

RENDERED: NOVEMBER 9, 2007; 2:00 P.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002152-MR

WILLIAM DALE DUNCAN

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 06-CI-00080

KENTUCKY DEPARTMENT OF CORRECTIONS

APPELLEE

### OPINION AFFIRMING

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BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,<sup>1</sup> SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: This is an appeal from a prison disciplinary action. We affirm the order of the trial court in its entirety.

Duncan was administered a drug test in prison. The results of the urinalysis revealed the presence of cocaine in Duncan's system. Following a hearing, the Kentucky State Penitentiary (KSP) adjustment committee found that Duncan had violated prison disciplinary rules by engaging in the “unauthorized use of drugs after testing positive a

<sup>1</sup> Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

third time or more, after July 13, 1998.” Duncan received a ninety day assignment to disciplinary segregation and was required to pay \$20.00 in restitution for the cost of the drug test. Duncan brought a declaratory judgment action in the Lyon Circuit claiming that his state and federal due process rights were violated because of an alleged break in the chain of custody of his urine sample. The trial court found no due process violation and found that it lacked jurisdiction to hear Duncan's open records complaint. This appeal followed.

Although inmate petitions for declaratory judgment are technically original actions, the trial court acts in its role as a reviewing court of the administrative decision. *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky.App. 1997). Due process requires: (1) that “some evidence” support the disciplinary finding; (2) that the prisoner have notice of the charges and a reasonable opportunity to be heard; and (3) a brief written explanation of the adjustment officer's decision. *Id.* at 357. The trial court does not review the evidence of the prisoner's infraction *de novo*, rather it reviews the record on appeal to ascertain whether “some evidence” exists to support the findings of the committee. *Id.* at 358.

The committee could not find Duncan guilty of unauthorized drug use with a flawed chain of custody. A chain of custody is not complete unless it at least indicates “who received the sample, that the specimen seal was then intact, and who had handled the specimen through the time it was tested.” *Byerly v. Ashley*, 825 S.W.2d 286, 288 (Ky.App. 1991). In this case the evidence demonstrates that the officer obtained the sample from Duncan and placed it in a plastic pouch. The officer inadvertently neglected

to sign and neglected to obtain Duncan's signature on a chain of custody form. The officer then opened the pouch containing the sealed specimen, signed the form, and then went to Duncan's cell and obtained his signature. The officer then resealed the pouch containing the specimen. Although the pouch was opened to obtain the missing signatures, the seal on the specimen remained intact from the time of collection until testing. We agree with the trial court that the decision of the committee was supported by “some evidence.”

Duncan next argues that the trial court erred by finding it lacked jurisdiction to review the denial of his request for audio tapes of the disciplinary hearing pursuant to the Kentucky Open Records Act.

KRS 197.025(3) states:

KRS 61.880 to the contrary notwithstanding, all persons confined in a penal facility shall challenge any denial of an open record with the Attorney General by mailing or otherwise sending the appropriate documents to the Attorney General within twenty (20) days of the denial pursuant to the procedures set out in KRS 61.880(2) **before an appeal can be filed in a Circuit Court.**

(emphasis added).

The KSP denied Duncan's open records request on January 12, 2006. No appeal was taken to the Attorney General as of the date Duncan filed the petition for declaratory judgment in the trial court. Therefore, the trial court properly declined to exercise jurisdiction.

Finally, Duncan argues that the trial judge should have disqualified himself and that he was entitled to an independent evaluation by the Chief Justice pursuant to KRS 26A.020(1). Duncan filed a motion for judicial disqualification with an attached affidavit pursuant to both KRS 26A.015 and KRS 26A.020. He is entitled to pursue both avenues of relief. *Nichols v. Commonwealth*, 839 S.W.2d 263 (Ky. 1992). The trial court itself denied the motion for disqualification under KRS 26A.015 and it does not appear that the circuit clerk forwarded the motion to the Chief Justice of the Supreme Court. Duncan argues that the failure to forward the motion to the Chief Justice was error. KRS 26A.020(1) states in part “[i]f either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide a change of venue, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge.”

Generally in a motion for judicial disqualification, the truth of the facts contained in the supporting affidavit must be assumed. *Neace v. Commonwealth*, 243 Ky. 149, 47 S.W.2d 995, 996 (1932). However, mere conclusionary allegations of prejudice are insufficient because the affidavit must state facts that necessarily demonstrate prejudice by the judge against the affiant. *Foster v. Commonwealth*, 348 S.W.2d 759 (Ky. 1961); *Chreste v. Commonwealth*, 178 Ky. 311, 198 S.W. 929 (1917). The affidavit at issue in this case contained nothing more than conclusionary allegations and opinion. Therefore, there were no “facts” for the circuit clerk to certify. The trial

court properly denied the motion for disqualification under KRS 26A.015 and the motion pursuant to KRS 26A.020 was not properly supported by factual allegations.

Accordingly, the order of the Lyon Circuit Court is affirmed.

ALL CONCUR.

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