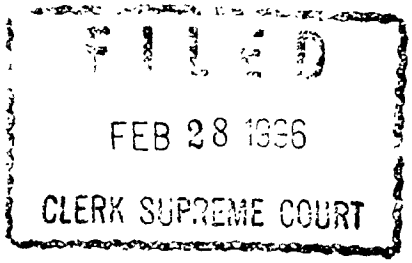
IN THE COURT OF APPEALS OF IOWA

No. 5-715 / 95-0089



MICHAEL BENHAM,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jones County, Van D. Zimmer, Judge.

Michael Benham appeals the denial of his application for postconviction relief in a prison discipline case. **AFFIRMED.**

Kelly A. Phipps of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General; and Layne M. Lindebak, Assistant Attorney General; for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

Michael Benham appeals from the denial of postconviction relief in a prison discipline action based on an attempted escape. He argues: 1) he cannot be punished for simply talking about escape; 2) the punishment imposed was excessive; 3) he was denied his right to present witnesses; and 4) the committee's use of confidential informants did not demonstrate sufficient reliability. We affirm.

The adjustment committee at the Iowa State Men's Reformatory found Benham had violated prison discipline rule five (escape) and rule forty-three (attempt/complicity). He appealed the committee's decision to the warden and the director of the Department of Corrections. His appeals were denied and he sought postconviction relief. Benham's application for postconviction relief was denied and he now appeals.

Benham and the State agree Benham's appellate arguments involve some constitutional concerns and our review is de novo in light of the totality of the circumstances. *See Gladson v. State*, 439 N.W.2d 214, 215 (Iowa App. 1989). To the extent Benham's arguments challenge only the sufficiency of the evidence to support the disciplinary action, our review is for the correction of errors at law. *Giles v. State*, 511 N.W.2d 622, 626 (Iowa 1994).

Benham argues he cannot be punished for simply talking about escape, but a review of the entire record reveals Benham did much more than merely discuss escape. *See Freitas v. Auger*, 837 F.2d 806, 811 (8th Cir. 1988). He personally

planned an escape for himself and several others. The committee had before it the statements of confidential informants as well as the observations of Benham's conduct by prison staff. There was evidence Benham set the time for the escape, acted as a "look out," and wore warm clothing to facilitate the late-night November breakout.

The district court's ruling is entitled to affirmance if "some evidence" exists to support the disciplinary committee's ruling. *Giles*, 511 N.W.2d at 626. Benham's conduct amounted to more than merely talking about escape and sufficient evidence supported the disciplinary committee's decision.

Benham argues the penalty imposed on him was excessive because "planning an escape should not be punished the same as attempting escape when the inmate chose to abandon the escape plan." The State argues Benham did not raise the issue of excessive punishment in his appeal to the warden and has now waived it on appeal. *See Bonds v. State*, 447 N.W.2d 135, 136 (Iowa 1989) (prisoner must assert ground for relief in the administrative process before raising it in postconviction application). Even if Benham properly preserved this issue he would not prevail as he provides no authority or compelling argument for finding an attempt to violate a prison rule must be punished less harshly than an actual violation of the rule.

Benham contends he was denied his right to present witnesses. An inmate has a limited due process right to call witnesses in his defense in prison disciplinary hearings. *Mahers v. State*, 437 N.W.2d 565, 568 (Iowa 1989). This right is not

unlimited. *Id.* A prisoner should be allowed to call witnesses in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. *Id.*

A review of the record indicates Benham did not mention the witnesses' names to the investigating officer or the disciplinary committee. Only when he appealed to the warden did Benham raise the issue of witnesses. In ruling on Benham's appeal, the warden noted the investigation of this matter had included interviews with three of the four witnesses and the fourth witness had escaped the prison and was unavailable for an interview.

Benham argues the witnesses were required to complete statements on his behalf even if prison officials regarded them as confidential informants. Benham cites no authority in support of this position, nor does he make a persuasive argument for its adoption. Given the facts of this case, there was no due process violation.

Finally, Benham claims the committee's use of confidential informants did not demonstrate sufficient reliability. When an inmate is disciplined on the basis of confidential information, his interest in a fair hearing requires there be some indication of the confidential informant's reliability. *Howard v. State*, 439 N.W.2d 193, 195 (Iowa 1989). It is required "there be sufficient information on the record to convince a reviewing authority that the disciplinary committee undertook such inquiry and correctly concluded the confidential information was credible and reliable." *Id.*

We have carefully reviewed the record and found the information provided by the confidential informants had sufficient indicia of reliability and credibility. The absence of a motive to fabricate, the existence of corroborating evidence, and the consistency of the statements are all indicative of the reliability of the information.

AFFIRMED.