

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002128-MR

LEWIS N. LEE

APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 06-CI-00140

LT. TAMMY MITCHELL

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Lewis Neil Lee, appeals *pro se* from an order of the Lyon County Circuit Court dismissing his petition for a declaration of rights filed pursuant to KRS 410.040, challenging a prison disciplinary action. Having concluded that Appellant has not shown that he possessed a liberty interest subject to due process protection, we affirm.

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

Appellant is presently a state inmate incarcerated at the Western Kentucky Correctional Complex in Lyon County, Kentucky. During an institutional shake down on or about March 9, 2006, Sergeant Tony Harris discovered a Department of Corrections 5-year pin in Appellant's locker. An Adjustment Committee hearing was held on March 16, 2006, and based upon the information presented, Appellant was found guilty of Possession of Staff Uniform Clothing or Uniform Related Items, a Category 6-7 offense of the Kentucky Corrections Policies and Procedures. He was assigned to 45-days disciplinary segregation, which was suspended for 180 days. Appellant then filed an appeal to the Warden, who concluded that some evidence did exist to support a finding of guilt and that procedural due process was provided.

Appellant thereafter filed a petition for a declaration of rights in the Lyon Circuit Court claiming that he was denied a fair disciplinary hearing because he was not afforded the opportunity to speak in his own defense and explain to the Committee that he thought the pin was a Sunday School pin similar to one his grandmother had owned.² The circuit court dismissed Appellant's petition, ruling that he failed to demonstrate the deprivation of any due process rights under the United States Constitution.

On appeal to this Court, Appellant again argues that the prison disciplinary action violated his rights to due process under the Fourteenth Amendment to the United States Constitution and Section 2 of the Kentucky Constitution. While Appellant does not deny being in possession of the pin, he believes that he should have been afforded the

² We would note that on Disciplinary Report Form Part II, the Adjustment Officer commented that Appellant admitted to having a Master's Degree and clearly knew the pin stated "Kentucky Department of Corrections."

opportunity to explain to the Adjustment Committee why he had such. He further asserts that the Lyon Circuit Court failed to grant him a full and fair hearing. We disagree.

KRS 418.040³ has become the vehicle whereby inmates may seek review of Prison Adjustment Committee proceedings. *Polsgrove v. Kentucky Bureau of Corrections*, 559 S.W.2d 736 (Ky. 1977). A petition filed pursuant to KRS 418.040 invokes the circuit court's authority to act as a court of review, seeking “not to form its own judgment, but, with due deference, ensure that the agency's judgment comports with the legal restrictions applicable to it.” *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky.App. 1997) (citing *American Beauty Homes Corporation v. Louisville & Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964)). As this Court has noted, “courts only *review* the decisions of the Adjustment Committee and prison officials are afforded broad discretion.” *Yates v. Fletcher*, 120 S.W.3d 728, 731 (Ky.App. 2003). Further, independent findings of fact are not only unnecessary, but unauthorized. *Smith, supra*. Finally, assessment of penalties for disciplinary infractions is within the discretionary authority of prison officials and court interference is generally discouraged. *Gilhaus v. Wilson*, 734 S.W.2d 808 (Ky.App. 1987).

The United States Supreme Court has recognized that the 14th Amendment Due Process Clause protects an inmate's state-created liberty interest. *See Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104

³ KRS 418.040 reads:

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

L.Ed.2d 506 (1989). In *Wolff v. McDonnell*, 418 U.S. 539, 563-567, 94 S.Ct. 2963, 2978-82, 41 L.Ed.2d 935 (1974), the Court held that although prison disciplinary actions are not subject to the full panoply of procedural safeguards, inmates are entitled to the minimum requirements of procedural due process including, (1) advance written notice of the disciplinary charges; (2) a written statement by the fact-finders of the evidence relied upon and the reasons for the disciplinary action; (3) the opportunity to call witnesses and present documentary evidence consistent with institutional safety and correctional goals; and (4) impartial fact finders. 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. *Id.*

Further, the requirements of due process are satisfied if there is merely “some evidence” in the record to support the disciplinary decision. *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985). See also *Williams v. Bass*, 63 F.3d 483, 486 (6th Cir. 1995). In *Smith v. O'Dea*, *supra*, at 358, Kentucky adopted the federal “some evidence” standard, holding that it provides courts with a “sufficient check upon adjustment committee fact-finding” and does not compromise Section 2 of our Constitution.

We conclude that Appellant's claim of procedural due process violations associated with the disciplinary action was properly dismissed because he failed to show that a constitutionally protected right was impacted. In *Marksberry v. Chandler*, 126 S.W.3d 747 (Ky.App. 2004), this Court explained the factors necessary to raise a due

process cause of action associated with prison disciplinary actions. Under the United States Supreme Court decision in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), in order to establish a "liberty" interest protected by the due process clause, an inmate must show both state statutes or prison regulations restricting the discretion of prison officials, and sanctions that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See Marksberry, supra* at 750 (*quoting Sandin*, 515 U.S. at 484, 115 S.Ct. at 2300). Factors relevant to determining whether a particular disciplinary penalty constitutes atypical and significant hardship include: "(1) the effect of the segregation on the length of prison confinement under the original sentence; (2) the extent to which the conditions of the segregation differ from other routine prison conditions; and (3) the duration of the segregation imposed." *Id. (citing Sandin*, 515 U.S. at 486-87, 115 S.Ct. at 2301-02). In *Marksberry*, we held that 15 days disciplinary segregation with no loss of good time credit did not constitute atypical and significant hardship and cited to several cases finding periods significantly longer than 15 days, including a 30 day period in *Sandin*, did not rise to the level of atypical and significant hardship. *Marksberry, supra*, at 750-51 and footnote 16.

The record herein establishes that Appellant was afforded all applicable due process requirements. The disciplinary report shows that the Appellant waived his 24-hour notice and his right to call witnesses. Moreover, there was more than "some evidence" to support the Adjustment Committee's finding that Appellant committed the offense charged. After the finding of guilt was entered, a penalty of 45 days disciplinary

segregation was imposed upon Appellant, which was suspended for 180 days. The imposition of the penalty did not result in the loss of any good-time credit, or otherwise affect the length of Appellant's confinement under the original sentence. Therefore, we find nothing to support Appellant's claim that he was deprived the due process required by the Fourteenth Amendment to the United States Constitution and Section 2 of the Kentucky Constitution. Thus, the Lyon Circuit Court correctly dismissed Appellant's petition.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lewis Neil Lee, *Pro Se*
LaGrange, Kentucky

BRIEF FOR APPELLEE:

James D. Godsey
Justice & Public Safety Cabinet
Frankfort, Kentucky