overall record shows the Kentucky Department of Corrections acted within the scope of the Corrections Policies and Procedures Manual and provided limited due process for [Thomas]."

Thomas now appeals, contending that: (a) his due process rights were violated when the Adjustment Committee made no determination concerning the reliability and credibility of the confidential informant(s), and when the Committee failed to explain its decision and factual findings; (b) his due process rights were violated when he was ordered to pay $1,500 in restitution, despite there being no verification in the record to substantiate this amount; and (c) his due process rights were violated when the Adjustment Committee "continued to try and convict him of the same charged incident report twice more while such was pending in court after the wardens' review and denial."

II. STANDARD OF REVIEW

A motion to dismiss a petition for declaration of rights arising out of a prison disciplinary proceeding should be treated as a motion for summary judgment. *See Smith v. O'Dea*, 939 S.W.2d 353, 355 n.1 (Ky. App. 1997). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id*. at 482.

> Where, as here, principles of administrative law and appellate procedure bear upon the court's decision, the usual summary judgment analysis must be qualified. The problem is to reconcile the requirement under the general summary judgment standard to view as favorably to the non-moving party as is reasonably possible the facts and any inferences drawn therefrom, with a reviewing court's duty to acknowledge an agency's discretionary authority, its expertise, and its superior access to evidence. In these circumstances we believe summary judgment for the Corrections Department is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record (including, if submitted, administrators' affidavits describing the context of their acts or decisions), does not raise specific,

> genuine issues of material fact sufficient to overcome the presumption of agency propriety, and the Department is entitled to judgment as a matter of law. The court must be sensitive to the possibility of prison abuses and not dismiss legitimate petitions merely because of unskilled presentations. *Jackson v. Cain*, 864 F.2d 1235 (5th Cir.1989). However, it must also be free to respond expeditiously to meritless petitions. By requiring inmates to plead with a fairly high degree of factual specificity and by reading their allegations in light of the full agency record, courts will be better able to perform both aspects of this task.

Smith, 939 S.W.2d at 356.

III. ANALYSIS

Thomas first contends that his due process rights were violated because there was no determination regarding the reliability and credibility of the confidential informant(s) upon which the Adjustment Committee based its decision, and because the Committee did not explain its decision or its factual findings.

The U.S. Supreme Court explained the evidentiary threshold in prison disciplinary proceedings as follows:

> Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. . . . The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction . . . and neither the amount of evidence necessary to support such a conviction . . . nor any other standard greater than some evidence applies in this context.

Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 456, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985). Consequently, prison disciplinary proceedings are subject to a lesser standard of due process than a criminal case because "prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due to a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974).

However, an inmate involved in prison disciplinary proceedings does retain certain protected rights. The U.S. Supreme Court recognized this in holding:

> [w]here a prison disciplinary hearing may result in the loss of good time credits . . . the inmate must 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. . . . [T]he provision for a written record helps to assure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental human rights may have been abridged, will act fairly. . . . We now hold that revocation of good time does not comport with the minimum requirements of procedural due process . . . unless the findings of the prison disciplinary board are supported by **some evidence** in the record.

Walpole, 472 U.S. 445 at 454, 105 S. Ct. 2768 at 2773 (internal quotation marks omitted and emphasis added). Kentucky has similarly held that this "some evidence" standard of judicial review of prison disciplinary proceedings does not

offend Section 2 of the Kentucky Constitution. *See Smith*, 939 S.W.2d at 358; *Webb v. Sharp*, 223 S.W.3d 113, 118 (Ky. 2007).

This Court must decide what qualifies as "some evidence" in relation to confidential informants in the framework of prison disciplinary proceedings. The U.S. Supreme Court set out broad basic requirements for "some evidence" when it held:

> [T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if there was some evidence from which the conclusion of the administrative tribunal could be deduced. . . . Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Walpole, 472 U.S. 445 at 455-56, 105 S. Ct. 2768 at 2774 (internal quotation marks omitted).

Using these guidelines, the Court should give the Adjustment Committee broad discretion in determining what constitutes "some evidence," with the circuit court acting as a court of review to determine whether there was any evidence to support the findings. *See Smith*, 939 S.W.3d at 355. The "some evidence" standard is strongest when the Adjustment Committee reviews and can reference physical evidence for the circuit court to review. *See Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003) (in which inmate was disciplined for possession of stolen property found in his belongings). The standard is weakest in cases

involving confidential informants. This is because inmates have no absolute due process right to information exposing the identity of or what the confidential informant said to the Adjustment Committee; this information remains off the record for review by the inmate. *See Stanford v. Parker,* 949 S.W.2d 616 (Ky. App. 1996); *Gilhaus v. Wilson*, 734 S.W.2d 808 (Ky. App. 1987); *Gaston v. Coughlin*, 249 F.3d 156 (2nd Cir. 2001); *Wells v. Israel*, 854 F.2d 995, 998-99 (7th Cir. 1988).

This Court has previously recognized the problems associated with review of the Adjustment Committee regarding confidential informants. In *Conn v. Morgan*, 2007 WL 4373117 (Ky. App. 2007)(2006-CA-002446-MR),[1] it was understood that the Adjustment Committee may consider confidential information without inmate access to the identity of the informant or the content to which the informant would testify. *Id*. at *2. However, "testimony of confidential informants cannot be given any weight unless there has been a determination that the informants are reliable." *Id*. (citing *Brown v. Smith*, 828 F.2d 1493, 1495 (10th Cir. 1987); *Taylor v. Wallace*, 931 F.2d 698, 701 (10th Cir. 1991); *Williams v. Fountain*, 77 F.3d 372, 375 (11th Cir. 1996)). Therefore, to determine whether the confidential informant qualifies as "some evidence" the reviewing court must be able to look into the reliability of the informant and the information the informant provides.

[1] We cite to this unpublished opinion because its analysis meets the criteria of Kentucky Rule of Civil Procedure 76.28(4)(c).

This Court recognized in *Conn* that reviewing courts should adhere to certain guidelines when using a confidential informant to establish "some evidence."

> Federal courts have held that there is no single mandatory method for determining and documenting the reliability of the confidential informant in a prison setting. *Taylor*, 931 F. 2d at 698; *Freitas v. Auger*, 837 F.2d 806, 810 n.9 (8th Cir. 1988). Generally, where the disciplinary committee relies on confidential sources, there must be sufficient information *in the record* to convince the reviewing authority that the disciplinary committee undertook an independent inquiry and correctly concluded that the confidential information was credible and reliable. *Taylor*, 931 F.2d at 702; *McKinny v. Meese*, 831 F.2d 728, 731 (7th Cir. 1987); *Ortiz v. McBride*, 380 F.3d 649, 655 (2nd Cir. 2004).

Id. at *3.

Within these guidelines, courts have recognized several methods for establishing informant reliability. For instance, the Seventh and Ninth Circuits use four ways to certify reliability: 1) the oath of the investigating officer as to the truth of his report containing confidential information, along with his appearance before the disciplinary committee; 2) corroborating evidence or testimony; 3) a statement on the record by the disciplinary committee of knowledge of the sources of the information and their reliability in prior instances; or 4) *in camera* review of material documenting the investigator's assessment of the reliability of the confidential informant. *See Henderson v. U.S. Parole Commission*, 13 F.3d 1073, 1078 (7th Cir. 1994) (citing *Mendoza v. Miller*, 779 F.2d 1287, 1293 (7th Cir. 1985)); *Zimmerlee v. Keeny*, 831 F.2d 183, 186-187 (9th Cir. 1987). The Second

Circuit uses a totality of the circumstances approach looking to the informant's motive for giving the information, the specificity of the information, the reliability of the informant in prior situations, and the degree to which the information is corroborated by other evidence. *See Sira v. Morton*, 380 F.3d 57, 78-79 (2nd Cir. 2004); *Gaston*, 249 F.3d at 163-164.

A final problem exists in cases where the reliability of the confidential informant is based upon a report of an investigator for the Adjustment Committee. In *Hensley v. Wilson*, 850 F.2d 269 (6th Cir. 1988), the Sixth Circuit held that in finding an inmate guilty, the disciplinary committee could not rely only on the investigator's opinion that the informant was credible. Instead, due process requires that the disciplinary committee have "some evidentiary basis…upon which to determine for *itself* that the informant's story is probably credible." *Hensley*, 850 F.2d at 277. The minimum information necessary to satisfy this requirement is that the investigator must report that the informant has proved reliable in the past or that the informant has been independently corroborated. *Id*. "The verification procedure need not be comprehensive, the committee need only include some reference to verification." *Gilhaus*, 734 S.W.2d at 810 (citing *Goble v. Wilson*, 577 F.Supp. 219, 220 (W.D.Ky. 1983)). Thus, we find that the reliability and trustworthiness of the informant[s] are sufficiently verified. If the court relies upon the investigator's report, then the authorities should provide a contemporaneous record of the evidence to the reviewing court, or the committee should record its findings and reasoning for the reliability of the confidential

sources. *Hensley,* 850 F.2d at 283. However, if the committee can point to independent corroboration, then this step is unnecessary because the confidential informant is no longer solely needed to satisfy the "some evidence" standard. *See Espinoza v. Peterson*, 283 F.3d 949, 952 (8th Cir. 2002); *Turner v. Caspari*, 38 F.3d 388, 393 (8th Cir. 1994); *Broussard v. Johnson*, 253 F.3d 874, 877 (5th Cir. 2001); *Young v. Jones*, 37 F.3d 1457, 1460 (11th Cir. 1994).

Upon review of the record in the present case, we cannot locate any evidence, let alone "some evidence," supporting the decision of the prison disciplinary review board as *Walpole* requires. Upon our review, the initial report from Lieutenant Walter Gribbins states as follows:

> Upon completion of investigation Inmate Thomas is being issued a disciplinary report. On April 3, 2009, Inmate Thomas confronted a general population inmate in front of dorm one. Inmate Thomas told the inmate that he was going to have to pay yard tax to walk the yard. The inmate told Thomas he was not going to pay and walked back into the dorm and got on the phone. Inmate Thomas entered dorm one and assaulted the inmate while he was on the phone. Inmate received multiple lacerations to his right eye and orbital area. Inmate had to be transferred out of the institution for treatment. This report will suffice as Inmate Thomas's summary. Confidential investigation sent to adjustment officer.

No evidentiary basis was provided to the trial court to support this report, so it is unknown how or from whom these allegations derived.

After Thomas appealed to the warden and the warden ordered a retrial, the Adjustment Committee entered the following findings:

> We find [Inmate] Thomas guilty based on the confidential information received from Lt. Gribbins. The committee has read the confidential information and believe[s] it to be true in accordance to policy. The names of the informants have been omitted for the safety of the institution and to prevent possible retaliation against the informants[.] We believe [Inmate] Thomas hit another [inmate] causing multiple lacerations to his right eye and orbital area[.]

(Capitalization changed and spelling corrected). Therefore, although the Adjustment Committee determined that the confidential information was credible, no such information or explanation for this determination was included in the record for review.[2]

Although we understand why, for security reasons, the appellees did not want Thomas to possess the information from the confidential informant(s), or the identity of the informant(s), that information nevertheless should have been filed under seal as part of the trial court record in order to provide for meaningful review. Without that information, there is simply no evidence in the record to review supporting the credibility of the disciplinary charge against Thomas. Rather, we would be called upon to rely on unsupported conclusions written in Lt. Gribbins report and the Adjustment Committee's review of the confidential informant unknown to the courts. This we are not permitted to do. Therefore, pursuant to the reasoning in *Walpole*, as well as the standard of review concerning summary judgment motions, Thomas's petition should not have been dismissed by the circuit court.

[2] We note that in his designation of record for appeal, Thomas designated the entire record.

Thomas also alleges that his due process rights were violated when he was ordered to pay $1,500 in restitution, despite there being no verification in the record to substantiate this amount; and that his due process rights were violated when the Adjustment Committee "continued to try and convict him of the same charged incident report twice more while such was pending in court after the wardens' review and denial." However, because we reverse the circuit court's order due to the fact that there was no evidence in the record to support the charge against Thomas, we need not address these other issues.

Accordingly, the order of the Lyon Circuit Court is reversed. This case is remanded with instructions for the circuit court to order a new prison disciplinary hearing not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ontario Thomas,
Pro se
Eddyville, Kentucky

BRIEF FOR APPELLEES:

Stafford Easterling
Justice and Public Safety Cabinet
Frankfort, Kentucky