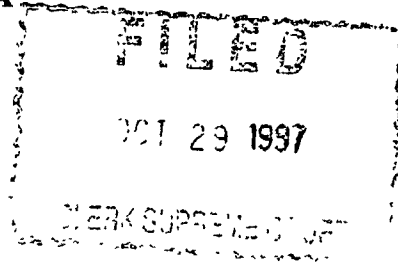


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IN THE COURT OF APPEALS OF IOWA

No. 7-441 / 95-2100
Filed 10/29/97



JAMES BLAIR-BEY,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Lee (North) County, R. David Fahey,
Judge.

The applicant appeals from the district court ruling denying him post-conviction relief from prison discipline. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Kristin W. Ensign, Assistant Attorney
General, for appellee.

Considered by Cady, C.J., and Streit and Vogel, JJ.

STREIT, J.***I. Background & Facts.***

An inmate at the Iowa State Penitentiary was assaulted in his cell. Inmate James Blair-Bey received a disciplinary report charging him with the assault in regard to the incident. Blair-Bey requested statements be obtained from four inmates and two correctional officers for the disciplinary hearing. The institution investigator obtained a statement from one correctional officer. Statements were not gathered from the other witnesses because they had left the institution. Blair-Bey said the witnesses were needed to establish his inaccessibility to Washburne that morning.

The Administrative Law Judge found Blair-Bey guilty of assault and sanctioned Blair-Bey one thousand days of good time. Blair-Bey filed an application for post-conviction relief asserting his due process rights were violated when he did not get the witness statements he requested. The district court denied the application concluding Blair-Bey did not show the witnesses would have contributed to his defense and therefore did not show prejudice. Blair-Bey appeals.

Proceedings for post-conviction relief are special proceedings treated as an action at law. *Kelly v. Nix*, 329 N.W.2d 287, 291 (Iowa 1983). When there is an alleged denial of constitutional rights, however, we make our own evaluation of the totality of the circumstances in a de novo review. *McLaughlin v. State*, 533 N.W.2d 546, 547 (Iowa 1995).

II. Right to Call Witnesses in Prison Disciplinary Proceedings.

Blair-Bey contends his due process right to call witnesses in his defense was violated because the prison investigator did not contact all his witnesses. The prisoners were no longer at the Iowa State Penitentiary. His contentions are without merit.

This court recognizes that minimum requirements of procedural due process must be observed before good time earned by an inmate can be forfeited. *Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991). Among the limited rights reserved to inmates in prison disciplinary cases is the right to call defense witnesses. *Id.* The right may be limited, at the discretion of prison officials, where security risks are posed. *Id.* If prison officials refuse to call witnesses requested by an inmate at a disciplinary hearing, at some point they must state their reasons for doing so. *Ponte v. Real*, 471 U.S. at 492-93, (1985). It is not required, however, that such reasons be placed in writing or otherwise exist as part of the administrative record. *Id.*

To prove due process was violated by a prison investigator's failure to call witnesses, the prisoner must prove: (1) the inmate made a specific request to the investigator before the investigator is required to search for or obtain statements from witnesses; and (2) the prisoner alleged what the testimony of the witnesses would have been or how the anticipated testimony would have changed the results of the disciplinary proceedings. *Hughes v. State*, 543 N.W.2d 872, 876 (Iowa 1995).

Blair-Bey made timely requests to have the witnesses called. The Administrative Law Judge at the disciplinary hearing explained why the witnesses were not called. Three of the inmate witnesses were not at the institution, another officer no longer worked at the institution, and another stated he was not a witness to the incident. Blair-Bey depends on *Bradham v. State*, 476 N.W.2d 369 (Iowa App. 1991), to support his position the fact that witnesses are no longer at the institution is an inadequate reason for the State to disallow the witnesses.

Bradham is factually distinguishable from this case, and for that reason does not lend support to Blair-Bey's contention. In *Bradham*, the investigator had the telephone number of the previous inmate who Bradham identified as a witness, but chose not to call him after determining his testimony was not relevant. Also, Bradham's proposed witness was highly important to determining what happened in the case. There was no evidence the investigator had easy access to Blair-Bey's witnesses. Blair-Bey did not show the testimony of his witnesses would have changed the outcome of the disciplinary matter. There is little doubt the result would have been the same even if Blair-Bey's witnesses would have testified. The disciplinary committee had Captain Burton's reports, the confidential information, a DCI report, a copy of the logbook, a statement of investigator Grinstead, a statement by a correctional officer, and Blair-Bey's statement. The district court did not err in denying Blair-Bey's application for post-conviction relief.

III. Ineffective Assistance of Counsel.

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Blair-Bey contends his postconviction counsel was ineffective because she did not have him state in his affidavit what his witnesses would say or how they would help him. An ineffective assistance of counsel claim is constitutional and we review de novo. *Picard v. State*, 339 N.W.2d 368, 373. An ineffective assistance of counsel issue may be raised in a post-conviction action which arises out of a disciplinary hearing. *Patchette v. State*, 374 N.W.2d 397 (Iowa 1985). To prove ineffective assistance of counsel Blair-Bey must prove counsel's error resulted in prejudice to his case. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987). Because the result of Blair-Bey's disciplinary hearing would have been the same even if his witnesses would have testified, no prejudice resulted. His counsel was not ineffective.

AFFIRMED.