

FILED
Jul 28, 2020
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of:)	No. 37168-9-III
)	
)	
ANTHONY JAMES BIRDEN,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	
Petitioner.)	

Anthony James Birden seeks relief from claimed unlawful personal restraint in the form of 30 days lost good time credit and other sanctions imposed after a Department of Corrections (DOC) hearing officer found Mr. Birden guilty of a serious prison infraction pursuant to WAC 137-25-030 (607) (Urinalysis).

While serving a sentence for felony violation of a no contact order, Mr. Birden was required to provide a urine sample for drug testing prior to transport. He did not provide a urine sample within the time allotted by DOC. The Department infringed him. At his disciplinary hearing, Mr. Birden claimed he did not willfully refuse to provide a sample because he had just used the restroom, despite having an hour within which to provide a sample. The Department found him guilty of the infraction. On appeal, Mr. Birden claimed his inability to urinate was due to his age

and underlying medical conditions. The Department affirmed. Notably, at the time of the incident, DOC employees noted they checked Mr. Birden's medical file to confirm he had nothing on record requiring him to have extra time to provide a sample or indicating that he would have difficulty providing a sample. Before this court, Mr. Birden now claims he was unable to urinate due to a rare side effect of the prescription drug Atorvastatin, but provides no evidence that he was taking this medication or that he raised this defense below.

When seeking relief from personal restraint arising from a prison disciplinary hearing, prisoners must show the hearing "was so arbitrary and capricious as to deny them a fundamentally fair proceeding so as to work to the petitioner's prejudice." *In re Pers. Restraint of Granthum*, 168 Wn.2d 204, 215, 227 P.3d 285 (2010); *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 293-94, 678 P.2d 323 (1984). The proceeding is only arbitrary and capricious if it fails to afford the petitioner minimum due process. *Reismiller*, 101 Wn.2d at 294. When a petitioner challenges the sufficiency of evidence supporting a prison infraction, this court reviews the record to determine whether there is "at least some evidence to affirm the discipline." *Granthum*, 168 Wn.2d at 215. A petition will be dismissed as frivolous if it "fails to present an arguable basis for relief in law or in fact, given the constraints of the personal restraint petition vehicle." *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Here, DOC afforded Mr. Birden an opportunity to call witnesses and present evidence. No evidence shows Mr. Birden himself suffered the claimed side effect of infrequent urination. Further, no evidence shows Mr. Birden was even taking Atorvastatin at the time of the drug test or that he raised this defense below. Because DOC affirmed Mr. Birden's infraction based on the incident report, the infraction report, and inmate testimony, the record reflects ample evidence

supporting DOC's decision to affirm the DOC hearing officer's finding of guilty. Accordingly, the proceeding was not arbitrary or capricious, and Mr. Birden's right to due process was not violated.

Mr. Birden makes no showing he is under unlawful restraint. Because his petition presents no arguable basis for relief as required by *Khan*, his petition is dismissed as frivolous. RAP 16.11(b).


KEVIN M. KORSMO
ACTING CHIEF JUDGE