

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001204-MR

CHARLES SMITH

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 05-CI-00536

MICHAEL FERGUSON, WARDEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: Charles Smith appeals from a May 15, 2006 Order of the Bell Circuit Court dismissing his Petition for Declaration of Rights. Smith sought relief based on alleged due process violations in the conduct of a prison disciplinary proceeding wherein he was found to to have conspired to commit escape from the Bell County Forestry Camp (BCFC). Finding no error in the trial court's judgment, we affirm.

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

On October 26, 2004, BCFC Captain Joe Martin received information from Boyd County Police Detective Kenny Diamond that Smith and possibly two other BCFC inmates were planning to escape from the institution during inmate visitation. A confidential informant had informed Diamond that two women would “cause some kind of incident during visitation” which would attract the guards' attention, allowing Smith and perhaps “two other unknown inmates” to escape. There was additional information regarding Smith's alleged plans following escape and two Boyd County drug dealers were named and said to be supposedly “putting back thousands of dollars for Smith to live on after the escape.” Based on this information, Captain Martin prepared an incident report early the following day. Lt. Bradley Porter then investigated the incident that same morning. He read Smith the report and his *Miranda* rights and then questioned him regarding the allegations. Smith denied any knowledge of the alleged conspiracy. At the conclusion of the investigation, Lt. Porter charged Smith with “conspiring with another to commit escape.”

A prison disciplinary hearing was held on October 29, 2004 wherein Smith pled not guilty and claimed the credibility of the confidential informant had not been established by Detective Diamond. Relying on the information from Diamond which he deemed “reliable” and believed to be true, the Adjustment Officer, Lt. Neal, found Smith guilty and ordered forfeiture of 180 days of his good time credit and disciplinary segregation for 90 days. On appeal, BCFC Warden Michael Ferguson concurred with the Adjustment Officer's findings and disciplinary action.

In his declaratory judgment action, Smith maintained that BCFC officials had violated his due process rights by relying on information from a confidential informant, failing to follow Kentucky Corrections Policy 9.18 regarding such information and failing to provide Smith with a statement of the charges before the disciplinary hearing. Ferguson responded to the petition and moved to dismiss the action on the grounds that the disciplinary proceeding had been in full compliance with state and federal law. After reviewing the allegations, the trial court concluded that Smith had failed to demonstrate any entitlement to relief and dismissed the action. This appeal followed.

In prison disciplinary proceedings, due process requires that the inmate (1) receive advance notice of the charges; (2) have an opportunity to present a defense by calling witnesses and presenting documentary evidence; and (3) receive a written statement from the factfinder indicating the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The United States Supreme Court has further held that federal due process standards are met when there is “some evidence” supporting the prison's disciplinary decision. *Superintendent, Mass. Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356, 365 (1985). Kentucky has similarly adopted a “some evidence” standard for judicial review of prison disciplinary proceedings under Section 2 of the Kentucky Constitution. *Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky.App. 1997).

Smith focuses first on the role of the trial court in reviewing prison disciplinary matters and maintains that the trial court did not fulfill its review function. Focusing on the “scant” administrative record, Smith claims the record did not allow for meaningful judicial review and that the trial court should have made additional findings of fact or remanded the matter to BCFC's Adjustment Officer for additional proceedings. The record before this Court reflects that in December 2005, when Smith moved to set aside the trial court's order dismissing the case for failure to exhaust administrative remedies, he attached thereto what was represented as “a copy of the administrative proceedings.” The order of dismissal was set aside. Several months later Smith propounded interrogatories to Ferguson seeking a transcript of the disciplinary hearing, information regarding his phone calls while at BCFC and Smith's “record . . . prior to, during or subsequent to his incarceration” at BCFC. Ferguson requested and received a protective order on the grounds that the trial court's role in prison disciplinary cases is simply to review the administrative record and therefore discovery is inappropriate.

Although Smith cites the entry of the protective order in lamenting the state of the record, he fails to note that the items requested in the declaratory judgment action did not even include the full administrative record with any confidential documents not previously supplied to him. Smith also fails to mention that, in seeking the protective order, Ferguson specifically stated that the administrative record in this disciplinary matter was available for the court's review and could be obtained by Smith's counsel through an Open Records request. Ferguson even supplied the name and complete

address of the person from whom Smith's counsel could obtain the administrative record. Apparently Smith never acted on this information because the record before us does not include a confidential memorandum submitted by Captain Martin to Lt. Neal which described the actions Martin took to verify information provided by the confidential informant to Detective Diamond. Whether the trial court had that part of the record is also unclear. Nevertheless, the responsibility for obtaining the administrative record and submitting it to the trial court lies with the inmate seeking relief. Even confidential records which were not made available to the inmate during the proceedings are maintained and available for "purposes of later administrative or judicial review." Kentucky Corrections Policy 9.18 (VI) (A) (8). These confidential documents can be presented to the trial court *in camera*, assuring their continued confidentiality, but the inmate is responsible in the first instance for properly requesting them. In short, it was incumbent upon Smith to seek and submit the entire administrative record in this case and his failure to do so does not constitute error on the part of the trial court.

Smith next contends that Kentucky Corrections Policy 9.18 regarding "Informants" was inappropriately used in this matter because the policy applies only to "employees, inmates, probationers and parolees under the jurisdiction of Corrections." He insists that because Detective Diamond was not in any of the categories listed the policy should not have applied. The record before us does not contain the confidential document prepared by Captain Martin so it is impossible to say whether the confidential informant who actually provided the information regarding the planned escape was a

person in one of the four categories of people to whom Policy 9.18 applies. Thus, Policy 9.18 may well have been applicable to the actual informant. In any event, Smith has failed to articulate how his due process rights could be denied by BCFC following a policy specifically designed to insure proper handling of confidential information in Adjustment Committee proceedings. The policy reflects an effort to balance the accused inmate's right to know the evidence against him with the institution's interest in maintaining order and safety. BCFC's processing of the information from the confidential informant in accordance with Policy 9.18, to the extent it may have done so, did not deny Smith due process.

Smith further maintains that he was furnished insufficient information regarding the charges against him. The trial court found that the incident report by Captain Martin, to which a facsimile of a two-page memorandum from Detective Diamond was attached, was provided to Smith and that this was sufficiently specific to allow Smith to prepare a defense. The trial judge further noted that Smith was not entitled to separate summaries of the confidential informant statement(s). We agree. The record reflects that Smith received the incident report and Detective Diamond's memorandum two days before the hearing. While an inmate is entitled to sufficient information to understand and defend the charges, he is not entitled to specific information that could potentially reveal the identity of a confidential informant. *Gilhaus v. Wilson*, 734 S.W.2d 808, 809-10 (Ky.App.1987). The trial court did not err in finding that Smith had adequate notice of the charges.

The crux of Smith's appeal is the handling and use by BCFC officials of the confidential information which Detective Diamond transmitted to Captain Martin. In *Hensley v. Wilson*, 850 F.2d 269, 276-77 (1988) the United States Court of Appeals for the Sixth Circuit set out the ground rules regarding use of confidential informants' statements in prison disciplinary matters:

In cases in which prisoner misconduct is found upon evidence consisting entirely, or even substantially, of the statement of an investigating officer that he has been told by confidential informants that the misconduct occurred, and that the investigator believes the informant to be reliable, there must be some independent determination by the committee of the informant's reliability. In such cases, unless the committee makes an independent determination about what the facts of the alleged misconduct are by deciding, minimally, that the hearsay information has been supplied by a reliable informant, it is merely recording the findings made by the investigating officer who has made a determination about the informant's reliability, without making any determination for itself about the informant's reliability or even the basis for the investigator's opinion that the informant is reliable. To proceed in that fashion is not fact finding. It is recordkeeping.

In its best light, such a procedure is an unwarranted delegation to the investigator of a key aspect of the committee's adjudicative function; in its worst, it suggests a willful reluctance to probe the possibly flawed foundation of the charges against inmates. Reliance upon an investigating officer's statement that an informant is reliable is not necessarily a fatal procedural flaw, but if the committee does not discover, and assess, the investigating officer's *basis* for concluding that the informant is reliable, it cannot be said that the committee has made reasoned choices about the truth of the information provided to it, as minimum due process requires it to do. While the Due Process Clause does not, in prison discipline cases, require the appearance of the confidential informant before the adjudicating committee, or

that the informant's identity be disclosed to the accused, or even to the disciplinary committee members, it requires at the very least that the committee have some evidentiary basis, even hearsay, upon which to determine for *itself* that the informant's story is probably credible.

The *Hensley* Court rejected the proposition that a prison adjustment committee must make written detailed findings regarding “why or to what extent each witness was believed or disbelieved.” *Id.* at 278. The adjustment committee or officer is required to make a contemporaneous record of the evidence relied upon and, if some evidence is withheld from the inmate in order to protect the identity of a confidential informant, “more detailed evidence, sufficient to meet constitutional standards, must be placed in a nonpublic record.” *Id.* at 283. However, the written statement to the inmate need only contain “some reference to verification” of the reliability of the confidential informant's statement. *Gilhaus*, *supra*, at 810 citing *Goble v. Wilson*, 577 F.Supp. 219, 220 (W.D.Ky.1983).

In this case, the trial court found that Captain Martin prepared a confidential memorandum outlining the steps he took to determine the reliability of the confidential informant, presumably what information he found and ultimately his conclusion that that person was indeed reliable. That memorandum was then supplied to Lt. Neal, the Adjustment Committee officer, who acknowledged “receiving (information) that the information provided was reliable” and who then concluded: “. . . I feel it to be true.” These steps complied with *Hensley's* directive that a prison disciplinary committee base its decision on something more than an investigating officer's conclusory statement

that the confidential informant was reliable. The report also complied with the requirement that there be some reference to the verification of the reliability of the informant. *Gilhaus, supra*. Of course, the details of Captain Martin's efforts and the information he obtained are not before us given Smith's failure to procure the entire administrative record, but we are satisfied that this process comports with *Hensley* and BCFC officials properly used the confidential information in this matter.

Although Smith insists that Correction Policy 9.18 is inapplicable, he alternatively alleges that the Adjustment Officer failed to comply with this policy because the report does not include a finding of fact that the confidential informant was reliable; does not include summaries of the informant's statements; does not indicate what facts were relied upon; and does not state the rationale for the decision if it is in fact based on information from a single confidential informant. See Correction Policy 9.18 (VI) (A) (7). The trial court did not address this issue in its Order and Smith did not proceed pursuant to CR 52.04 to request findings of fact, rendering the issue unavailable to Smith as a basis for reversal or remand of the trial court's judgment. Nevertheless, we note that the report does contain a finding that the informant was reliable and, as for the remaining matters, they need not be addressed in the public record but may be separately maintained in the administrative record as provided in Policy 9.18 (VI) (8) entitled "Information to be kept confidential."

Smith's general allegations that summary judgment was inappropriate and the trial court committed numerous palpable errors are simply efforts to reargue his

specific issues regarding the state of the record and the improper use of information from a confidential informant. All of those specific allegations have been considered and rejected. Moreover, it is obvious that there is “some evidence” supporting the disciplinary action taken and that Smith was accorded the level of due process required in prison disciplinary proceedings. Accordingly, the Bell Circuit Court did not err in dismissing Smith's Petition for Declaratory Relief.

The May 15, 2006 Order of Dismissal is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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