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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002121-MR

JOHN BRENTON PRESTON — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 04-CI-00048

LT. COMPTON; and
JOHN MOTLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: John Brenton Preston appeals pro se from an order entered by the Morgan Circuit Court denying his motion seeking a declaratory judgment pertaining to a prison disciplinary proceeding. For the reasons stated hereafter, we affirm.

Preston is an inmate at Eastern Kentucky Correctional Complex. It is undisputed that certain pictures of young males were found in his cell during a search on February 4, 2004, and that Preston admitted the pictures were his. After an

investigation Preston was charged with the possession of child pornography. However, Preston asserts that he believed he was permitted to possess the pictures as they had been inspected but not confiscated on several prior occasions.

A hearing was conducted and a disciplinary report was filed which noted that Preston was forcibly removed from the hearing. The report further stated that the hearing officer found Preston

> guilty of the charge based on C/O Rose's disciplinary report stating inmate had pictures of young males in various poses, nudes, and with suggestive comments. Inmate admitted that the items were his, and based on the attached correspondence addressed to this hearing officer that inmate Preston would enter a plea of guilty if "the sentence was probated and he would not be sent to segregation." The hearing officer issues 90 days [disciplinary segregation].

The warden affirmed the hearing officer's decision on appeal, and the circuit court dismissed Preston's petition seeking a declaration of rights. This appeal followed.

In *Smith v. O'Dea*,[1] a panel of this court addressed the procedures which should be followed, and the concerns which should be addressed, when a petition for declaratory judgment is filed in regard to prison disciplinary proceedings. Such

[1] 939 S.W.2d 353 (Ky.App. 1997). *See Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

petitions "share many of the aspects of appeals,"[2] and the administrative record provides the focal point for judicial review.[3] The court noted:[4]

> In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Court ruled that, in prison disciplinary proceedings where a prisoner's good behavior credit is at stake, the Due Process Clause of the United States Constitution is implicated, but the process due is no more than notice of the charges, a reasonable opportunity to be heard, and a brief written finding suitable for judicial review. The Court approved these minimal procedures after balancing the prison administration's profound interest in maintaining order against the inmate's relatively minor interest in avoiding a portion of his sentence.
>
> Since *Wolff*, the Court has reiterated and confirmed this estimate of the disparate interests at stake in the context of ordinary prison management and its significance for due process analysis. . . . In these cases the Court held that, in light of the exceptional difficulties confronting prison administrators, a highly deferential standard of judicial review is constitutionally appropriate with respect to both the factfinding that underlies prison disciplinary decisions and the construction of prison regulations.

The *Smith* court applied the federal "some evidence" standard of review and upheld the sanctions imposed, noting that "the

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[2] *Id.* at 355.

[3] *Id.* at 356.

[4] *Id.* at 357.

concept of procedural due process is flexible,"[5] and that "the process due in any given context will depend on the interests at stake and the costs of safeguarding the accuracy of the tribunal's factual and legal determinations."[6] As part of its analysis, the court weighed "the prison administration's compelling interest in order and in authority as a means to order"[7] against the "uncomplicated factual situations and . . . relatively minor interests (in slightly reduced sentences, for example, or marginally mitigated conditions of confinement)"[8] which typically are presented in inmate declaratory judgment petitions.

Here, there certainly was "some evidence" to support the disciplinary action taken against Preston. It is undisputed that he possessed the materials in question, and the audiotape of the disciplinary hearing reflects that although Preston argued that the ages of the young subjects could not be determined and that the materials were not pornographic, the hearing officer specifically found that the materials constituted child pornography in violation of current prison regulations. We cannot say that the hearing officer violated

[5] *Id.* at 357.

[6] *Id.* at 357.

[7] *Id.* at 358.

[8] *Id. at* 358.

her authority by imposing a punishment for Preston's possession of the materials.

Moreover, we are not persuaded by any of the other numerous pro se allegations of error raised by Preston on appeal, which we will make every effort to discern and address. First, although Preston complains that he was "convicted and sentenced" *in absentia*, our review of the record and the hearing audiotape in fact demonstrates that he was present throughout the hearing, that he presented witnesses in his own defense, and that his due process rights were not violated at any point. Moreover, our review of the record and the tape does not confirm the allegation that he was removed from the room prior to the hearing officer's imposition of ninety days' segregation, or that he therefore is entitled to relief.

Next, Preston contends that "the disciplinary report placed against" him by a prison guard was written in such a "defective and structurally deficient [manner] that it failed to constitute an offense and a cause of action[.]" However, our review of the disciplinary report form shows that "Part I – Write Up and Investigation" does not even permit a reporting prison guard to specify a particular charge against an inmate. Instead, that charge can be placed against the inmate only after an investigation and the completion of the next section of the form. As the investigating officer did indeed charge Preston

with “possession, creating any writing or photography of which child pornography is the subject,” there is no merit to Preston’s complaint on appeal.

Next, we are not persuaded by Preston’s contention that “the hearing officer err[ed] as a matter of law and abuse[d] her administrative discretion by stating on [the] record and as a matter of fact that ‘what I see’ is pornography,” without first conducting “an independent evaluation of each of the three-part analysis required by *Miller v. California*[.]”[9] As *Miller* pertains to state laws which regulate obscene materials, rather than prison regulations which necessarily limit many of the freedoms available to unincarcerated citizens, the hearing officer was not required to conduct a *Miller* analysis prior to determining if the materials in question violated prison regulations against the possession of child pornography. Moreover, there is no merit to Preston’s claim that before finding him guilty of possessing child pornography, the hearing officer was required either to distinguish between prohibited and permitted magazine and newspaper clippings, or to find that each of the confiscated items would be admissible in court pursuant to the Kentucky Rules of Evidence. Further, as the seized photographs and clippings satisfied the “some evidence” standard below, we are

[9] 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

not persuaded by Preston's assertion that because the charges against him mentioned that suggestive comments were written on the folder which contained the seized materials, the hearing officer erred by failing to permit him to review the folder and comments during the hearing below.

Next, we are not persuaded by Preston's complaint that any regulation prohibiting the possession of the materials in question was applied retroactively and "violate[d] ex post facto" because possession of the materials was not prohibited when he acquired them. Regardless of whether Preston's original acquisition of the materials was permissible, it is clear that his continued possession of such materials became a prohibited activity once the regulation against child pornography went into effect some months before the charge was levied against Preston. Thus, the regulation was not improperly applied to Preston's ongoing possession of the seized materials. Moreover, there is no merit to his contention that the regulation itself was unconstitutional because it was too vague and ambiguous, because it was not approved and ratified by the Kentucky Legislative Research Commission and General Assembly, or because it "expand[ed] and add[ed] words to the statutory definition of pornography[.]"

Next, Preston asserts that the hearing officer improperly considered the correction officer's report and

Preston's prior correspondence with her, and that the hearing officer was "hostile, biased, prejudiced and partial[.]" After reviewing the record, we are not persuaded that Preston is entitled to relief on either ground.

Finally, having carefully reviewed the record, we find no merit in Preston's remaining contentions, including those regarding the alleged denial of his due process and other constitutional rights at any stage of the proceedings below.

The circuit court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John Brenton Preston, *pro se* West Liberty, Kentucky	No appellee brief filed