

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000753-MR

ALARIC MOORE

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 01-CI-00454

EDWARD GREEN, SR., SGT.;
DAVID MESKER, LT.;
AMIE PERKINS, C.O.;
CHARLIE BARNET, C.T.O.;
AND WILLIAM SEABOLD

APPELLEES

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: BAKER; GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order upholding disciplinary action taken against a prisoner for attempting to sexually assault a nurse in the medical unit of the prison. Appellant claims various due process violations during the course of the proceedings against him and that there was insufficient reliable evidence to support the finding of guilty.

From our review of the record, appellant was denied due process when certain exculpatory evidence was not disclosed by the prison prior to appellant's hearing. Hence, we vacate the circuit court's order and remand for further proceedings.

On June 17, 2000, at about 3:30 p.m., appellant, Alaric Moore, an inmate at the Kentucky State Reformatory, was called by nurse Marcia Payne to the Unit B Medical Shack so that Payne could check a rash on Moore's arm that Payne had treated the previous day. According to Payne's version of events, Payne was examining and applying cream to Moore's rash when Moore began asking Payne personal questions such as whether she thought he was attractive and whether she had any tattoos. He then asked if he could kiss her because it had been a long time since he had kissed a woman. Payne asked Moore to please not ask her such questions. Moore said he was sorry and moved towards Payne, again asking if he could kiss her. Payne told Moore to stop and, at some point, Moore grabbed Payne's wrists and told her not to run because he could catch her. Payne then sat on the floor and told him to stop. When Payne ultimately stood up, Moore got in front of her, pushed her down on the exam table, and stood over her. Payne pushed Moore away with her hands and legs and asked him to get off because he was scaring her. Moore then replied, "Just let me put the head in or see it." Moore also commented that he could see a heart tattoo on

her chest and asked if she would put his name in it. Moore retreated and then stated to Payne, "Look what you have done to me," pointing to the erection in his pants. Moore then asked Payne for some antibiotic cream to "fix the problem" she had caused.

It was undisputed that Payne did not report this incident until around 5:15 p.m. Payne stated that she failed to immediately report the incident because she feared that if she called for help while Moore was there, he would hurt her. Payne also stated that she waited to first report the incident to Sergeant Michael Roberts because she had not been working there very long and did not want to get into trouble.

Moore's version of the events differed greatly from Payne's version. Moore claims that when Payne was applying the cream to his rash, she complimented him on his tattoos and later informed him that she too had tattoos. Moore claims that without any prompting, Payne rolled up her pant leg, revealing a tribal tattoo on her leg. According to Moore, she then opened her blouse, lowered her bra cup and showed him a heart-shaped tattoo on her breast. At about that time, they heard over the two-way radio that there was a problem with the count. Moore asked Payne if she had called to report that he was there, to which Payne replied that she had thought the dorm officer had done that. Moore asked Payne if she would call to verify that

fact. When Payne called Dorm 5 and spoke with C.O. Skeens, Payne was informed by Skeens that Payne herself had to report Moore's location into the Yard Office for the count, which Payne then did. Shortly thereafter, someone from the Yard Office called and rebuked Payne for not calling in Moore's location at the beginning of the count. Moore claims that when he left at approximately 3:45 p.m., Payne told him to return at 5:00 p.m.

On June 19, 2000, two disciplinary reports were filed against Moore alleging that he had committed the offenses of sexual assault and pursuing or developing a relationship with a prison employee. On June 26, 2000, Moore was interviewed by Sergeant Edward Green about the events of June 17. At that time, Moore gave a statement containing his version of those events. The hearing before the Adjustment Committee was initially commenced on July 5, 2000, but was continued until July 10 and July 12, 2000, so that Moore could have additional time to consult with his inmate legal aide. After hearing the testimony of two KSR officers, Moore, and Payne, the Adjustment Committee found Moore guilty of attempted sexual assault for which he was given one year of segregation and loss of two years' nonrestorable good time. Moore thereafter sought review from the Warden who denied the appeal.

On August 8, 2000, Moore made an open records request from KSR to obtain various documents related to his case. On

August 31, 2000, Moore received eleven of those documents. Based on those documents, Moore filed a motion with the Warden to reconsider the decision regarding his appeal. Said motion was also denied.

On July 30, 2001, Moore filed a pro se petition for declaratory judgment, alleging, among other things, that his due process rights were violated during the course of the disciplinary proceedings against him when KSR: failed to conduct an adequate investigation of the matter; denied his request to call C.O. Skeens as a witness; withheld exculpatory documents from him; and based its decision on knowingly unreliable evidence from Marcia Payne. On December 19, 2001, the court entered its opinion and order dismissing the case, finding that Moore was not denied due process in the disciplinary proceedings and that the ruling was supported by sufficient evidence. Moore then filed motions for reconsideration and to vacate pursuant to CR 59.05. From the order denying those motions, Moore now appeals pro se.

Moore's first argument is that the circuit court erred when it found that the prison adequately investigated the case against him. Within this argument, Moore maintains that the investigating supervisor, Sergeant Edward Green, failed to collect all of the statements by Marcia Payne and, in so doing,

denied him the opportunity to present evidence which controverted the testimony of the main witness against him.

In reviewing the record, we see that it does not contain the entire record of the administrative proceedings, only that which was filed in the circuit court pursuant to the declaratory judgment proceedings. In support of his petition, Moore filed in the record, among other documents, three statements of Marcia Payne, which he maintains he received after the adjustment committee hearing pursuant to his open records request. The three separate statements are all on a form entitled "NURSE'S NOTES" and they are all dated June 17, 2000. Two of the statements are three and four pages long respectively, with a detailed description of the alleged attempted sexual assault. The description of the attempted sexual assault was, for the most part, consistent between these two statements, although certain of the details surrounding the assault differed slightly. The third statement was devoid of any mention of the alleged attempted sexual assault, stating only the following:

I had seen [inmate] Alaric Moore #109087 D-5 C-30 on Friday 6/16 for a rash on his arm. I wrote an Rx for the [inmate] and applied the lotion. As I instructed him on using his meds we started talking about his tattoos and he asked me if I had any. I told him I had one on my leg that was a tribal design.

Because we do not have the benefit of the full record of the administrative proceedings, we have no way of knowing whether the adjustment committee had knowledge of these three statements of Marcia Payne at the time of the hearing. It is Moore's contention that Green never collected all three of the statements, and the appellee, Department of Corrections ("the Department"), never disputes this fact. Indeed, the investigative report prepared by Green contains only a summary of the statement of Payne describing the alleged attempted sexual assault. Nor does the Department dispute the fact that prior to his hearing, Moore did not receive the statement in which Payne makes no mention of the alleged attempted sexual assault. Hence, we will proceed on the presumption that, at best, Moore did not have the benefit of this contradictory statement prior to his hearing.

Loss of good-time credit is considered a liberty interest for purposes of the due process clause of the Fourteenth Amendment to the United States Constitution. Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Goben v. Parker, Ky. App., 88 S.W.3d 432 (2002). In Wolff, the United States Supreme Court held that an inmate cannot be deprived of good-time credit without the following: 1) notice of the grounds for the deprivation; 2) a evidentiary hearing; 3) a neutral decision maker; 4) an opportunity to call

witnesses and present documentary evidence so long as it does not jeopardize institutional safety; and 5) a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action. Prisoners do not have a constitutional right to confront and cross-examine witnesses in disciplinary proceedings. Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988). Prison disciplinary decisions will be upheld if there is "some evidence" in the record to support the committee's findings. Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 358 (1997). The issue of whether a prisoner has a constitutional right to exculpatory evidence relating to prison disciplinary proceedings against him appears to be a question of first impression in Kentucky.

The Seventh Circuit of the United States Court of Appeals has held that prisoners are entitled to have exculpatory evidence disclosed unless its disclosure would unduly threaten institutional security. Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981). The Chavis Court applied the general rule for disclosure of exculpatory evidence in criminal prosecutions set out in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), stating:

[S]uppression by the prosecution of evidence clearly favorable to an accused violates due process where the evidence is material either to guilt or punishment, even if it was not specifically requested by the

defendant. Evidence is material 'if [it] creates a reasonable doubt that did not otherwise exist.' [United States v. Agurs, 427 U.S.] at 112, 96 S. Ct. at 2401. This means:

If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Id. at 112-13, 96 S. Ct. at 2401-2402.

Chavis, 643 F.2d at 1285.

The Court in Chavis further held that even though the disciplinary committee had access to the exculpatory evidence at the time of the hearing, due process still requires that the prisoner have access to the evidence prior to the hearing in order to "prepare the best defense he can and bring to the court's attention any evidence helpful to his case." Chavis, 643 F.2d at 1286.

In the instant case, the major evidence of Moore's guilt was the testimony of Marcia Payne.¹ Besides Moore, Payne was the only other witness to the alleged offense. Hence, it was essentially Moore's word against Payne's word. We believe the statement of Payne in which she makes no mention of the

¹Apparently, there were two witnesses called by the Department at the hearing besides Payne, Lt. A. Ray and Lt. Wasson, both of KSR. However, the tapes of the hearing which are included in the record before us are incomplete, only containing a portion of the testimony of Payne. They do not contain the testimony of Ray, Wasson, or Moore.

attempted sexual assault created a reasonable doubt as to whether the incident occurred, and, thus, constituted exculpatory evidence under Agurs, 427 U.S. at 112, 96 S. Ct. at 2401. Although Payne may have had a plausible explanation for not including the attempted sexual assault in that statement, we believe that Moore nevertheless had a right to that statement for purposes of preparing his defense and challenging the reliability of Payne's testimony. Further, we do not see how a disclosure of this statement would have threatened institutional security at KSR. This was not a case of a confidential prison informant as in Gilhaus v. Wilson, Ky. App., 734 S.W.2d 808 (1987). Moore obviously knew that Payne would be the major witness against him. Accordingly, we vacate the order of the Oldham Circuit Court and remand for another hearing before the adjustment committee.

Moore's second argument is that the circuit court erred in holding that the adjustment committee's denial of Moore's request to call C.O. Skeens as a witness at his hearing was not an abuse of discretion. According to Moore, C.O. Skeens was one of the KSR officers that Payne had radio contact with during the time Moore was in the medical unit with Payne. Moore maintains that C.O. Skeens was the officer who told Payne that it was her responsibility to call Moore's location into the Yard Office. According to a statement given by Skeens, when she

spoke with Payne during this time, Payne's voice sounded normal and nothing seemed unusual. Moore contends that this was evidence he was entitled to present to prove that Payne was not in any distress when the alleged sexual assault occurred. In an affidavit submitted by Lt. David Mesker who sat on the adjustment committee that heard Moore's case, Moore's request to call Skeens as a witness was denied because Skeens was not a witness to the incident. In Wolff, 418 U.S. at 566-67, 94 S. Ct. at 2979-80, the Supreme Court explicitly recognized that prison officials must have the necessary discretion regarding the prisoner's right to call witnesses to balance the security and needs of the prison against the inmate's interest in avoiding loss of good time, noting that "some amount of flexibility and accommodation is required." Here we cannot say that the adjustment committee abused this discretion given the fact that Skeens was not an actual witness to the alleged offense. In any event, Moore was not prejudiced by the refusal to allow Skeens to testify when, according to Moore's appellate brief, Lt. Ray testified that when he talked to Payne over the radio during the time that the alleged sexual assault occurred, she did not exhibit any signs of distress or fear.

Given our remand of the case, Moore's argument that there was not sufficient evidence to support the disciplinary action is moot. For the reasons stated above, the order of the

Oldham Circuit Court is vacated and the cause remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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