

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000510-MR

ROBERT GARRETT

APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT  
HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 06-CI-00358

PATTY WEBB, WARDEN and  
DAVID FRAILLEY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL, THOMPSON AND VANMETER, JUDGES.

NICKELL, JUDGE: Robert Garrett (“Garrett”), *pro se*, has appealed from the Muhlenberg Circuit Court's February 6, 2007, order dismissing his petition for a declaratory judgment arising from two prison disciplinary actions taken by Warden Patty Webb (“Webb”) of the Green River Correction Complex (“GRCC”) and David Frailley (“Frailley”), a member of Webb's staff. For the following reasons, we affirm.

Garrett was adjudicated guilty of one count each of unauthorized use of drugs or intoxicants and possession or promotion of dangerous contraband. As a result of these violations, Garrett was penalized with a loss of good time credit against his sentence<sup>1</sup> and was placed in disciplinary segregation. Garrett sought judicial review in the Muhlenberg Circuit Court under the Declaratory Judgment Act.<sup>2</sup> Petitions under that Act have become the means by which prisoners may seek review of their disputes with the Department of Corrections when Habeas Corpus proceedings are inappropriate. *See Graham v. O'Dea*, 876 S.W.2d 621 (Ky.App. 1994). While these actions are technically considered original actions, they share many of the same attributes as appeals, as the circuit court does not form its own opinion but rather reviews the judgment of prison officials to determine whether it comports with the appropriate legal restrictions. *See American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). Judicial review is limited to the administrative record produced during the disciplinary proceeding, and not a new record produced just for the circuit court. *Smith v. O'Dea*, 939 S.W.2d 353, 356 (Ky.App. 1997) (quoting *Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 743, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985) (quoting *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973))). The circuit court is required to make findings of fact only if the administrative

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<sup>1</sup> Kentucky Revised Statutes (KRS) 197.045.

<sup>2</sup> KRS 418.040 – 418.090.

record is insufficient to permit meaningful review. *Id.*

Garrett alleged that prison officials erred in imposing upon him punitive conditions of confinement without adequate proof. Specifically, he argued he was convicted of unauthorized use of drugs or intoxicants solely on the basis of an allegedly improperly administered breathalyzer test, and was convicted of possession of dangerous contraband due solely to allegedly unreliable field test for marijuana. After reviewing the record before it, the circuit court rejected Garrett's arguments and dismissed the case, specifically finding the conviction was supported by sufficient evidence. The court further found Garrett had failed to demonstrate any violation of his due process rights under the United States or Kentucky Constitutions. This appeal followed.

Before this Court, Garrett argues the trial court erred in dismissing his action as the evidence presented against him at the administrative level was unreliable, inadmissible and/or insufficient to support a conviction, thus making the decision to punish him arbitrary and unconstitutional. In support of his argument, Garrett contends the results should not have been considered in his disciplinary action because (1) the proper foundation was not laid for the introduction of the breathalyzer test results; (2) the reliability of the test was not established on the record; and (3) the test used to identify the substance as marijuana in the field is unreliable for positive identification without additional scientific testing. We disagree with all three of Garrett's contentions.

A prison disciplinary action is a civil matter carrying a lower burden of proof than that required in a criminal proceeding. *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). So long as “some evidence” supports the prison disciplinary committee's findings of fact, such findings will not be disturbed on appeal. *Smith v. O'Dea*, *supra*, 939 S.W.2d at 357-8. See also *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774, 86 L.Ed.2d 356 (1985). The relevant question is whether there is any evidence in the record which supports the conclusion reached at the administrative level. *Id.*

Garrett cites us to the recent Supreme Court of Kentucky case of *Webb v. Sharp*, 223 S.W.3d 113 (Ky. 2007) for the proposition that the failure of prison authorities to establish the reliability of field testing precludes the use of such tests during disciplinary proceedings. We agree that “fundamental fairness dictates that the evidence relied upon to punish [a prisoner] at least be reliable.” *Id.* at 119 (quoting *Byerly v. Ashley*, 825 S.W.2d 286, 288 (Ky.App. 1991)). However, Garrett fails to note that additional evidence of his guilt was set forth during his disciplinary hearing.

The hearing officer, relying upon testimony from Captain Leggett Morris,<sup>3</sup> specifically found that the breathalyzer test had been performed by an individual trained

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<sup>3</sup> Although unclear from the record, Captain Morris appears to be the corrections officer at GRCC who filed the disciplinary report form charging Garrett with unauthorized use of drugs or intoxicants.

to perform such testing. Captain Morris also testified he had received information that Garrett smelled of alcoholic beverage prior to the administration of the breathalyzer test. Although Garrett testified a different individual actually administered the test, we will not substitute our judgment for that of the hearing officer in regard to assessing the credibility of witnesses. The testimony presented by Captain Morris clearly qualifies as “some evidence” of guilt sufficient to support Garrett's conviction, and the hearing officer acted within his discretion in imposing the administrative punishment.

Further, Garrett's reliance on *Webb v. Sharp, supra*, is misplaced as it pertains to his conviction of possession of dangerous contraband. Garrett fails to note that following the positive field test result, additional testing of the marijuana was completed by the Kentucky State Police which confirmed the substance was marijuana. Therefore, even were the hearing officer to disregard the field test result, the additional confirmation testing was more than sufficient to satisfy the low burden of proof in this matter. In addition, the hearing officer took into account the testimony of the officers who searched Garrett's person as well as Garrett's testimony regarding his innocence. Garrett has simply failed to appreciate the weight of the evidence against him and has failed to show how the hearing officer or circuit court erred to his prejudice.

Finally, as the circuit court correctly noted, pursuant to *Wolff, supra*, and *Superintendent v. Hill, supra*, Garrett's due process rights were adequately protected as he received: advance written notice of the charges lodged against him; an opportunity to

present witnesses and documentary evidence in his own behalf; a written summary of the evidence relied upon by the fact-finder; and the rationale for the disciplinary actions being imposed. As such, we are unable to ascertain any procedural due process violations from the record before us.

For the foregoing reasons, we find no error and the order of the Muhlenberg Circuit Court dismissing Garrett's petition for declaration of rights is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert Garrett, *pro se*  
Central City, Kentucky

BRIEF FOR APPELLEES:

Emily Dennis  
Frankfort, Kentucky