

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2007-CA-000045-MR

ROBERT GARRETT

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 06-CI-00472

PATTI WEBB, WARDEN;  
AND DAVID FRAILLEY

APELLEES

OPINION  
AFFIRMING IN PART, AND REVERSING  
AND REMANDING IN PART

\*\* \*\* \* \* \* \* \*

BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

VANMETER, JUDGE: Robert Garrett appeals *pro se* from the Muhlenberg Circuit Court's order dismissing his petition seeking a declaration of rights relating to a prison disciplinary action. For the reasons stated hereafter, we affirm in part, and reverse and remand in part.

Garrett was imprisoned at the Green River Correctional Complex on July 2, 2006, when prison officials entered his cell and searched Garrett and the cell.

Subsequently, two disciplinary reports were filed, the first of which stated:

On July 2, 2006 at approximately 9:26 p.m., I officer Lorenza Abrams stripped searched Inmate Robert Garrett #164574 in Cell 8-AU-10. While searching Inmate Garrett [*sic*] Reebok Tennis Shoes, I found 2-hand rolled cigarettes inside the insoles of his left shoe. The hand rolled cigarettes contained green leafy substance with an odor of marijuana. I showed the items to Inmate Garrett, Officer Michael Guy and Sgt. Michael Hinton. I then secured the items in my right shirt pocket. At approximately 11:41 p.m. I read the Miranda Warning to Inmate Garrett in the presence of Sgt. Hinton and Officer Guy. Inmate Garrett understood his right [*sic*] and refused to talk to us. At approx. 11:42 p.m., I conducted a test of the green leafy substance in one of the hand rolled cigarette [*sic*] using the Duquenois-Levine Reagent E test kit in the presence of Sgt. Hinton, Ofc. Guy and Inmate Garrett. The substance tested positive for Marijuana. At approximately 11:44 p.m., Sgt. Hinton took digital and Paloroid [*sic*] photo [*sic*] of the test kit. At approx. 11:48 p.m., I conducted a test of the second hand rolled cigarette. The substance tested positive for Marijuana. Sgt. Hinton took digital and Paloroid [*sic*] pictures of the test kit. – continue.[<sup>1</sup>]

The second report stated:

On July 2, 2006 at approximately 10:30 p.m., Officer Michael Guy and I, Officer Lorenza Abrams was [*sic*] searching 8-AU-10. This cell is assigned to Inmates Robert Garrett . . . and . . . . While searching the top section of the Wall Locker, I asked both inmates who's [*sic*] loaf of bread. . . . Neither of the inmates claimed the possession of the bread. While searching the loaf of bread, still in it's [*sic*] original package, I saw a sealed plastic bag containing green leafy substance. I radioed Sgt. Hinton to report to the cell. When Sgt. Hinton arrived, I showed Sgt. Hinton what I had found. I then removed the plastic bag containing the green leafy substance from the bread and showed the content to both inmates. I then secured the green leafy substance in my left shirt pocket. At approximately 11:31 p.m., Officer Guy and I completed the cell search. –continue – [<sup>2</sup>]

---

<sup>1</sup> The remainder of the report is not included in the record on appeal.

<sup>2</sup> The remainder of the report is not included in the record on appeal.

After field tests indicated that the green leafy substances were marijuana, Garrett was charged with two counts of possessing or promoting dangerous contraband.

On the morning of July 24, 2006, two hearings were conducted and Garrett was found guilty of both charges. He received 60 days' disciplinary segregation and the forfeiture of 90 days' good time for each charge, plus 120 days' restricted visitation for the second charge. The warden concurred on appeal, and both charges were referred to the Commonwealth's Attorney. According to Garrett's petition for declaratory judgment, he eventually entered a circuit court<sup>3</sup> guilty plea to a single charge of possession of dangerous contraband.

Garrett then filed the underlying *pro se* action seeking a declaratory judgment. The circuit court granted appellees' motion to dismiss, finding that the disciplinary action satisfied due process requirements. The court opined that "hiding dangerous contraband in a shoe, and also hiding dangerous contraband in a loaf of bread represents two distinct offenses." Further, the court rejected Garrett's remaining claims based on his admissions that the contraband was his and that he had pled guilty to the circuit court charge of possessing dangerous contraband. This appeal followed.

Garrett first asserts that the trial court erred by failing to find that he was denied due process in the prison disciplinary proceedings when he was found guilty of two separate counts of possessing dangerous contraband. We agree.

---

<sup>3</sup> The action was identified by Garrett as "*Garrett v. Webb*, docket number 06-CI-00358."

The test used to determine if more than one offense has occurred as a result of a single course of conduct is whether each offense “requires proof of a fact which the other does not.” *Mack v. Commonwealth*, 136 S.W.3d 434, 438 (Ky. 2004) (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)). Here, Garrett contends and the Commonwealth does not specifically dispute that the two charges of possession arose out of a continuous search of Garrett’s person and cell during an approximately two-hour period on the evening of July 2, 2006, and that neither Garrett nor the officers left the cell during the search. Indeed, the overlapping of times in the written reports strongly supports Garrett’s assertions. Further, although contraband was located several feet apart in two different places within the confines of the cell, it was undisputed that all of the seized substances involved a single type of contraband, described as a green leafy substance later identified as marijuana.

Regardless of whether a portion of the contraband was in Garrett’s shoe and another portion was in a loaf of bread, and regardless of whether the two caches were discovered an hour apart, the simple fact remains that while in the presence of jail officials during an ongoing search on the evening of July 2, Garrett was found to be in possession of a single type of contraband. Given the fact that throughout the entire search Garrett remained in the cell under close supervision, with no opportunity to acquire additional contraband, it must be concluded that he was in possession of all of the contraband when the search began. As neither of the possession charges required proof of a fact which the other did not, *Mack*, 136 S.W.3d at 438, the trial court erred by failing to find that only one disciplinary offense occurred. It follows that Garrett was improperly

found guilty of, and penalized for, two separate offenses of possession of dangerous contraband.

Garrett also raises several issues relating to whether the field tests of the contraband were properly conducted, whether those tests provided sufficient scientific proof of the nature of the contraband, and whether the trial court exceeded the record in finding that Garrett pled guilty in circuit court to possessing the contraband. However, as Garrett admitted in his pleadings below that he had pled guilty to possessing the contraband, there is no merit to his claim that the trial court went outside of the record in referring to that guilty plea when reaching its decision. Moreover, as Garrett necessarily admitted to the offense and waived any defenses when he pled guilty, the claims raised herein regarding the propriety of the field tests are rendered moot.

The circuit court's order is affirmed in part, and reversed and remanded in part for entry of an order directing appellees to vacate and set aside one of the two findings of guilt entered by the adjustment officer on July 24, 2006, as well as the penalties associated with such finding.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Garrett, *Pro se*  
Central City, Kentucky

BRIEF FOR APPELLEES:

Wesley W. Duke  
Frankfort, Kentucky