

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001637-MR

DAVID NUNN

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 02-CI-00232 AND 03-CI-00157

CAROLINE MUDD; LOLA COX; DAVID E.
GRIBBINS; AND RHONDA TUNGATE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: David Nunn, an inmate of the Marion Adjustment Center, had a hearing before the prison's adjustment committee on three separate charges against him: possession of a controlled substance, tattooing self or allowing self to be tattooed, and possession of tattooing paraphernalia. The proceedings resulted in findings of guilt and revocation of good time credits by the adjustment committee. Nunn filed two petitions for declaration of rights in the Marion Circuit Court

alleging he was deprived of his due process rights in the proceeding. The petitions were consolidated by the Court since they concerned the same disciplinary proceeding.

Nunn alleged in his petition that when the adjustment committee found him guilty of possession of a controlled substance, the chain of custody was not properly documented and the field test was insufficient. He alleged he was subjected to an unlawful search. He alleged there was no evidence to support the finding that he was guilty of the offense of tattooing self or allowing self to be tattooed, and insufficient evidence to conclude he was guilty of possession of tattooing paraphernalia. We agree with the court that Nunn was not denied due process, and so we affirm.

The full panoply of rights due a defendant in a criminal prosecution does not apply in prison disciplinary proceedings. Stanford v. Parker, Ky. App., 949 S.W.2d 616, 617 (1996); Wolff v. McDonnell, 418 U.S. 539, 556, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974). The requirements of due process are satisfied if "some evidence" supports the finding of guilt by the prison disciplinary board. Stanford, 949 S.W.2d at 617, citing Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 456, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985). Prison disciplinary proceedings are afforded a less stringent evidentiary standard under the constitution due to the highly

charged atmosphere of a prison and the need of administrators to often act swiftly under exigent circumstances. Hill, 472 U.S. at 456, 105 S. Ct. at 2774.

Nunn argues that the search which revealed the contraband was "suspicious," since it was performed after he was taken away to the medical unit. The court below correctly held that officers followed Correction Policy and Procedure 9.8, which only requires that cell or inventory searches be done with the inmate present if possible. The search was conducted under established practice within the institution. Nunn does not identify any violation of his rights.

Nunn next complains that the chain of custody was not established, and the scientific test done on the contraband was invalid. Nunn cites Corrections Policy and Procedure 9.8 which requires a chain of custody form be filled out and the evidence be kept in a secure place until final disposition. The trial court found that there was a sufficient chain of custody shown as to the testing of the marijuana. The court found that Officer Cox observed Nunn place something in a ball cap next to the bed area. Lieutenant Withrow conducted a search and found three bags of suspected marijuana. Lieutenant Withrow handed the bags to Captain Hill. Hill took the marijuana to a control center where it was field tested and shown to be marijuana.

While there is a chain of custody form included as an exhibit below, Nunn argues it is insufficient as it was created after the test was completed rather than as the incident unfolded, and it was not provided to him until the case went to the circuit court. The trial court did not address the question of whether the chain of custody form was sufficient, but merely found that the chain of custody evidence could be relied on. We find this was proper.

The question is whether there was some evidence to support the disciplinary decision in order to satisfy due process standards. The officers testified as to the complete chain of custody of the marijuana prior to its testing, and so it was shown to have been reliably connected to Nunn. We do not find Byerly v. Ashley, Ky. App., 825 S.W.2d 286 (1991), cited by Nunn, to be on point. In that case the evidence was sent out of the facility and had not been properly documented. This Court concluded that the lack of records did not satisfy the requirement that the evidence "at least be reliable." Id. at 288. In the case at bar, the testing was done on the site and there was no period of delay between collection and testing in which the evidence was unaccounted for. The evidence was thus reliable.

We do not find any due process violation when Nunn went before the adjustment committee without having received a

copy of the chain of custody form. In prison disciplinary proceedings, due process requires only that written notice of the charges be given to the inmate, that there be a written statement by the factfinders as to the evidence relied on and any reasons for disciplinary action, and the inmate be allowed to call witnesses and present documentary evidence when permitting this will not be unduly hazardous to institutional safety or correctional goals. Wolff, 418 U.S. 539, 563-566, 41 L. Ed. 2d 955-956. Nunn is not entitled to any relief since the fact that the Corrections Policy and Procedure called for a chain of custody form does not confer additional due process rights on him. Additionally, Nunn does not convince us that the field test cannot be relied on as "some evidence" of guilt in the prison setting. There was no due process violation.

As to the tattooing charge, Nunn argues on appeal that the nurse stated on the date of the incident that she could not tell whether Nunn's tattoos were fresh. Nunn argues that he showed his tattoos to the adjustment committee members and none could tell whether the tattoos looked fresh or not. Nunn seems to believe that this disposes of the charge. However, the committee below cited a statement by the nurse that Nunn had a tattoo which had not been noted on his admission form and that the tattoo appeared fresh. This is certainly reliable evidence

that he had committed the offense of tattooing while at the facility. Therefore, there was no due process violation.

Nunn also complains that the alleged tattoo paraphernalia were merely art drawings not prohibited by the Department of Corrections, and argues the similarity in appearance was coincidental. We agree with appellees that the Marion Adjustment Center had authority to interpret the regulations forbidding tattooing paraphernalia as prohibiting drawings such as Nunn possessed which appeared to be intended as a guide in tattooing. Commonwealth, Cabinet for Health Services v. Family Home Health Care, Inc., Ky. App., 98 S.W.3d 524 (2003)(agency's interpretation of its own regulations is entitled to deference on judicial review). Nunn fails to recognize that the similarity of pattern, which he admits, to his tattoos is sufficient to satisfy the "some evidence" standard that the drawings were used for tattooing purposes. There was no due process violation.

We affirm the order of the Marion Circuit Court which denied the petitions for declaration of rights.

ALL CONCUR.

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