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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001765-MR

THOMAS McCLENDON — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
INDICTMENT NO. 04-CI-00153

JAMES MORGAN; HARDIE JOHNSON;
AND DEPARTMENT OF CORRECTIONS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: This is a *pro se* appeal from a Boyle Circuit Court order denying Thomas McClendon's petition for declaration of rights. McClendon, an inmate at the Northpoint Training Center, was found guilty of unauthorized drug use. McClendon contends that prison officials failed to establish an

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

adequate chain of custody for the drug-test evidence as required under Byerly v. Ashley.[2] We affirm.

On October 4, 2002, a urine sample was taken from McClendon and sent via Airborne Express to a laboratory, Advanced Toxicology Network, in Memphis, Tennessee. Tests on the sample revealed the presence of marijuana. A hearing was held shortly thereafter where McClendon was found to have committed the disciplinary infraction of unauthorized drug use for testing positive two or more times. His penalty was ninety days in segregation, the forfeiture of 180 days of good time credit, and the payment of $16.00 to offset the cost of the urinalysis. McClendon unsuccessfully appealed the Committee's decision to the prison warden, James Morgan, thereby exhausting his administrative remedies. He then filed a "motion for declaratory judgment" in Boyle Circuit Court.[3] He claimed in the memorandum supporting his motion that the adjustment officer who conducted the disciplinary hearing erred in stating that "all paperwork and documents appear to be in order" because it appeared that the chain of custody form accompanying his sample was a photocopy of the same form that had accompanied the sample of another inmate. The circuit court denied his motion on the grounds that the "fundamental fairness" and "reliability"

[2] 825 S.W.2d 286 (Ky. App. 1991), disc. rev. denied 1992.

[3] The circuit court treated McClendon's motion as a petition for declaration of rights.

standards set forth in Byerly[4] had been met, and that the evidence presented was sufficient to support the findings of the disciplinary review board. This appeal followed.

This Court has adopted the "some evidence" standard of review for prison disciplinary proceedings espoused by the United States Supreme Court in Superintendent, Massachusetts Correctional Institution, Walpole v. Hill.[5] In that case, the Supreme Court held that

> the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced . . . ." Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.[6]

Although a prison inmate facing administrative disciplinary proceedings does not have the same procedural safeguards as does a person facing criminal prosecution or even

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[4] Supra, note 2, at 288.

[5] 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985), cited in Smith v. O'Dea, 939 S.W.2d 353, 358 (Ky. App. 1997).

[6] See Walpole, supra, note 2, 472 U.S. at 455, 105 S. Ct. at 2774 (citations omitted).

parole revocation, fundamental fairness dictates that the evidence relied upon to punish him at least be reliable.[7]

McClendon's first argument on appeal is that the chain of custody of the sample was not properly documented before its release from the Northpoint Training Center to the courier. McClendon has explained that he did not raise this argument before the trial court because it is based on evidence that he gleaned from the appellees' response to his motion for declaratory rights. This issue is nonetheless not properly before us. The law is well-settled that the trial court must be given the opportunity to rule on issues before they are presented for appellate review and the Court of Appeals is without authority to review issues not raised in or decided by the trial court.[8]

Moreover, McClendon's argument that the chain of custody was not maintained prior to the release of the sample is based on a misunderstanding of the terminology used in the appellees' response to his petition. In their response, the appellees explained that after a sample is taken from an inmate and sealed in a container, it is placed in a "secure unit" to await pick up by the courier. McClendon appears to believe that the words "temporary storage" on the chain of custody form

[7] Byerly, supra, note 1, at 288, citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

[8] Regional Jail Authority v. Tackett, 770 S.W.2d 225, 227 (Ky. 1989).

refer to this "secure unit." However, the "temporary storage" area referred to on the form is located at the laboratory, and therefore the laboratory employee who signed beside this term on the form to indicate receipt of the sample was not "fraudulently" signing on behalf of the Northpoint Training Center as McClendon alleges.

McClendon also appears to argue that there is a flaw in the chain of custody because there is no evidence on the form to indicate who released the sample from the Northpoint Training Center to the courier.

This issue was recently addressed by this Court in Lucas v. Voirol.[9] In that case, the officer who collected the sample placed it in a locked storage box, where it remained until the courier came. The form did not indicate who removed the sample from storage, or when. The chain of custody form did indicate that the sealed sample was shortly thereafter received and signed for at the laboratory. Lucas argued that this "courier gap" in the chain of custody undermined the reliability of the sample. We held that the absence of this information on the form "does not undermine confidence in the test where lab personnel certify that the sample arrived within a reasonable time after collection, clearly identified, and with its seal

[9] 136 S.W.3d 477 (Ky. App. 2004).

intact."[10] We concluded that "now that we have held that the courier gap is harmless, that gap will not provide a ground for challenging the sufficiency of drug-test evidence. Future petitions based upon that gap may be deemed frivolous."[11] Since there is no indication in this case that McClendon's sample did not arrive at the laboratory in a reasonable time, was not clearly identified, nor that the seal had been tampered with, this argument is without merit.

We turn now to the McClendon's argument concerning the chain of custody form used at the laboratory. McClendon has noted that his "litigation package summary" from the Advanced Toxicology Network, when compared with that of a fellow inmate, Harlan Bivins, shows the identical "screening batch" number and the identical "confirmation batch" number for their urine samples. But McClendon fails to explain how this evidence in any way demonstrates that the integrity of the samples was compromised. It appears reasonable to this Court that samples taken from inmates at the same prison at the same time would be part of the same screening and confirmation batches.

McClendon also claims that the chain of custody form accompanying Bivins' sample is identical to his own. In other words, the names and signatures recorded on that form to show

[10] Id. at 479.

[11] Id. at 480.

the passage of the samples through the various stages of testing were photocopied. The only difference between the forms is the nine-digit specimen identification number listed at the bottom. It appears that lab employees are not personally signing each form, but are using a common form that they have signed and then photocopying it and attaching it to the various samples.

McClendon argues that the regulations demand that the form be an "original" and that because the form was photocopied, his sample could somehow have been compromised or mixed up with another inmate's sample. The system of using a common chain of custody form, he argues, seriously undermines the reliability of the sample.

We have reviewed the relevant regulation and find no requirement that the chain of custody form accompanying the sample be an "original." It states as follows:

> The laboratory personnel conducting the testing shall sign and date the Chain of Custody certifying that the sample:
>
> 1. was received intact; and
>
> 2. is properly identified as the inmate's.[12]

In this case, the name of every individual laboratory employee who handled the sample at each phase of testing is clearly documented on the form. The individual nine-digit

[12] Kentucky Corrections Policies and Procedures (CPP) 15.8 (VI)(3)(B), incorporated by reference in 501 Ky. Adm. Regs. (KAR) 6:020.

specimen identification number of each sample is recorded at the bottom of the form accompanying that sample. Simply because the same laboratory employees conducted identical tests on a batch of samples from the Northpoint Training Center and indicated this on the same form does not undermine the reliability of the test results. McClendon claims that the photocopied form fails to reflect the proper handling of the specific specimen, or to reflect that the specimen has gone through the testing phase without tampering. He also claims that by using a photocopy, erroneous test results could be generated and reported. He does not, however, explain how this could occur.

> Proving a proper chain of custody is not an end in itself. In a case like this it is for the purpose of establishing that the sample tested is the same as that taken from a particular individual and that, at the time it is tested, the sample is in the same condition as when taken, free of tampering.[13]

In our view, the use of the individual identification numbers on the forms is sufficient evidence to establish with reasonable certainty that the sample was indeed McClendon's and that it was not tampered with at the laboratory.

The order of Boyle Circuit Court is therefore affirmed.

ALL CONCUR.

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[13] Byerly, supra, note 2, at 287.

BRIEFS FOR APPELLANT:

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