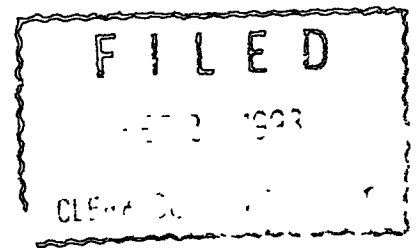


IN THE COURT OF APPEALS OF IOWA

No. 2-445 /91-1953



LOREN JASPER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Lee County,
William L. Dowell, Judge.

Loren Jasper appeals the district court's denial of his
application for postconviction relief. **AFFIRMED AS
MODIFIED.**

Linda Del Gallo, State Appellate Defender, and Andi S.
Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, and William A.
Hill, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

SCHLEGEL, J.

The applicant, Loren Jasper, appeals the district court's denial of his application for postconviction relief. He contends: (1) he was impermissibly denied an opportunity to call witnesses at the disciplinary hearing (2) he was denied his right to due process when the prison disciplinary committee improperly applied the rules governing the Iowa State Penitentiary rather than those governing the Iowa Men's Reformatory when imposing sanctions; and (3) the disciplinary committee's finding that he violated rule II.G.14 was not supported by sufficient evidence.

Jasper was transferred to the Iowa Men's Reformatory from the Iowa State Penitentiary for two days while waiting to participate in a trial. According to the disciplinary report filed by Officer Isaac, Isaac was in the process of moving Jasper to another cell when Jasper told the officer, "You're not going to put your fucking hands on me." As the cell door opened, Jasper stepped out and began walking away. Officer Isaac then grabbed Jasper's shoulder and told him he was going to conduct a shake down. Isaac claimed Jasper was loud and disruptive. Isaac also reported that as Jasper was placed in his new cell Jasper stated to Isaac that the next time Isaac tried to put his hands on Jasper he would have to come in after him. Jasper was subsequently transferred back to the Iowa State Penitentiary.

Prior to the disciplinary hearing, Jasper requested to call two witnesses, Furtrell and Kertrell, on his behalf. The disciplinary committee, however, could not find any inmates at the Iowa Men's Reformatory with the names given by Jasper. At the hearing, Jasper claimed he did not make any threatening statements to Officer Isaac. The disciplinary committee found Jasper guilty of two disciplinary rule violations and ordered Jasper to serve fifteen days disciplinary detention. In addition, Jasper's sanctions included the loss of 180 days good conduct time, six months administrative segregation, and imposition of suspended sanctions.

After exhausting his administrative remedies, Jasper appealed to the district court which denied his application. Jasper subsequently filed a petition for writ of certiorari pursuant to Iowa Code section 663A.9 (1991). Thereafter, the Iowa Supreme Court held section 663A.9 unconstitutional and ordered Jasper be permitted to pursue his case as a matter of right. The court then extended the time for Jasper to file his notice of appeal, and Jasper appealed.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards, we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Jasper first contends he was impermissibly denied an opportunity to call witnesses at his disciplinary hearing. It is well settled that a prisoner has a due process right at a disciplinary hearing to call witnesses supporting his case or to present written evidence. Fichter v. Iowa State Penitentiary, 285 N.W.2d 751, 757 (Iowa 1979) (citing Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). This right, however, is not unlimited. Mahers v. State, 437 N.W.2d 565, 568 (1989). The question in the instant case concerns the extent to which prison officials must expend efforts to contact witnesses requested by an inmate. More specifically, the question here is whether the investigator's efforts to communicate with the Iowa Men's Reformatory in an attempt to contact the requested inmate witnesses were reasonably thorough. We conclude they were.

We considered a similar question in Bradham v. State, 476 N.W.2d 369 (Iowa App. 1991). In Bradham an Iowa Men's Reformatory inmate was requested as a witness in a prison disciplinary matter after the inmate had been transferred to a work release center in Des Moines. Id. at 373. The individual who investigated the matter had the telephone number to contact the inmate at the work release program, but he did not do so. We held the investigating officer should have at least contacted the inmate at the work release center to determine whether the inmate's testimony would add to the evidence. In the event the officer

determined the testimony did not add to the evidence, the officer was required to make a written statement delineating the reasons for the decision.

Unlike Bradham, the investigating officer in the present case did contact the Iowa Men's Reformatory where the requested inmates allegedly resided and discovered that no inmates with the names given by Jasper were incarcerated there. In addition, the investigator attempted to locate the inmate witnesses at the Iowa State Penitentiary. When the requested inmates could not be found, the disciplinary committee determined the requested witnesses were unavailable. Jasper asserts the investigator should have used the department of corrections' computer to access the master list of inmates incarcerated in Iowa to determine the identity and location of the requested witnesses. We disagree; we are satisfied that the investigator made every reasonable effort to locate and interview the applicant's witnesses.

Next, Jasper contends he was denied his right to due process when the prison disciplinary committee applied the rules governing the Iowa State Penitentiary rather than those governing the Iowa Men's Reformatory when imposing sanctions. In the event we determine the disciplinary committee applied the proper set of rules, Jasper contends depriving him of 180 days of good conduct time is impermissible under the governing rules. After carefully reviewing the entire record, we conclude the prison

disciplinary committee applied the correct set of rules incorrectly.

Iowa Code section 903A.3 (1991) provides in pertinent part:

Loss or forfeiture of good conduct time.

1. Upon finding that an inmate has violated an institutional rule, the independent administrative law judge may order forfeiture of any or all good conduct time earned and not forfeited up to the date of the violation by the inmate. The independent administrative law judge has discretion within the guidelines established pursuant to section 903A.4, to determine the amount of time that should be forfeited based upon the severity of the violation.

Iowa Code section 903A.4 (1991) provides in relevant part:

The director of the Iowa department of corrections shall develop policy and procedural rules to implement sections 903A.1 through 903A.3. The rules may specify disciplinary offenses which may result in the loss of good conduct time, and the amount of good conduct time which may be lost as a result of each disciplinary offense.

As specified in the disciplinary committee's decision, the correct set of rules to be applied in the present case is the department of corrections' disciplinary policy and procedure. These rules were applied in the instant case, but were applied incorrectly. Disciplinary rules II.C.2 and II.C.3 state:

2. For each inmate who is serving a sentence for an OFFENSE COMMITTED ON OR AFTER JULY 1, 1983, they may forfeit up to 16 days good conduct time for each Class I violation, except as noted below. The loss of good conduct time shall be determined by the Administrative Law Judge and shall be based upon the Administrative Law Judge's view of the seriousness of the misconduct. (Section 903A).

a. Normally, violations of Class I rules shall result in not more than sixteen (16) days Good Conduct Time for any single offense. For the fifth and each subsequent violation, the warden shall have the authority, with the approval of the Director of Institutions, to deprive the inmate of any portion or all of the good time that may have been earned up to the date of the violation.

b. In cases of escape, attempted escape, and serious or dangerous violence, the Administrative Law Judge may recommend a loss of any or all accumulated good conduct time. Such recommendations shall be subject to review by the Director of the Division of Institutions. Serious and dangerous violence is killing, actual rape or assault, kidnapping, rioting, and arson or the attempt to kill, kidnap, riot, and arson.

c. The Administrative Law Judge shall determine the amount of good time which the inmate has accrued at the time of the disciplinary hearing and specify the amount of time, in days, which are to be forfeited as a result of the violation(s) being heard.

d. Any suspending sanctions which an inmate may have received for previous reports shall be counted towards the number of violations used in determining the amount of good time to be taken for all future violations.

3. Whenever an inmate is found guilty of a Class I infraction and it is not suspended, the inmate shall lose the amount of good time consistent with the statute and this policy. . . .

(Emphasis added.)

Here, the disciplinary committee found Jasper had committed two Class I infractions. No evidence was included in the committee's decision as to whether Jasper had committed prior violations. Consequently, Jasper may forfeit up to sixteen days good conduct time for each

violation since the exceptions to rule II.C.2 are not applicable in the present case. Despite the State's argument that "this violation must have been the fifth or subsequent violation for inmate Jasper and approval must have been given by the warden and the Director of Institutions," there is no clear indication in the record whether Jasper had committed at least five rule violations. Accordingly, we hold Jasper should forfeit thirty-two days of good conduct time--not 180 days as erroneously determined by the disciplinary committee. The remainder of Jasper's sanctions are affirmed.

Finally, Jasper claims the disciplinary committee's finding that he violated rule II.G.14 regarding threats and intimidation is not supported by sufficient evidence. Review of an applicant's sufficiency of evidence claim in a prison disciplinary case involves determining whether "some evidence" exists to support the disciplinary committee's decision. Mahers, 427 N.W.2d at 569.

The evidence relied upon by the disciplinary committee in finding Jasper guilty consisted of Officer Isaac's written report and Jasper's statement. On review, Officer Isaac's written report, alone, constitutes "some evidence." The written report of a correctional officer is a sufficient basis for disciplinary action. Id. at 570; see also Pierce v. State, 433 N.W.2d 38, 39 (Iowa App. 1988). Jasper argues further, however, that even if the officer's report is deemed to be true, Jasper's statement

to the officer does not constitute a disciplinary rule violation. We disagree. Jasper's statement to Isaac that "[n]ext time you think you're going to put your hand on me you're going to have to come in after me" constitutes "threats/intimidation" pursuant to disciplinary rule II.G.14.

For the reasons stated above we affirm the district court's denial of postconviction relief as modified.

AFFIRMED AS MODIFIED.

Oxberger, C.J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

Except for the provision in the majority opinion that reduces the forfeiture of good conduct time from 180 days to 32 days, I concur with the well-reasoned opinion of the majority.

As it relates to the number of good conduct days in excess of 16 that can be forfeited, I would remand to the district court with directions to the discipline committee to certify to the district court the number of rule violations committed by Jasper. The district court on remand, after receiving the certification, should then make a separate finding as to the number of rules violated and, after making that finding, should adjudicate anew the number of good conduct days forfeited. If the appellant is yet dissatisfied with that result, he can then certify to us the decision of the district court and for that limited purpose we would retain jurisdiction and separately rule on that question.

There is no need to refer the matter to the warden for respondent's exhibit A gives every indication that the warden of the Iowa State Penitentiary and the Director of Institutions both approved the loss of good time. Although I agree with the majority the violations are not set forth in the record, there is every indication that the violation must have been the fifth or subsequent violation for Mr. Jasper.