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IN THE COURT OF APPEALS OF IOWA

FRANK R. LeVAN,)

Petitioner-Appellant,) Filed June 26, 1984

vs.)

STATE OF IOWA,) 4-208
83-1077

Respondent-Appellee.)

Appeal from the Iowa District Court for Lee County - William S. Cahill, Judge.

Petitioner appeals the denial of his petition for postconviction relief from a disciplinary decision by the Fort Madison penitentiary authorities. AFFIRMED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Layne Lindebak, Assistant Attorney General, for respondent-appellee.

Considered by Snell, P.J., Hayden and Sackett, JJ.

This postconviction relief appeal involves a prison disciplinary action taken against the petitioner while he was an inmate at the Fort Madison penitentiary. On April 22, 1982, the petitioner received a furlough from the penitentiary to spend a week in Des Moines. While on furlough in Des Moines, the petitioner was charged with theft in the fifth degree for an incident which occurred on April 26, 1982; the petitioner pled guilty to the charge in Polk County District Court on April 28, 1982, and received a five-day sentence to be served concurrently with the sentence he was already serving. The petitioner was returned to the Fort Madison penitentiary on the same day—April 28, 1982.

On May 10, 1982, the penitentiary notified the petitioner that it planned to take disciplinary action against him for the theft he committed while on furlough. On May 12, 1982, a three-member penitentiary disciplinary committee ruled that the petitioner had violated two penitentiary rules and imposed the following punishment: fifteen days of disciplinary detention, cancellation of honor contract, loss of all good and honor time, and one year of administrative segregation. As a result of this ruling, the petitioner lost 2,254 days of good time which he had previously accrued.

Petitioner asserts that the prison authorities failed to comply with rule 804(C) of the prison disciplinary rules, which requires that a disciplinary hearing be held within four days of the incident which gave rise to it, and that this was a violation of his due process rights. Petitioner asks that the good and honor time which he lost as a result of the hearing be restored to him, and that all record of the disciplinary action be expunged. We affirm.

Proceedings in postconviction relief are special proceedings treated as actions at law. The burden of proof is on the petitioner who must establish the facts by a preponderance of the evidence. Where there are fundamental constitutional rights involved, we review the case de novo in light of the totality of the circumstances. Kelly v. Nix, 329 N.W.2d 287, 291 (Iowa 1983).

Iowa State Penitentiary disciplinary procedure rule 804(C)(4) in effect at the time of petitioner's discipline hearing was as follows:

> The hearing shall be held within four working days of the alleged incident unless (1) the inmate requests a continuance for further investigation or other good cause; (2) the disciplinary authority continues the hearing for further investigation or other good cause; (3) summary action, such as placement in administrative segregation, has been taken against the inmate in connection with the alleged incident; or (4) the matter has been referred to the County Attorney or other prosecuting authorities for investigation and possible prosecution as a criminal offense.

It has since been amended.

The Iowa Supreme Court in the case of Kelly v. Nix, 329 N.W.2d at 293, adopted the clarification decision of the federal district court, September 30, 1982, in a suit against the warden of the Iowa State Penitentiary, Kane v. Brewer, Civ. No. 73-153-1 (S.D. Iowa 1974):

> . . . in some instances rule 804 provides protection above and beyond the requirements of minimum due process. . . . when deviations are not substantial expungement is not necessary because . . . the title [of rule 804(E)] indicates an intent on the part of the drafters of Rule 804(E) that the provision would not apply to insubstantial and nonprejudicial violations of [Rule] 804. (emphasis added)

In 1974, the United States Supreme Court, recognizing that prisoners were entitled to rights under the due process clause of the Constitution, ruled that the minimum requirements of procedural due process appropriate for the circumstances must be observed in prison disciplinary proceedings involving the loss of good or honor time. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935, 952 (1974).

The record in this case supports the trial court's findings of fact, as follows:

> 1. On April 22, 1982, the petitioner was furloughed to Des Moines, Iowa, from the Iowa State Penitentiary. While on furlough, on April 26, 1982, he was charged with the crime of theft in the fifth degree. On April 28, 1982, he entered a plea of guilty and was fined $50 or five days in jail. On April 28, 1982, he was returned to the Iowa State Penitentiary to serve the five days with his present sentence.

2. Richard Cain, a work release employee, wrote a disciplinary report concerning the conviction of the crime of theft in the fifth degree by the petitioner. This report was mailed from Des Moines to the Iowa State Penitentiary.

3. On May 10, 1982, a disciplinary report was written at the Iowa State Penitentiary and a copy was made available to the petitioner. The copy which was made available to the petitioner shows that it was actually delivered to the petitioner on June 10, 1982, at the bottom of the report. This conflicts with the date at the top of the report which was May 10, 1982. In view of the date of the hearing, May 12, 1982, the date at the bottom of the disciplinary report is obviously in error.

4. On May 12, 1982, a hearing was held by the disciplinary committee. Findings of Fact were entered on that date and the evidence which the committee relied upon in finding the petitioner guilty was recorded and made available to the petitioner.

Since it was necessary for the report of the petitioner's criminal disposition on April 28, 1982, in Polk County, Iowa, to be made and mailed to the Iowa State Penitentiary, where it was routed to a shift supervisor, the trial court did not find that this delay was in any way excessive. We find the delay to be insubstantial for the same reason.

Assuming, arguendo, the delay was not insubstantial, the petitioner has made no showing of record that, because the hearing was not held within four working days of the date of the alleged incident, he was prejudiced in any manner and, therefore, for this reason alone, is not entitled to the relief he seeks here on appeal.

We hold the petitioner has failed to show by a preponderance of the evidence that the delay of the disciplinary hearing was not insubstantial under the circumstances and not nonprejudicial. Therefore, his due process rights were not violated in the rule 804(C)(4) hearing.

AFFIRMED.