IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of ANDREW A. FLEMING, Petitioner.	No. 48280-1-II ORDER DISMISSING PETITION

Andrew A. Fleming filed this personal restraint petition challenging the sanctions imposed following a prison disciplinary hearing. Because "some evidence" supports the disciplinary action, we dismiss the petition.

A corrections officer located Fleming inside another inmate's cell after smelling a burning smell coming from the area. After a search of the cell, synthetic marijuana ("spice") was located on a top shelf. Under the cell tag rule, "If contraband . . . is discovered in an area under control of the inmate (such as within the confines or contents of a cell), the contraband . . . shall be constructively attributed to the inmate(s) assigned to that area, unless the inmate(s) can establish a lack of involvement in the infraction at the disciplinary hearing." Former WAC 137-28-160 (2013)[1]. The Department of Corrections (DOC) cited Fleming with violating WAC 137-25-030 (709) (out-of-bounds:

[1] DOC amended this section in January 2016, after Fleming's infraction. WAC 137-28-160 no longer references a cell-tag rule and instead defines possession as "[w]hen an item(s) is found on an offender or in an offender's assigned area of responsibility." WAC 137-28-160(10).

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being in another offender's cell) and former WAC 137-25-030(603) (2006)[2] (possession of any narcotic, controlled substance, illegal drug, unauthorized drug, or mind altering substance). Fleming pleaded guilty to being in another offender's cell but not guilty to the possession offense.

During the infraction hearing, Fleming claimed he did not know about the spice in the other inmate's cell and offered the results of a drug test where he tested negative for spice as evidence. The hearing officer did not allow the drug test, finding it was not relevant to possession. The officer found Fleming guilty of both offenses and sanctioned him to 15 days of segregation with credit for time served, 15 days of loss of gym and yard time, and 15 days loss of good conduct time.

Fleming contends that sufficient evidence does not support the hearing officer's decision and, consequently, Fleming's due process rights were violated by basing his conviction on lack of sufficient evidence.[3].

To obtain relief, Fleming must show that he is under unlawful restraint. *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 212-13, 227 P.3d 285 (2010). Restraint is unlawful if the conditions or manner of restraint are in violation of the state or federal constitutions. RAP 16.4(c)(6).

To be entitled to relief for a due process violation, a prisoner must show that a protected liberty interest is at issue. *Sandin v. Conner*, 515 U.S. 472, 483-84, 115 S. Ct.

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[2] This section was also amended in January 2016, after Fleming's infraction. WAC 137-25-030(603) now states that an inmate commits a serious violation for, "Introducing or transferring any unauthorized drug or drug paraphernalia."

[3] Fleming also alleges the hearing officer was biased but he fails to identify any evidence to support this claim. Accordingly, we do not consider this claim further. RAP 16.7(a)(2); *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990).

2293, 132 L.Ed.2d 418 (1995). Due process protections are triggered by disciplinary hearings resulting in the loss of good time credit. *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 397-98, 978 P.2d 1083 (1999).

This court will not disturb the result of a prison disciplinary proceeding unless action taken was "so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice." *In re Pers. Restraint of Grantham,* 168 Wn.2d 204, 215, 227 P.3d 285 (2010). A disciplinary proceeding is not arbitrary and capricious if the inmate was afforded the applicable minimum due process protections and the decision was supported by constitutionally sufficient evidence. *In re Pers. Restraint of Krier*, 108 Wn. App. 31, 38, 29 P.3d 720 (2001). The evidentiary requirements of due process are satisfied if there is "some evidence" in the record to support a prison disciplinary decision. *In re Pers. Restraint of Johnston*, 109 Wn.2d 493, 497, 745 P.2d 864 (1987).

The Washington Supreme Court has clarified the "some or any evidence" test: "[T]here essentially must be some reasonable connection between the evidence and the inmate in order to support actions taken by the prison disciplinary board." *In re Anderson*, 112 Wn.2d 546, 549, 772 P.2d 510 (1989).

In *Anderson*, a search of petitioner's cell led to the discovery of a knife in a shoe. *Anderson*, 112 Wn.2d at 548. The petitioner in that case shared his cell with three other cellmates. *Anderson*, 112 Wn.2d at 550. The record did not specifically connect petitioner to the knife. In fact, one cellmate testified at the hearing that the knife belonged to a cellmate other than the petitioner. *Anderson*, 112 Wn.2d at 548. Nevertheless, the board found against petitioner and sanctioned him to 10 days' isolation,

20 days' segregation, and the loss of 360 days of good time credit. *Anderson*, 112 Wn.2d at 547-48. An essential fact in finding against all four cellmates was the cell tag rule. *Anderson*, 112 Wn.2d at 548. The Washington Supreme Court held that a sufficient connection existed between the petitioner and the knife to satisfy the limited due process available to prisoners. *Anderson*, 112 Wn.2d at 550. In other words, there was some evidence that any one of the cellmates, or all four of them, committed an infraction involving the knife.

Here, Fleming was chargeable with the infraction based on the cell tag rule and *Anderson*. And despite the lack of a direct connection to the drugs, the mere presence of drugs in a cell where Fleming was unauthorized to be coupled with a burning smell observed by the corrections officer is sufficient to constitute "some evidence" to support a finding of guilt. While the cell tag rule states that the contraband will be "constructively attributed to the inmate(s) assigned to that area" and Fleming was not assigned to the area the spice was found, he still had access to the space by being in the cell. Moreover, the cell tag rule references the inmate's assigned cell because it is impermissible for inmates to be in another inmate's cell. WAC 137-25-030(709). Fleming cannot break a DOC rule and then use the language of the cell tag rule as a shield to culpability.

Given all, there was "some evidence" to support the possession infraction. Therefore, the prison disciplinary proceeding action was not so arbitrary and capricious that it denied Fleming a fair proceeding. Fleming fails to show that he is under unlawful restraint by some condition or manner that is in violation of the state or federal constitutions.

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 5th day of April, 2016.

Acting Chief Judge, Pro Tem

cc: Andrew A. Fleming
Pierce County Clerk
County Cause No(s). 11-1-03263-1
Timothy J. Feulner, Assistant Attorney General