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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ELBERT WILSON, JR.,)

Petitioner-Appellant,) Filed January 29, 1985

vs.)

HAROLD FARRIER, ET AL.,) 4-418
83-1635

Respondent-Appellee.)

Appeal from the Iowa District Court for Lee County - John C. Miller, Judge.

Petitioner appeals the dismissal of his application for postconviction relief from disciplinary action taken by the prison disciplinary committee. VACATED AND REMANDED FOR AN EVIDENTIARY HEARING.

Charles Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, Gordon E. Allen, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for respondent-appellee.

Heard by Snell, P.J., Schlegel, and Hayden, JJ., but considered en banc.

SCHLEGEL, J.

Petitioner, Elbert Wilson, appeals the dismissal of his application for postconviction relief from disciplinary action taken by the prison disciplinary committee. He asserts his due process rights were violated because the disciplinary committee's findings of fact were insufficient to support the conclusion that he participated in the murder of another inmate. We vacate and remand.

On September 2, 1981, Gary Tyson was murdered in the kitchen of the Iowa State Penitentiary by a prison gang known as the Vice Lords. In April, 1982, Wilson appeared before a prison disciplinary committee for a hearing on the charge that he had violated prison rule 01—prohibiting killing or attempting to kill, injure, or maim another person—by participating in the murder of Tyson. The disciplinary committee found Wilson guilty of violating rule 01 and imposed various disciplinary sanctions. Wilson was also tried for murder in a court of law. He was acquitted of all charges on September 2, 1982.

After his acquittal, Wilson filed a petition for a writ of habeas corpus. An application for postconviction relief was later substituted for the petition for a writ. The postconviction petition alleged that the prison disciplinary committee had violated Wilson's due process rights in several respects.

The disciplinary committee then held three rehearings of the charge against Wilson, finding him guilty of violating rule 01 all three times. Wilson amended his petition for postconviction relief after each rehearing. His petition for postconviction relief was heard before a court on October 25, 1983. The court determined that the disciplinary committee had not violated Wilson's due process rights and ordered his petition dismissed.

I. Scope of Review. The sole issue on appeal is whether there was sufficient evidence to support the disciplinary committee's decision. It is not clear, however, what standard of review we are to apply in reviewing that decision.

In Kelly v. Nix, 329 N.W.2d 287, 294 (Iowa 1983), the Iowa Supreme Court apparently applied a substantial evidence standard of review. The appellee, however, points out that in Fichtner v. Iowa State Penitentiary, 285 N.W.2d 751, 759 (Iowa 1979), the supreme court cited the standard adopted in some federal cases. Under that standard, the district court should simply determine whether there is any evidence at all to support the prison officials' decision. Willis v. Ciccone, 506 F.2d 1011, 1018 (8th Cir. 1974). We note that in neither case did the supreme court directly and explicitly confront the issue of the proper standard of review for this kind of situation.

Because there is no persuasive precedent, we should consider relevant policy concerns before reaching our decision. On the one hand, we must accommodate the legitimate institutional needs of the prison. See Fichtner, 285 N.W.2d at 756. In doing so, the judiciary's role "is not to afford a de novo review of the disciplinary board's factual findings." Ciccone, 506 F.2d at 1018. We should not encourage unnecessary litigation by making the disciplinary hearing a mere way station on the road to judicial review. In short, the integrity of the prison disciplinary system will be undermined unless a deferential standard of review is applied.

On the other hand, we must consider the rights of the prisoners.

> [O]ccupants of penal institutions, although prisoners, are persons, and they are not beyond the pale of the Constitution. Prison officials must not permit a disciplinary proceeding against such a person to be a mere gesture or a sham. The person has a liberty interest protected by the due process clause.

Fichtner, 285 N.W.2d at 756.

We believe the substantial evidence standard provides the proper balance between the two policy concerns. It is a standard that is quite deferential to the findings of the disciplinary board. Under the standard, the court will find the evidence substantial when a reasonable mind could accept it as adequate to reach

the same findings. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269, 270 (Iowa 1982). Application of this standard does not result in the court substituting its own judgment for that of the disciplinary board's. If a reasonable mind could reach the same finding as the board reached, it is irrelevant that a different conclusion could also have been reached based on the evidence. Id.; Woods v. Iowa Department of Job Service, 315 N.W.2d 838, 841 (Iowa Ct. App. 1981).

The substantial evidence standard also satisfies due process concerns. As the Iowa Supreme Court recognized in Fichtner, the leading authority on the issue of due process rights in the prison disciplinary context is Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). See Fichtner, 285 N.W.2d at 752, 756-59. The major thrust of Wolff is the prevention of arbitrary decisions. Kyle v. Hanberry, 677 F.2d 1386, 1390 (11th Cir. 1982) (citing Gomes v. Travisono, 510 F.2d 537, 540 (1st Cir. 1974)). A prison disciplinary proceeding must not be allowed to become "a mere gesture or a sham." Fichtner, 285 N.W.2d at 756. The problem with the any evidence standard is that in some cases its application could result in prison proceedings becoming a sham or a charade. See Helms v. Hewitt, 655 F.2d 487, 501-02 (3d Cir. 1981) (rejecting application of the any evidence standard when disciplinary decision was based on hearsay derived from an unidentified informant).[1] Such a result could occur in situations in which there is some evidence of guilt, but in which that evidence, because it is devoid of reliability, is not adequate to convince a reasonable mind that the person charged is guilty. The same result cannot occur, however, when the substantial evidence standard is

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[1] A portion of the Helms decision was reversed in Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). However, the portion of the Helms opinion cited to here was not before the Supreme Court in Hewitt. 459 U.S. at 481, 103 S. Ct. at 876, 74 L. Ed. 2d at 694 n.3.

applied. Because we believe a decision based on evidence that is inadequate to convince a reasonable mind is a decision that is arbitrary, we believe due process requires us to apply the substantial evidence standard.

In applying the substantial evidence standard, we are acting in accordance with the standard used in the most recent Iowa Supreme Court case offering guidance on this issue: Kelly v. Nix, 329 N.W.2d 287 (Iowa 1983). Although the court in Kelly did not directly or explicitly state that the substantial evidence standard should be applied, the actions of the court were inconsistent with application of the any evidence test. When reviewing Kelley's disciplinary proceedings, the court reviewed the evidence against him to determine whether it was reliable. Id. at 294. Such a review was inconsistent with application of the any evidence standard of review. We note further that Kelly is not the only case to apply the substantial evidence standard. See Chavis v. Rowe, 643 F.2d 1281, 1287 (7th Cir. 1981); Helms v. Hewitt, 655 F.2d 487, 501-02 (3d Cir. 1981) (rejecting application of the any evidence standard). For all the reasons stated above, we apply the substantial evidence test in reviewing this case.

II. Adequacy of the Evidence. The disciplinary committee's findings of fact state that Wilson was present in the penitentiary kitchen when Tyson was murdered and that Wilson aided and abetted the murder. The evidence relied on consisted of statements of confidential informants that placed Wilson at the scene of the murder. Although Wilson presented written statements to the disciplinary committee in which other inmates say Wilson was not in the kitchen at the time of the murder, the committee chose to believe the confidential informants. Because of that decision, the committee concluded Wilson was lying by denying his presence at the murder scene. The committee further concluded that because Wilson was lying, he had something to hide, which would constitute additional evidence Wilson participated in the murder.

Wilson attacks these findings in two respects. First, he argues that the evidence showing he was present in the kitchen was not sufficient to show that he aided and abetted the murder. Second, he argues the evidence is insufficient to support a finding that he was in the kitchen at the time of the murder. We consider each argument separately.

A. Aiding and Abetting. We reject Wilson's first argument. A finding that he was in the kitchen would support a conclusion that he was an aider or abettor in this case. "Although the accused's mere presence is not enough, the requisite participation [in the offense] can be inferred 'from circumstantial evidence including presence, companionship and conduct before and after the offense is committed.' " State v. Miles, 346 N.W.2d 517, 520 (Iowa 1984) (quoting Fryer v. State, 325 N.W.2d 400, 406 (Iowa 1982)). In this case a gang-related murder was committed. Several members of the Vice Lords physically participated in the attack. The Vice Lords knew when they went as a group to the kitchen that they were going to attack Tyson. Wilson was a known member of the Vice Lords. Therefore, we must conclude that if Wilson was in the kitchen at the time of the attack, the committee could infer he "assented to or lent countenance and approval to the criminal act . . . by . . . in some manner encouraging it prior to or at the time of its commission." Miles, 346 N.W.2d at 520.

B. Presence in the Kitchen. In finding that Wilson was present in the kitchen at the time of the murder, the committee relied on statements from three confidential informants. Our only record of these statements consists of two single sheets of paper—marked Con-1 and Con-2 respectively—that the trial court examined in camera and found sufficient to support the committee's finding.

Exhibit Con-1 is a file memo that summarizes the confidential information heard by the disciplinary committee. The memo identifies the three informants. Their summarized testimony, however, does not specifically mention petitioner Elbert Wilson. Instead, the summary states they saw "Terry Wilson along with

Gary Tyson and others . . . ." (Emphasis added.) The memo names petitioner as Elbert Wilson, so we assume that Terry Wilson is a different person.[2] When we so assume, there is no evidence in exhibit Con-1 that shows Elbert Wilson was in the kitchen at the time of the murder.

Exhibit Con-2 consists mainly of excerpts of an interview given by a person who admitted being at the scene of the murder. The excerpts mention Terry Wilson, but not Elbert Wilson. Following the excerpts is a list of sixteen names "mentioned as being in the [kitchen] when Tyson was stabbed." Both Elbert and Terry Wilson are in that list.

Exhibit Con-2 apparently reports there was an eye-witness who saw Elbert Wilson at the scene of the murder. We have some doubts, however, about the eye-witness's ability to remember all sixteen people assembled in one room. Further, the exhibit does not state the context in which the sixteen names were mentioned: whether the witness named all sixteen with certainty, or whether he responded affirmatively to suggestions by the interviewers that certain people were there.

We also have reservations about the context in which the statements were made by the three confidential informants. We do not know if the committee actually heard their testimony, or whether it relied on written statements. If the latter, we do not know if the written statements were simply summaries like exhibit Con-2, or if they were signed statements relating directly to Elbert Wilson's participation in the events leading to the murder.

Because of the questions we have raised about exhibits Con-1 and Con-2, and because Wilson presented contradictory evidence, we cannot say that the evidence relied upon by the disciplinary committee is adequate for a reasonable mind to reach the same findings. Therefore, we are inclined to hold that Wilson has met his burden of proving that the committee's decision was not supported by substantial evidence. See Kelly v. Nix, 329 N.W.2d at 291 (burden on petitioner in

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[2] Exhibit Con-2 also lists Elbert Wilson and Terry Wilson as separate people.

postconviction proceeding). We recognize, however, that many of our questions about the evidence arise because of the use of confidential informants. There is nothing wrong with their use, and the prison officials acted properly in trying to preserve confidentiality. Nonetheless, use of confidential informants does not abolish the need to ensure the credibility of the evidence.

Several courts have held that prison disciplinary boards, when basing their conclusions upon confidential evidence, must make a bona fide evaluation that such evidence is credible and reliable. Kyle v. Hanberry, 667 F.2d 1386, 1390 (11th Cir., 1982); Helms v. Hewitt, 655 F.2d 487, 502 (3d Cir. 1981); Gomes v. Travisono, 510 F.2d 537, 540 (1st Cir. 1974); Casper v. Marquette Prison Warden, 337 N.W.2d 56, 57-58 (Mich. Ct. App. 1983). Cf. Crook v. Oregon State Penitentiary, 655 P.2d 1246, 1247 (Or. Ct. App. 1983) (administrative rules require finding of reliability). In Kelly, the Iowa Supreme Court acted in conformity with these holdings when it reviewed confidential information to determine whether that information was reliable. 329 N.W.2d at 294. The reasons for requiring an inquiry into credibility and reliability were stated in Kyle.

> In a prison environment, where authorities must depend heavily upon informers to report violations of regulations, an inmate can seek to harm a disliked fellow inmate by accusing that inmate of wrongdoing. Since the accuser is usually protected by a veil of confidentiality that will not be pierced through confrontation and cross-examination, an accuser may easily concoct the allegations of wrongdoing. Without a bona fide evaluation of the credibility and reliability of the evidence presented, a prison committee's hearing would thus be reduced to a sham which would improperly subject an inmate accused of wrongdoing to an arbitrary determination.

677 F.2d at 1390.

The disciplinary board in this case, in addition to its duty to evaluate the reliability of confidential information, also had a duty pursuant to a federal injunction to prepare a written summary of that information. Rhinehart v. Brewer, 483 F. Supp. 165, 169-70 (S.D. Iowa 1980). The contents of the summary must include:

> (1) A brief written summary of all the confidential information, both oral and written, available to the disciplinary committee which pertains to the alleged incident under consideration;
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> (2) A statement setting forth the identity of the informants either by name or by his relationship to the penitentiary;
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> (3) A statement indicating what confidential information was relied upon by the disciplinary committee in reaching its decision;
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> (4) A statement indicating why the disciplinary committee believes the confidential information relied upon to be credible, whether any corroboration of such information is available, and if such is available, what the corroborating information is; and
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> (5) A statement indicating why the disciplinary committee believes the confidential information should in fact be kept confidential.

Id. at 170. One of the purposes of requiring this summary is to facilitate judicial review of disciplinary proceedings. Id.

Exhibit Con-1 minimally meets all the requirements of Rhinehart. However, even if we were to assume that Terry Wilson and Elbert Wilson are the same person, the information in Con-1 would not be sufficient to meet the substantial evidence standard of review. Con-1 states the disciplinary commitee found the information provided by the confidential informants reliable because the three stories corroborated each other. Such a conclusion only has merit when there is evidence that the witnesses giving the corroborative statements are also telling the truth. Unfortunately, Con-1 does not provide any basis for concluding that the confidential informants were telling the truth. We therefore cannot, on the basis of this record, conclude that the disciplinary committee's conclusion was supported by substantial evidence.

We believe the record regarding the confidential information is inconclusive at best. We therefore vacate the trial court's judgment and remand for an evidentiary hearing. At the evidentiary hearing, the parties should present

evidence showing whether Terry Wilson and Elbert Wilson are the same person. The appellee shall also present evidence showing whether the three confidential informants testified before the committee, or whether the committee only considered written statements. If only written statements, there should be a showing of the nature of the statements, and the context in which they were given, so that a determination can be made about the credibility of those statements. Similarly, appellee should present evidence about the context in which Elbert Wilson was named by the witness giving the interview that was reported in exhibit Con-2.

In remanding, we do not suggest that that trial court must decide in favor of the petitioner. It should make whatever decision is warranted by the evidence.

VACATED AND REMANDED FOR AN EVIDENTIARY HEARING.

All judges concur except Donielson and Sackett, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully but vigorously dissent from the majority's determination that we should apply a "substantial evidence" standard of review. I firmly believe that application of the "any evidence" standard would strike a proper balance between preserving the integrity of the prison disciplinary system and protecting the rights of the prisoner against arbitrary decisions. This is the standard which was specifically adopted by the Eighth Circuit Court of Appeals in Willis v. Ciccone, 506 F.2d 1011, 1018 (8th Cir. 1974):

> [T]he role of the district court is not to afford a de novo review of the disciplinary board's factual finding. The district court should simply determine whether the decision was supported by some facts. The sole and only issue of constitutional substance is whether there exists any evidence at all, that is, whether there is any basis in fact to support the action taken by the prison officials.

The majority relies on language from Fichtner v. Iowa State Penitentiary, 285 N.W.2d 751, 759 (Iowa 1979), and policy reasons set forth in Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), in support of its position. I believe this reliance is misplaced. Wolff and the portion of Fichtner quoted by the majority were addressing the policies to consider in affording a prisoner procedural due process—notice and opportunity to be heard.

In the present action we are not addressing whether the defendant's procedural due process rights are met. We are concerned with substantive due process—the sufficiency of evidence and avoidance of arbitrary decisions. While some of the policy considerations for procedural and substantive due process may parallel each other, I am hesitant to directly rely on language and reasoning which was obviously used in a different context than the situation before this court.

Furthermore, while Wolff and Fichtner do point out that a disciplinary proceeding should not be "a mere gesture or a sham" in the procedural sense, both courts also recognized:

> Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.

418 U.S. at 556, 94 S. Ct. at 2975, 41 L. Ed. 2d at 951, quoted in Fichtner, 285 N.W.2d at 756. In recognition of this principle, the Wolff court held that procedural due process does not require confrontation and cross-examination procedures in prison disciplinary hearings. Id. at 568, 94 S. Ct. at 2980, 41 L. Ed. at 958. The principle to be derived from Wolff is that it is only necessary to afford a prisoner minimal procedural due process rights. To require more than this would only serve to interfere with and unnecessarily disrupt prison administration.

In a broad sense, these principles can be applied in affording a prisoner substantive due process rights. To avoid arbitrary decisions, it is necessary to afford minimal substantive due process rights. Yet our courts must avoid unnecessary interference.

It is not a function of the court to run prisons and supervise day-to-day treatment and discipline. The Eighth Circuit has consistently recognized this in affording prison officials wide discretion in dealing with security matters. Roger v. Scurr, 676 F.2d 1211, 1216 (8th Cir. 1982); Morrissey v. Brewer, 443 F.2d 942, 948 (8th Cir.) cert. denied 404 U.S. 999, 92 S. Ct. 568, 30 L. Ed. 2d 553 (1971), rev'd and remanded on other grounds, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (due process requires informal hearing for parole revocation). In Morrissey, the court specifically stated:

> Unless infringement of a paramount constitutional right is involved . . . federal courts are loathe to interfere.

433 F.2d at 948. I strongly believe our state courts should be equally loathe to interfere with prison discipline. As stated in Courtney v. Bishop, 409 F.2d 1185, 1187 (8th Cir. 1969):

> Lawful incarceration necessarily operates to deprive a prisoner of certain rights and privileges he would otherwise

> enjoy in the free society, a retraction justified by considerations underlying our penal system. A convict, however, does not lose all of his civil rights—for those that are fundamental follow him, with appropriate limitations, through the prison gate, and the walls do not foreclose his access to the courts to protect those rights. On the other hand, prison officials are vested with wide discretion in controlling prisoners committed to their custody, and it is elementary that unless an infringement upon constitutional or fundamental rights is involved, federal courts are naturally reluctant to interfere with a prison's internal discipline, whether the institution is federal or state. [citations omitted]

The "any evidence" standard meets substantive due process requirements and achieves the desirable result of interfering with prison discipline as little as necessary. Application of a more stringent standard of review achieves very little other than unnecessary interference and unnecessary perpetration of litigation, substantially creating, in effect, a de novo review. Creating a new expansive trial and appellate review litigation is a result we should make every attempt to avoid as long as it does not deny basic constitutional rights.

Sackett, J., joins this dissent.