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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001466-MR

WILLIAM P. EVANS — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 15-CI-00154

KATHY A. LITTERAL, WARDEN;
MICHAEL H. SMITH, ADJ. OFFICER-LT.;
AND JENNIFER T. SMITH, OFFICER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND STUMBO,[1] JUDGES.

ACREE, JUDGE: William Evans, *pro se*, appeals the order of the Morgan Circuit Court dismissing his petition for declaration of rights. At issue is whether Evans

[1] Judge Janet Stumbo concurred in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed by administrative handling.

received sufficient due process during his prison disciplinary hearing. After review, we affirm.

Evans is an inmate at the Eastern Kentucky Correctional Complex. Correctional Officer Jennifer Smith overheard Evans in his cell say the following while listening through the cell's intercom: "That Bitch watched me the whole time, if she says one more thing to me I am going to slap her jaws. She don't wanna mess with me!" (R. 14). In her report, Officer Smith noted Evans sounded aggressive while making the statement. Correctional Officer Sarah Prater investigated the incident. Evans admitted to making the statement, telling her, "I always talk to myself when I vent. I'm not going to say that I never said that. I never meant any disrespect to any officer." (*Id.*).

Evans was charged with making threatening or intimidating statements under Kentucky Corrections Policies and Procedures (CPP) 15.2(II)(C)(IV)(19). Adjustment Officer (AO) Michael Smith found Evans guilty, citing "the Officer's Report and the fact that staff overheard you make threats towards another [member of the] staff." (R. 16). As a result, Evans forfeited 60 days' good-time credit.

Evans filed an administrative appeal to the warden, although the warden did not issue a decision. Evans then filed a petition for declaration of rights in Morgan Circuit Court, arguing his due process rights were violated. The circuit court dismissed Evans's petition, determining that he had received due process. This appeal followed.

Evans's appeal is based on due process violations. He makes the following arguments: (1) the CPP[2] creates a protected liberty interest in privacy, and his right to privacy was violated when a correctional officer listened to his cell; (2) he was deprived of adequate notice of the disciplinary charges; (3) he was denied an impartial decision-maker; and (4) there was no evidence to support a disciplinary infraction. We address each in turn.

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 is not entitled to "the full panoply of rights due a defendant" in a criminal proceeding. *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

In general, the minimal due process requirements in a prison disciplinary hearing include: (1) advance written notice of the claimed violation; (2) an opportunity to call witnesses and present a defense so long as the process aligns with institutional safety or correctional goals; and (3) a written statement by the fact-finder detailing the evidence relied on and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563-67, 94 S.Ct. at 2978-80; *Webb v. Sharp*, 223 S.W.3d 113, 117-18 (Ky. 2007). These due process requirements are generally met "if some evidence supports the decision by the prison disciplinary board[.]" *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S.

[2] Kentucky Department of Corrections Policies and Procedures.

445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985). The "some evidence" review "does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence." *Id.* Instead, the "relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Id.*, 472 U.S. at 455-56.

"[P]rocedural due process ensures that one is not unfairly deprived of his life, liberty, or property without receiving a hearing, adequate notice, and a neutral adjudicator." *White v. Boards-Bey*, 426 S.W.3d 569, 574 (Ky. 2014) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). Substantive due process involves "protection against governmental interference with certain fundamental rights that are encompassed in the terms life, liberty, and property." *Id.* (citing *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S.Ct. 3020, 3090-92, 177 L.Ed.2d 894 (2010)).

First, Evans argues that he has a liberty interest in his right to privacy created by the CPP because the regulations do not authorize the use of electronic equipment to eavesdrop on inmates. Evans is correct that there is a liberty interest implicated here because he has lost 60 days' good-time credit. *See id.* However, this does not entitle him to relief absent some violation of his due process rights. *Id.* Additionally, "[p]rison regulations [. . .] do not automatically confer on the prisoner an added procedural due process protection." *Id.* at 575.

Evans further argues the officer violated his right to privacy because the CPP does not authorize the use of an auditory monitoring device in inmates'

cells, and therefore, the correctional officer could not have legally obtained the evidence against him. For the following reasons, we are not persuaded.

The United States Supreme Court has recognized, in the Fourth Amendment context, that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell[.]" *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed. 2d 393 (1984). The Court stated:

> A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.

Id. at 527-28, 104 S.Ct. at 3201 (footnote omitted). *See also Lanza v. New York*, 370 U.S. 139, 145, 82 S.Ct. 1218, 1222, 8 L.Ed. 2d 384 (1962) (holding that electronically eavesdropping on a room set aside for visitation in a jail did not violate the Fourth Amendment).

While prisoners are afforded constitutional rights, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Bell v. Wolfish*, 441 U.S. 520, 545–46, 99 S. Ct. 1861, 1877, 60 L. Ed. 2d 447 (1979) (quoting *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948)). "Prison administrators . . . should be accorded wide-

ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547, 99 S.Ct. at 1878. Accordingly, Evans's argument that the eavesdropping constituted an unreasonable search and seizure under the Fourth Amendment is without merit.

Likewise, we find this reasoning to be equally applicable to Evans's argument to the extent it concerns his substantive due process right to privacy under the Fourteenth Amendment. "Loss of freedom of choice and privacy are inherent incidents of confinement[.]" *Id.* at 537, 99 S.Ct. at 1873. "The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Hudson*, 468 U.S. 517, 526, 104 S.Ct. 3194, 3200. The record reflects that the correctional officers listened to Evans rant through an intercom, a device which should have been obvious to him. Though it is unclear why the correctional officers deemed it necessary to subject Evans to audio surveillance, it is certainly plausible that the use of an intercom was related to maintaining order in the institution. *See Bell*, 441 U.S. at 546–47, 99 S. Ct. at 1878. Given Evans's limited right to privacy in prison and the wide-ranging deference prisons have in executing policies to maintain security, we cannot conclude that Evans's right to privacy was violated when a correctional officer listened to him while he was stationed in his cell.

Next, Evans asserts that he was not properly provided with adequate notice of the charges against him. We disagree.

Under CPP 15.6(II)(D)(2)(c), the inmate must be allowed to consider the documents related to the disciplinary hearing or a summary of those documents at least 24 hours before the hearing. Evans signed his disciplinary report form on July 17, 2015 verifying that he had received a copy of the charges. His hearing took place on July 21, 2015. This constitutes compliance with the notice requirements of the CPP.

Additionally, Evans argues he was deprived of notice because the offense with which he was charged is not written in the CPP. Evans is mistaken. Making threatening or intimidating statements is prohibited under CPP 15.2(II)(C)(IV)(19) and the charge was included on the disciplinary report form provided to him on July 17, 2015. Consequently, Evans was not deprived of his procedural due process right to notice.

Evans's penultimate argument is that his due process rights were violated because he was denied his right to an impartial decisionmaker. Evans believes that the AO's sister-in-law was the reporting officer in his case, so the AO was biased against him.

CPP 15.6(II)(A)(4) requires disqualification of an adjustment committee member "when the employee has: (1) filed the complaint or witnessed the incident; (2) participated as an investigating officer; or (3) been assigned the subsequent review of the decision." None of these circumstances is present in this

case. Further, Evans has not offered any evidence demonstrating prejudice by the AO, only his subjective belief based upon the AO's adverse decision.

Lastly, Evans argues the findings of his violation were not supported by "some evidence." Yet, Evans does not contest that he admitted to making the statements in question. He claims he was "venting" for therapeutic purposes. Regardless of Evans's intentions in making the statements, the fact remains that he made intimidating statements under CPP 15.2(II)(C)(IV)(19). Because "[a]n admission is 'some evidence' sufficient to uphold the decision of the Adjustment Committee[,]" *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky. App. 2003), Evans's disciplinary infraction was supported by "some evidence."

For these reasons, the Morgan Circuit Court's order dismissing Evans's prison disciplinary action is affirmed.

ALL CONCUR.

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