

FILED
Oct 13, 2021
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint)	No. 38052-1-III
of:)	
)	
JONOTHAN ANDREW DELAY,)	ORDER DISMISSING PERSONAL
)	RESTRAINT PETITION
)	
Petitioner.)	

Jonathan Delay seeks relief from claimed unlawful personal restraint resulting from the imposition of various sanctions following a Department of Corrections (DOC) hearing officer finding him guilty of a serious prison infraction under WAC 137-25-030 (603) (introducing or transferring any unauthorized drug or drug paraphernalia). For the following reasons we reject his challenge and dismiss the petition.

The facts giving rise to the 603 infraction are set forth in the initial serious infraction report written by Corrections Officer Joshua Greene and the hearing officer's Hearing Summary Report. DOC Response at 2-5; Nelson Decl., Attach. A *Prison Disciplinary Hearing Packet*. The report states that Airway Heights Correctional Center

(AHCC) Intelligence and Investigations Unit received confidential information from multiple sources that the petitioner, Mr. Delay, along with two others (a fellow inmate—Andrew Clifton, and Petitioner’s father, Ronald Hunter) were conspiring to introduce contraband (narcotics) into the secure AHCC facility by placing the narcotics (Suboxone strips) at a location where inmates out on medical transport would be able to retrieve the contraband and then bring it back to the secure AHCC facility. *Id.* at 1. Much of the incriminating information came from Mr. Delay himself, during recorded telephone calls between Mr. Delay and his father, Mr. Hunter. *Id.* at 1.

During the phone calls, Mr. Delay instructed Mr. Hunter to hide the contraband in a second floor restroom at a specified Multicare Rockwood Medical Facility by taping it behind a urinal. *Id.* at 1. Mr. Delay then explained that Mr. Clifton (fellow inmate) would claim a medical emergency such that it would be necessary for him to be transported to the designated medical facility. *Id.* at 1. While at the medical facility, Mr. Clifton would indicate he needed to use the bathroom. Once in the bathroom, Mr. Clifton could retrieve the contraband, hide it on his person, and bring it back to the AHCC for sale and distribution. *Id.* at 1.

On August 4, 2020, based on the above information, AHCC investigators initiated surveillance of the medical facility. *Id.* at 1. During surveillance, the investigators observed Mr. Hunter enter the facility and move directly to the restroom discussed during

the phone calls. *Id* at 1. After Mr. Hunter exited the restroom and the building, investigators entered the restroom where they found a package taped behind the urinal (the exact location and place discussed during the recorded phone calls). *Id* at 1.

Investigators removed the package and replaced it with a “dummy package with stain detection powder.” *Id* at 1. Later that day, consistent with the plan discussed in the recorded phone calls, Mr. Clifton claimed a medical emergency and was transported to the medical facility. *Id.* at 1. Mr. Clifton requested to use the bathroom and while in the bathroom he entered both stalls. *Id* at 1. Mr. Clifton was then escorted to the transport vehicle. When Investigator Green opened the transport vehicle, he observed Mr. Clifton with purple die on both hands and the dummy package concealed in his boxer shorts. *Id* at 1

The original package that the investigators removed from the back of the urinal was collected as evidence and tested. *Id* at 1. Testing revealed that the removed package contained 76 Suboxone Strips (a Schedule III controlled substance). *Id* at 1.

Based on physical evidence recovered, the surveillance conducted, and confidential information received, DOC issued an infraction against Mr. Delay for a WAC 603 conspiracy violation—conspiring to introduce or transfer any unauthorized drug or drug paraphernalia. *Id* at 5.

On August 26, 2020, Mr. Delay was notified of the infraction and disciplinary

hearing. *Id.* at 5. Mr. Delay waived his right to 24-hour notice before the hearing. *Id.* at 5. The disciplinary hearing was held on August 27, 2020. *Id.* at 4. Mr. Delay did not request witness statements but did speak in his defense. *Id.* at 2, 5. Mr. Delay argued (1) investigator reports were not produced at the hearing, (2) transcripts of the recorded phone calls were not produced, (3) there was no evidence identifying Mr. Hunter as the person leaving the Suboxone in the bathroom, (4) investigators did not search the bathroom before the incident, and (5) there was no evidence that Mr. Hunter was the only person who had entered bathroom. *Id.* at 2.

The hearing officer reviewed confidential information outside Mr. Delay's presence. *Id.* at 8-9. After, the hearing officer completed a Confidential Information Review Checklist. *Id.* at 8-9, *Disciplinary Hearings Review Confidential Information Checklist*. The hearing officer determined that safety and security concerns justified the nondisclosure of the confidential information. *Id.* at 8-9. The hearing officer also found the confidential information was reliable and credible.

Based on the evidence presented--written staff testimony, detailed incident reports, recorded telephone conversations, reliable confidential information, investigator surveillance, photographs, and testimony that only Mr. Hunter accessed the bathroom during the incident--the hearing officer found Mr. Delay guilty of violating WAC 603 by conspiring with another offender to transfer an unauthorized drug into ACHH. The

No. 38052-1-III

PRP of Delay

hearing officer imposed several sanctions including loss of good conduct time and suspension of visitation. The violation decision was affirmed on appeal by DOC Superintendent Kay Heinrich. DOC Resp. 5-6, Nelson Decl., Attach. B *Prison Appeal Decision Packet*. This petition follows.

“A prison is ‘a tightly controlled environment populated by persons who have chosen to violate the criminal law’ and “[o]ffenders facing discipline are not entitled to the full panoply of constitutional procedures given criminal defendants at trial.” *Matter of Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984). Accordingly, review of prison disciplinary proceedings is limited to a determination of whether the action taken was so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding. *Reismiller*, 101 Wn.2d at 293-94.

A disciplinary proceeding is *not* arbitrary and capricious if (a) the decision is supported by at least some evidence, and (b) the petitioner is afforded the minimum due process protections applicable in prison disciplinary hearings. *In re Pers. Restraint Petition of Krier*, 108 Wn. App. 31, 38, 29 P.3d 720 (2001). Mr. Delay’s petition will be dismissed as frivolous if he “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).

a. Sufficiency of the evidence

Mr. Delay first argues that insufficient evidence supports finding that he conspired to introduce or transfer any unauthorized drug. We disagree. As noted above, a decision is not arbitrary or capricious if it is supported by at least some evidence. “Some evidence” requires a reasonable connection between the evidence and the inmate to support the action taken by the prison disciplinary board. *In re Pers. Restraint Petition of Anderson*, 112 Wn.2d 546, 548-49, 772 P.2d 510 (1989).

Ascertaining whether “some evidence” exists does *not* require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. *Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); *In re Personal Restraint of Johnston*, 109 Wn.2d 493, 497, 745 P.2d 864 (1987). Instead, this court determines whether any evidence in the record could support the conclusion reached by the hearing officer. *Hill*, 472 U.S. at 445-56; *In re Personal Restraint of Johnston*, 109 Wn.2d 493, 497 (1987). The evidence must connect the petitioner to the infraction. *Reismiller*, 101 Wn.2d at 297.

In this case, the hearing officer found Mr. Delay guilty of conspiracy to introduce or transfer an unauthorized drug or drug paraphernalia pursuant to WAC 137-25-030(603). This regulation declares in pertinent part:

Serious violations.

(1) Any of the following types of behavior may constitute a serious violation. Attempting or *conspiring to commit one of*

the following violations, or aiding and abetting another to commit one of the following violations, shall be considered the same as committing the violation. . . .

Category A

. . . .

603 – Introducing or transferring any unauthorized drug or drug paraphernalia[.]

WAC 137-25-030(603) (emphasis added, boldface in original).

Although a criminal trial applies a different standard of proof than applicable in the review of a prison disciplinary hearing, the DOC must nevertheless satisfy the elements necessary to demonstrate criminal conspiracy. In other words, the State must show that the conspirators agreed to undertake a criminal scheme and they took a substantial step in furtherance of the conspiracy. *State v. Bobic*, 140 Wn.2d 250, 265, 996 P.2d 610 (2000).

In this case, contrary to Mr. Delay's assertions, the evidence clearly demonstrated that Mr. Delay, along with his father and fellow inmate Clifton, agreed to undertake a criminal scheme to bring contraband into the secure corrections facility for sale and distribution. The evidence included initial confidential information alerting officials to the criminal scheme, recorded phone conversations between Mr. Delay and his father specifically detailing the plans necessary to carry out the criminal scheme, eyewitness

observation by investigators observing Mr. Delay's father and Mr. Clifton behaving in a manner consistent with the plans of the criminal scheme, and corroborating physical evidence including the package containing Suboxone that was removed from behind the urinal and the dye and dummy package found on Mr. Clifton's body after using the same bathroom where the drug package was previously removed.

Therefore, "some evidence" supports the hearing examiner's finding of guilt.

b. Minimum due process

Mr. Delay also argues that he was denied due process in the DOC's infraction proceeding because he was not provided a copy of the confidential information. Contrary to Mr. Delay's assertions, due process in a prison disciplinary proceeding does not require that he be given a copy of all confidential information. Rather, minimum due process in such proceedings means the prisoner must (1) receive notice of the alleged violation; (2) be provided an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals; and (3) receive a written statement of the evidence relied upon and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-66, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *see also In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999).

In this case, the record provided demonstrates that Mr. Delay received all the due process necessary in such proceedings. Mr. Delay received notice of the alleged violation (as evidenced by his signature on the Disciplinary Hearing Notice/Appearence Waiver dated 8/26/2020, *see DOC Response*; Nelson Decl., Attach. “A” at pg. 5 Prison Disciplinary Hearing Packet); he was provided an opportunity to present documentary evidence and call witnesses (*see id.*); and he received a written statement of the evidence relied upon and the reasons for the disciplinary action (*see id.*). Thus, Mr. Delay cannot demonstrate a violation of his due process rights.

Additionally, contrary to Mr. Delay’s assertions, the hearing examiner did not improperly use or rely on confidential information. Indeed, when a prison disciplinary proceeding is premised on confidential information, due process focuses on the hearing examiner’s independent review of the information, not the inmate’s access to the information.

According to the applicable regulations, the hearing officer must conduct an independent review and determination of the reliability and credibility of the information. WAC 137–28–300(7)(a). The hearing officer must also determine whether safety concerns justify the nondisclosure of the sources of confidential information. WAC 137–28–300(7). If so, DOC may introduce the confidential information through written statements. DOC must provide the offender with a summary of the confidential

information, which may be contained within the infraction report. WAC 137–28–290(2)(f).

In this case, the hearing officer met all WAC 137–28–300 requirements when she completed the written confidential information review form. The form demonstrates the hearing officer independently assessed the reliability and credibility of the confidential information. *See DOC Response*; Nelson Decl., Attach. “A” at pg. 8-9, Form C-2, Disciplinary Hearings Review of Confidential Information Checklist.

Reviewing the form, it is clear that the hearing officer found the information reliable and credible because the confidential information was provided by a source with first-hand information, it was both internally consistent and consistent with other known facts, and it was corroborated by other objective evidence, specifically physical evidence such as photographs of the Suboxone and medical facility bathroom. The hearing officer also found that “Safety concerns justify nondisclosure of the source(s) of confidential information.” *Id.*

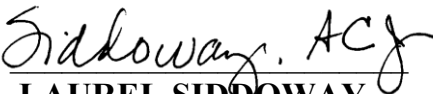
Additionally, Mr. Delay was properly informed as to the nature and content of the confidential information as a summary of the confidential information was included in the Initial Serious Infraction Report, the Serious Infraction Report, and in the Disciplinary Hearing Minutes and Findings. Therefore, Mr. Delay’s claim that the hearing officer improperly used confidential information as the basis for the disciplinary

No. 38052-1-III

PRP of Delay

action fails because the officer followed all required procedures.

Accordingly, Mr. Delay makes no showing that he is under unlawful restraint as required by RAP 16.4(a)-(c). Therefore, his petition is dismissed as frivolous pursuant to RAP 16.11(b). The court also denies Mr. Delay's request for appointed counsel. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).¹


LAUREL SIDDOWAY
ACTING CHIEF JUDGE

¹ Mr. Delay's motion for accelerated review is denied as the matter was ready to be set prior to the motion and therefore, there was no reason for the Court to shorten time. Mr. Delay's motion to supplement his Reply is granted.