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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000564-MR

JAMES THOMPSON

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 05-CI-00471

LT. JAMES CONLEY

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * **

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE

PAISLEY, SENIOR JUDGE: This is an appeal from an Order of the Boyle Circuit Court denying appellant's petition for declaration of rights. In his petition, he argues he was denied due process of law in a prison disciplinary proceeding conducted April 12, 2005.

On February 1, 2005, prison authorities at the Marion Adjustment Center, where Thompson was an inmate, conducted a search of his cell and discovered a

¹ Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

typewriter with a firearm and ammunition hidden inside. In addition to the prison disciplinary proceedings initiated against him, Thompson was indicted by the Marion County Grand Jury and charged with possession of a firearm by a convicted felon, promoting contraband in the first degree and with being a first degree persistent felony offender. At the disciplinary hearing and later at his trial, Thompson admitted that the typewriter was in his cell. He claimed that John Gibson, another inmate, was attempting to curry favor with the prison officials and placed the weapon and ammunition in the typewriter, left it in Thompson's cell, and then reported the contraband to prison authorities. Thompson claims Gibson believed this would help him with his own chances at gaining an early parole release. Thompson testified that he had no knowledge the typewriter concealed a firearm and ammunition.

At the disciplinary hearing, Thompson was found in violation and received a penalty of 90 days in segregation confinement, had 180 days of good time credit removed from his record and was assessed \$7,238.54 in restitution for expenses associated with a search of the facility after the discovery of the firearm. At the later trial involving the same incident, he was acquitted by the jury.

Thompson argues that he was denied his right to due process of law at the disciplinary hearing when, without an adequate explanation from corrections authorities, he was not allowed to call any of the 17 inmate witnesses he requested. He also claims a due process violation based on the prison authorities' failure to follow Department of

Corrections regulations concerning confidential informants. We find that claim to be without merit and will only address his claim relating to witnesses.

Appellee points out, and Thompson acknowledges, that the level of due process a prisoner is entitled to in a disciplinary hearing is significantly less than that afforded at a criminal trial. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the United States Supreme Court set out the due process requirements that apply in prison disciplinary hearings. A prisoner has a right, consistent with institutional safety and correctional goals, to call witnesses. Thompson sought to call 17 inmate witnesses and additionally several institution employees. In response, Appellee claims Thompson waived all witnesses except Captain Forrest. Although there is some confusion about this in the record, it appears to us that Thompson only waived the employee witnesses and not the inmate witnesses. Appellee also claims that the adjustment officer did not allow Thompson to call witnesses because their testimony was “unnecessary to the proceeding.” Although they were obviously not needed to prove the prison authority's case, they were certainly important, if not necessary, to allow Thompson to mount a defense to the charges.

Department of Corrections policy requires that if an inmate is denied witnesses, “justification shall be made in writing on Part II of the report.” 501 KAR 6:030 (2004) (Incorporating by reference Ky. Corr. Policies and Procedures 15.6(VI)(D)(2)(f)). Part II of the disciplinary report for Thompson's hearing states that the case was continued while “(W)aiting on witnesses statements from MAC.” The

meaning of this comment is not clear from the record. None of the inmate witnesses Thompson requested testified either in person or by telephone although the regulations specifically authorize that testimony where appropriate. There simply is no justification in the record to explain why Thompson was denied the testimony of at least some of the witnesses.

While asking to call 17 witnesses may be excessive, being allowed to call none without a valid explanation is equally excessive. We recognize that the charges involving the possession of a firearm and ammunition in a correctional facility are extremely serious. We also recognize the limited standard of due process required for prison disciplinary hearings. *See Wolff*, 418 U.S. at 539. Minimal due process demands, however, that Thompson have some opportunity to defend himself against those charges. We hold that the circuit court erred when it denied Thompson's petition.

For the foregoing reasons, this matter is Reversed and Remanded to the Boyle Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Thompson.
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Emily Dennis
Frankfort, Kentucky