

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000489-MR

KEITH PUTTY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 01-CI-00378

JAMES L. MORGAN

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Keith Putty appeals from an order of the Boyle Circuit Court dismissing his complaint, which was treated as a petition for declaratory relief pursuant to KRS¹ 418.040. At issue was a prison disciplinary proceeding in which Putty was found guilty of conspiracy to possess or to promote dangerous contraband. Putty alleges that the disciplinary action taken against him violated his due process rights. However, there was some evidence from which the Adjustment Officer could reasonably

¹ Kentucky Revised Statutes.

have inferred that Putty was involved with smuggling drugs into the prison. Additionally, the Boyle Circuit Court correctly analyzed Putty's due process claims. Therefore, we affirm.

The events giving rise to this appeal began on April 16, 2001, when Putty and Herman Grubbs were both inmates at Northpoint Training Center (NTC). Lieutenant Bill Case began an investigation of Putty after intercepting an out-going letter written in code by Grubbs and addressed to his mother. The letter instructed the recipient to package drugs in a video-cassette and to mail it to the institution in care of Putty. Lieutenant Case later taped a telephone conversation between Grubbs and his mother that also implicated Putty in the smuggling scheme. In his written report, Case stated that in addition to the letter and phone conversation, he had obtained evidence of Putty's involvement in the conspiracy from a confidential informant. The report provided that the informant's identity and reliability would be provided "to the adjustment officer only."

On May 31, 2001, a hearing was conducted on the charges. Putty denied having any knowledge or involvement in the plan to bring drugs to the prison. Nevertheless, the Adjustment Officer found him guilty:

based on the evidence contained in Lt. Cases [sic] written report, his investigation and

confidential information that has been deemed reliable.

Putty's punishment was fixed at loss of 180 days of good-time credit and 45 days of disciplinary segregation. Upon appeal, the warden (the appellee, James Morgan) concurred with the Adjustment Officer's decision.

Putty filed an action in Boyle Circuit Court challenging the disciplinary action. That court concluded: (1) that Putty "received all mandated due process protections" and (2) that the hearing conducted by the Department of Corrections "exceed[ed] all constitutional requirements." Putty's petition was dismissed. This appeal followed.

Putty argues that the trial court erred in finding no violation of his due process rights because of the Adjustment Officer's reliance on evidence obtained from a confidential informant. He further argues that the court erred in denying his motion for an *in camera* review of the information provided by the confidential informant. Finally, he maintains that his due process rights were violated because he was not provided a copy of the taped telephone conversation allegedly indicating his participation in the drug conspiracy.

With respect to the evidence provided by the confidential informant, Putty contends that the Adjustment Officer failed to make any findings to support her conclusion

that the informant was reliable. Further, he contends that nothing in the record demonstrated that the Adjustment Officer actually made an independent determination of the informant's reliability. He relies on Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988), in support of his argument that he was denied minimum due process by the failure of the Adjustment Officer to make an independent assessment of the informant.

We agree that the holding in Hensley is applicable to the circumstances presented in this appeal. However, we believe that Hensley serves to support the conclusion of the trial court that Putty's rights to due process were not infringed by the Adjustment Officer's reliance on the informant's evidence:

As we have indicated earlier, the principal reason the Supreme Court commanded in *Wolff* [v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)] that prison disciplinary authorities prepare a "written statement by the fact finder as to the evidence relied on and the reasons for the disciplinary action" is to enable reviewing courts to obtain a reviewable record that demonstrates that the prison disciplinary hearing was conducted fairly. Such a record must demonstrate, at a minimum, that the committee members received information which provides some evidence that the charged misconduct occurred and, when the evidence is only the hearsay repetition of information supplied by otherwise unidentified confidential informants, that the committee determined for itself, on some reasoned basis, that the informants and their information were reliable.

. . .

We hold that prison disciplinary committees are obligated to assess the reliability of inmate informants upon whose testimony they rely to deprive inmates of good time credits. A contemporaneous written record must be made of the evidence relied upon. If, because of efforts to protect informant anonymity, the evidence in support of disciplinary action supplied to the inmate fails to meet the constitutional minimum of "some evidence," more detailed evidence, sufficient to meet constitutional standards, must be placed in a nonpublic record.

Id. at 277 and 283 (emphasis added).

Although Putty objects to the verification procedures used by the Adjustment Officer, he overlooks the fact that the Officer did not rely solely on evidence obtained from the confidential informant. Rather, Lieutenant Case's investigation produced other evidence -- a coded letter and a telephone conversation -- that implicated Putty in the crime. Thus, if we were to exclude the evidence obtained from the informant, the record contains the modicum of evidence necessary to uphold the Adjustment Officer's finding of guilt. Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356, 365 (1985); Smith v. O'Dea, Ky.App., 939 S.W.2d 353 (1997). Consequently, the institution was not required to create a confidential, non-public record for appellate review; the Adjustment Officer's reference to verification was all that was necessary. Hensley,

supra, and Gilhaus v. Wilson, Ky.App., 734 S.W.2d 808, 810 (1987).

Finally, Putty argues that he was treated unfairly by the failure of the prison authorities to provide him a copy of the taped telephone conversation between Grubbs and his mother. The appellee contends that Putty has failed to preserve any error for review as he did not raise this issue either in his appeal to the warden or in his complaint in the lower court.

Regardless of the problems as to preservation, we conclude that any failure to provide Putty a copy of the telephone conversation prior to the hearing did not offend the minimum due process rights to which Putty was entitled. In the special context of prison disciplinary actions, due process requires only: (1) advance written notice of the charges; (2) an opportunity to call witnesses and to present evidence; (3) a brief written statement by the fact finder of the evidence relied upon and the reasons for the decision; and (4) "some evidence" to support the decision. Hill, supra, 472 U.S. at 454-55; O'Dea, supra, at 357. The trial court was correct in concluding that Putty received all of these protections.

The order of the Boyle Circuit Court is affirmed.

BAKER, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. I think this case goes too far. Grubbs and his mother could have set up the whole scheme without Putty's knowledge. If we accept the confidential informant's statements, then there should be something for the reviewing court to review to assure that the Adjustment Officer determined the reliability of the confidential informant.

If the confidential informant's information was not used, then the conviction rests on the coded letter and taped conversation of Grubbs and his mother. This could easily be a set-up. Due process should require that upon request, the appellant be provided a copy of the letter and the tape prior to the appellant's hearing.

I would vacate and remand for further proceedings.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Emily Dennis
Frankfort, Kentucky