

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000664-MR

MARK JENKINS

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
CIVIL ACTION NO. 04-CI-00181

TERRY HENDERSON AND
COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF CORRECTIONS

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Mark Jenkins, an inmate at the Kentucky State Penitentiary (KSP), appeals from a Lyon Circuit Court order that dismissed his petition for a declaration of rights seeking relief from an adjustment committee's adverse decision. Because the adjustment committee abused its

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.

discretion when it denied Jenkins's request to call a witness, we reverse in part and remand for further proceedings.

On October 24, 2003, Jenkins was an inmate at the Blackburn Correctional Complex (BCC) in Lexington, Kentucky. On that date, Evelyn Ritchie, a correctional officer at BCC, was attacked by an inmate. In two incident reports, Ritchie briefly described the attack. According to Ritchie, at approximately 2:30 a.m., after she had descended a back stairwell, she saw an inmate, who she identified as Jenkins, leaning against a wall in a crouched position. Jenkins allegedly charged her, grappled with her and forced a tan toboggan over her head. He then punched Ritchie three times in the face, grabbed her breasts and attempted to grab her crotch. Ritchie screamed, kicked and eventually hit her assailant with her radio causing him to fall. After that, he fled.

Later that day, Jenkins was transferred to the Kentucky State Penitentiary. After receiving medical treatment for her injuries, Ritchie completed two incident reports on October 27, 2004, in which she set forth her version of the incident. After Ritchie's reports were received at KSP, Sgt. Chad Knight, an officer there, conducted an investigation. Knight interviewed Jenkins and, after he informed Jenkins of his right to remain silent, Jenkins denied Ritchie's allegations insisting that he did not attack her. Knight also interviewed

Lt. McQuinn, an internal affairs officer at BCC, who told Knight that Ritchie had positively identified Jenkins as the attacker and that she had been injured during the attack. Later, Knight charged Jenkins with "physical action resulting in injury of an employee" and with "sexual assault".

On December 10, 2003, a KSP adjustment committee held a disciplinary hearing to consider the charges against Jenkins. According to the record, Sgt. Taulbee, Ritchie's shift commander, and Lt. McQuinn testified against Jenkins. Neither officer appeared in person before the committee; instead, they testified via speakerphone. To bolster his defense, Jenkins requested permission from the committee to call Ritchie as a witness, but the committee denied Jenkins's request stating that Ritchie was not available since she was on sick-leave due to the attack and since she had been intimidated by Jenkins. The adjustment committee found Jenkins guilty of both charges and punished him by placing him in disciplinary segregation for two years and taking away eight years of non-restorable good-time credit. Jenkins appealed to KSP's warden, Glenn Haeberlin, who upheld the committee's ruling.

On October 29, 2004, Jenkins filed a petition for declaration of rights in Lyon Circuit Court seeking reversal of the adjustment committee's ruling. In his petition, Jenkins argued that the adjustment committee violated his substantive

due process rights since its decision was not supported by sufficient evidence. Furthermore, Jenkins claimed, the adjustment committee violated his procedural due process rights when it denied his request to call Ritchie as a witness and when it failed to provide him with Ritchie's medical records and the extraordinary occurrence report from BCC.

On February 25, 2005, the circuit court dismissed Jenkins's petition. In its order, the circuit court cited *Superintendent, Mass. Correctional Institution, Walpole v. Hill*,² *Wolff v. McDonnell*,³ and *Smith v. O'Dea*,⁴ and concluded that Ritchie's incident reports and the testimony of Lt. McQuinn and Sgt. Taulbee constituted "some evidence" which supported the adjustment committee's decision. The circuit court concluded that the committee did not violate Jenkins's due process rights when it refused to provide him with the extraordinary occurrence report since the committee did not rely upon it. Citing Kentucky Revised Statutes (KRS) 197.025(2), KRS 61.878(1)(a) and 45 Code of Federal Regulations (C.F.R.) Part 164, the court concluded that the committee did not violate Jenkins's rights when it failed to require the production of Ritchie's medical records since they contained confidential, protected health

² 472 U.S. 445, 105, S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

³ 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

⁴ 939 S.W.2d 353 (Ky. 1997).

information. Finally, the court noted that prison disciplinary proceedings were not criminal prosecutions; thus, Jenkins was not entitled to the full panoply of due process rights guaranteed to a criminal defendant. The court reasoned that, "since [Ritchie's] written statement is in the record and Lt. McQuinn and Sgt. Taulbee had personal knowledge of the reported incident and Ms. Ritchie's injuries, the committee acted within its discretion in deeming her testimony as unnecessary and cumulative."

In his brief to this Court, Jenkins claims that Officer Ritchie could not have identified him since he had only been committed to BCC ten days prior to the attack, which is why he insisted on calling her as a witness. Citing *Wolff v. McDonnell*,⁵ Jenkins argues that he has a constitutional right to call, confront and cross-examine his accuser during his disciplinary hearing. He insists that by refusing his request, the adjustment committee violated his due process rights.

When reviewing prison administrative disciplinary proceedings, we affirm if "some evidence" supports the committee's finding of guilt.⁶ However, while only "some

⁵ *Supra*, note 3.

⁶ *Stanford v. Parker*, 949 S.W.2d 616, 617 (Ky. App. 1996).

evidence" is the rule, fundamental fairness demands that this evidence must be reliable.⁷

The United States Supreme Court has repeatedly held that prison disciplinary proceedings are not criminal prosecutions; therefore, an inmate is not entitled to the complete array of due process rights accorded a criminal defendant.⁸ While the Court has recognized that an inmate has a right to call witnesses on his behalf, this right is limited, and a disciplinary committee may deny an inmate's request if calling the witness would cause undue hazard to the institution's safety or interfere with its correctional goals.⁹ Moreover, the denial of an inmate's request to call a witness is within the sound discretion of the disciplinary committee.¹⁰

Despite Jenkins's insistence, a prisoner does not have an unqualified right to either call witnesses or confront his accuser in a prison disciplinary proceeding. But, while a prisoner's right to present evidence may be curtailed, the evidence upon which a disciplinary committee ultimately relies must, in fact, be reliable. As the record reveals in the present case, the adjustment committee relied upon Ritchie's

⁷ *Byerly v. Ashley*, 825 S.W.2d 286, 288 (Ky. App. 1991).

⁸ *Ponte v. Real*, 471 U.S. 491, 495, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985). See also, *Wolff v. McDonnell*, *supra*, note 3.

⁹ *Ponte v. Real*, *id.*

¹⁰ *Baxter v. Palmigiano*, 425 U.S. 308, 322, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

written incident reports and upon the testimony of Lt. McQuinn and Sgt. Taulbee, neither of whom witnessed the attack. Despite the circuit court's finding to the contrary, neither officer had any personal knowledge of the attack. So, when the officers testified, they did not corroborate Ritchie's allegations but merely repeated them. Furthermore, as the record reveals, Jenkins had only been transferred to BCC ten days prior to the attack, and, during the attack, Ritchie's head may have been covered by a toboggan obscuring her vision. Given these particular facts, the case against Jenkins turned not upon the credibility of McQuinn and Taulbee but upon Ritchie's credibility. This made cross-examination of Ritchie particularly important.

However, the adjustment committee denied Jenkins the opportunity to test Ritchie's credibility explaining that she was on leave due to the injuries she sustained and because she had been intimidated by Jenkins. While it is true that a prison disciplinary committee may curtail an inmate's right to call a witness if calling the witness would be unduly hazardous to the institution's security or interfere with its correctional goals,¹¹ in this case, Ritchie's appearance would not have endangered either the prison system's security or its correctional goals. Like her fellow officers, Ritchie could

¹¹ *Ponte v. Real*, *supra*, note 8, at 495.

have testified by speakerphone. This would have given Jenkins the opportunity to test Ritchie's credibility while sparing Ritchie the undue trauma that a face-to-face encounter with her alleged attacker might have caused. We do not suggest that prison inmates have an unqualified right to call witnesses or to confront their accusers in disciplinary proceedings, but, given the particular facts of the present case, we are convinced that the KSP adjustment committee abused its discretion when it denied Jenkins's request to call Ritchie as a witness. Thus, the circuit court erred when it dismissed Jenkins's petition for declaration of rights.

Jenkins also argues that the committee violated his due process rights when it refused to provide him with Ritchie's medical records and BCC's extraordinary occurrence report. However, we agree with the circuit court that Jenkins was not entitled to Ritchie's medical records pursuant to KRS 61.878(1)(a) and 45 C.F.R. Part 164 since they were not relevant and their disclosure would constitute an unnecessary invasion of her privacy. Nor was Jenkins entitled to BCC's extraordinary occurrence report since the committee did not rely upon it in reaching its decision.

Finally, Jenkins argues that the testimony of Lt. McQuinn and Sgt. Taulbee along with Ritchie's incident report did not constitute "some evidence" to support the committee's

finding of guilt. Since we reverse on other grounds, we find it unnecessary to address this issue.

The order of the Lyon Circuit Court dismissing Jenkins's petition for declaration of rights is affirmed to the extent that it upholds the denial of Jenkins's request for records, but is reversed in part regarding Jenkins's request to call Ritchie as a witness. This case is remanded to Lyon Circuit Court with directions to remand it to the adjustment committee for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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