RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000308-MR
NO. 2004-CA-000329-MR

PATTI WEBB AND
LIGGETT MORRIS — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM MUHLENBERG CIRCUIT COURT
v. HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 03-CI-00451

BRIAN SHARP — APPELLEE/CROSS-APPELLANT

AND NO. 2004-CA-000817-MR

PATTI WEBB; RICK WILLIAMS;
LIGGETT MORRIS; AND BRETT LILE — APPELLANTS

APPEAL FROM MUHLENBERG CIRCUIT COURT
v. HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 04-CI-00016

DONTRAE THOMAS — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

DYCHE, JUDGE: These appeals arise from prisoner discipline actions taken by Patti Webb, Rick Williams, Liggett Morris, and Brett Lile, who are the warden and other staff at the Green River Correctional Complex ("the officers"), against inmates Brian Sharp and Dontrae Thomas. Sharp was adjudicated to be guilty of two counts of possession of dangerous contraband (marijuana and amphetamines) and one count of physical action against an employee; Thomas was found guilty of two counts of possession of dangerous contraband (marijuana) and one count of physical action against an employee. These offenses are defined and categorized in Kentucky Corrections Policies and Procedures 15.2, "Rule Violations and Penalties." As a result of these alleged violations, Sharp and Thomas were penalized with loss of "good time" credit against their sentences (Ky. Rev. Stat. 197.045), being placed in disciplinary segregation, and loss of privileges. The prisoners sought judicial review of the results of the administrative actions against them in the Muhlenberg Circuit Court under the Declaratory Judgment Act, Ky. Rev. Stat. 418.040-.090.

> A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever Habeas Corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department. Polsgrove v.

> Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977); Graham v. O'Dea, Ky.App., 876 S.W.2d 621 (1994). While technically original actions, these inmate petitions share many of the aspects of appeals. They invoke the circuit court's authority to act as a court of review. The court seeks not to form its own judgment, but, with due deference, to ensure that the agency's judgment comports with the legal restrictions applicable to it. American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n., Ky., 379 S.W.2d 450 (1964).
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> " 'The focal point for [this] judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.' " Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985) (quoting Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)). These petitions thus present circumstances in which the need for independent judicial factfinding is greatly reduced. The circuit court's fact-finding capacity is required only if the administrative record does not permit meaningful review. Even then, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power, supra, 470 U.S. at 744, 105 S.Ct. at 1607; see also American Beauty Homes, supra (constitutional provisions for the separation of powers restrict the court's authority to rely upon its own rather than the agency's factual determinations).

Smith v. O'Dea, 939 S.W.2d 353, 355-6 (Ky.App. 1997).

The circuit court conducted a review of the administrative record from the prison, and found that there was

sufficient evidence and procedural regularity to support the discipline of both prisoners on the physical action charges, but that there was insufficient reliable evidence to support the contraband charges, and ordered each of them expunged from the prisoners' records. We affirm. We note at the outset that the Corrections Cabinet is not a party to this action; it would seem that the cabinet would be interested in the outcome of this action, and would perhaps even be a necessary party. We will nevertheless consider all of the issues properly before us.

Sharp argues that there was not sufficient evidence to support the disciplinary action against him for physical contact with the corrections officer. He maintains that the offense, as designated in Policies and Procedures, is vague and overbroad.

We review claims such as this under the "some evidence" standard. Smith v. O'Dea, 939 S.W.2d at 358. The testimony was that Sharp had scuffled with the officers and tried to prevent them from discovering the nature of the alleged contraband. The definition is sufficient to inform prisoners of the parameters of behavior required of them; it is not vague or overbroad. There was "some" evidence to support the action.

Sharp also argues that it was error for the trial court to fail to award him damages against the officers. There was no finding of the trial court on this issue, so this matter is not before us.

Sharp's final argument is that the trial court failed to enforce its order and require expungement of the contraband actions from his institutional record. As we are affirming the trial court on all its rulings, we are confident that the institution will take the appropriate action.

The officers appeal from the trial court's finding that the results of the field tests conducted on the alleged contraband were not reliable, and therefore inadmissible. The officers argue that the field tests conducted upon the alleged contraband items were reliable. The tests involved are the Duquenois-Levine Reagent test, and the Marquis Reagent A field test. We will not engage in a lengthy survey of how other states have dealt with these particular tests, or of the underlying methodology of the tests. We have not found, nor have we been cited to, any instance where a Kentucky court has been asked to judge the reliability and admissibility of these two tests.

The officers argue that the prisoners did not show that the tests are unreliable. They seem to have the process backward. It is the burden of the charging officer or institution to come forward with proof to support the charges. If the use of some sort of scientific test is implicated, then the reliability must be established to the satisfaction of the

court or other tribunal. It is not the obligation of the prisoners to prove the unreliability of such a test.

We are aware of the lessened proof standards in prison discipline actions, Wolff v. McDonnell, 418 U.S. 539 (1974), but, even under those standards, reliability must be established before some scientific test may be used to deprive a prisoner of a liberty interest. We do not think it will be oppressive for the institutions to have to establish reliability to the satisfaction of the courts before use of such scientific tests withstands scrutiny. In this case, the officers made no effort whatsoever to do so. As a result, the circuit court had no choice but to set aside the adjudication of guilt on the contraband charges. The orders and judgments of the Muhlenberg Circuit Court are affirmed.

COMBS, CHIEF JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent from the majority opinion insofar as it upheld the circuit court's judgment setting aside the institutional findings that Sharp and Thomas possessed dangerous contraband. The evidence was uncontested that both Sharp and Thomas were found in possession of a leafy green substance resembling marijuana. In a separate incident, Sharp was found in possession of a white, powdery substance. Subsequent tests

showed the leafy green substance to be marijuana and the white substance to be amphetamines.

When a prison disciplinary action is based on a positive drug test, there must be some evidence establishing the reliability of the test.[1] The majority finds that the prison officials failed to introduce such evidence. But while there is no Kentucky case law directly addressing this question, courts in other jurisdictions have recognized the reliability of the Duquenois-Levine test used by the prison officials.[2] Moreover, neither Sharp nor Thomas challenged the accuracy of the drug tests at the disciplinary hearings. Their failure to raise the issue before the adjustment committee precludes them from raising it now.[3] Therefore, I would reverse the trial court's judgment and reinstate the penalties imposed by the prison officials.

Furthermore, the trial court ordered the institution to expunge the possession-of-contraband charges from Sharp's and Thomas's records. The majority concedes that the Corrections Cabinet likely would be a necessary party for such relief, but

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[1] Higgs. v. Bland, 888 F.2d 443, 449 (6th Cir., 1989).

[2] Cunrod v. State, 526 S.E.2d 902-03 (Ga. App., 1999); *citing* Moore v. United States, 374 A.2d 299 (D.C.App.1977), *abrogated on other grounds by* Thomas v. United States, 650 A.2d 183 (D.C. App. 1994); and People v. Escalera, 143 Misc.2d 779, 541 N.Y.S.2d 707 (City Crim.Ct.1989).

[3] O'Dea v. Clark, 883 S.W.2d 888, 892 (Ky.App. 1994).

nevertheless upholds this aspect of the trial court's order. Because the Corrections Cabinet was not made a party to this action, I would set aside the trial court's order ordering the institution to expunge the adjudication from Sharp's and Thomas's records.

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