IN THE COURT OF APPEALS OF IOWA

No. 0-460 / 99-0787
Filed November 20, 2000

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CLERK SUPREME COURT

ARTHUR POYNER,
Applicant,

vs.

IOWA DISTRICT COURT FOR JONES COUNTY,
Respondent.

Appeal from the Iowa District Court for Jones County, Thomas L. Koehler, Judge.

Applicant filed a petition for certiorari challenging the district court's denial of postconviction relief on prison discipline for a violation of a prison rule prohibiting possession of dangerous contraband. **WRIT SUSTAINED AND REMANDED WITH DIRECTIONS.**

Patrick Ingram, Mears Law Office, Iowa City, for applicant.

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

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

MAHAN, J.

Applicant filed a petition for certiorari challenging the district court's denial of postconviction relief on prison discipline for a violation of a prison rule prohibiting possession of dangerous contraband. Poyner claims he was improperly denied his right to call witnesses at the disciplinary hearing. He also claims the district court erred in not allowing his counsel to review confidential information presented at the disciplinary hearing and erred in failing to allow counsel to make an offer of proof. We sustain the writ and remand with directions.

Poyner was an inmate at the Iowa State Penitentiary (ISP) in the spring and summer 1996. On September 5, 1996, he was accused of violating the following: rule 9 (possession of dangerous contraband), rule 16 (unauthorized possession), rule 27 (obstructive and disruptive conduct), and rule 43 (attempt or complicity). He allegedly requested another inmate make him a twenty-inch "shank," and was in possession of the weapon. Confidential informants revealed the information to prison officials. The disciplinary notice informed Poyner as follows: "Confidential informants will remain so as to release them could cause injury to them."

Poyner requested Young, an ISP staff member, as a character witness. The request was denied because Young "would have no first-hand knowledge of the incident." The disciplinary committee found Poyner in violation of rule 9, possession of dangerous contraband based in part on "reliable confidential information." The punishment imposed was restriction to cell in the maximum

security cellhouse for six months and the loss of 180 days good time. The disciplinary decision for the first time identified inmate Johnson as the individual who Poyner requested make the knife for him.

Poyner exhausted his administrative remedies and filed an action for postconviction relief in Lee County on April 21, 1997. The case was transferred to Jones County in April 1998. Poyner filed an amended and substituted application for postconviction relief in September 1998. The court denied Poyner's motion to compel, which sought review of the confidential information. After an evidentiary hearing in March 1999, the district court denied Poyner's application for postconviction relief. Poyner's motion for certiorari was granted.

Standard of Review. Ordinarily, our review of postconviction relief proceedings is for errors at law. *Goodwin v. State*, 585 N.W.2d 749, 751 (Iowa App. 1998). However, when a postconviction petitioner asserts violation of constitutional safeguards, de novo review is required in light of the totality of the circumstances and record upon which the postconviction court ruling was made. *Rushing v. State*, 382 N.W.2d 141, 143 (Iowa 1986). We review de novo the constitutional issues raised by Poyner: the right to call witnesses and review confidential information. We review the court's failure to allow counsel to make an offer of proof for errors at law.

Witnesses. Poyner contends his due process right to call defense witnesses was violated. Minimum requirements of procedural due process must be observed before good time earned by an inmate can be forfeited. *Marshall v. State*, 524 N.W.2d 150, 152 (Iowa 1994). Among the limited rights reserved to

inmates in prison disciplinary cases is the right to call defense witnesses. *Mahers v. State*, 437 N.W.2d 565, 568 (Iowa 1989). This right does not extend to confrontation or cross-examination, and may be limited at the discretion of prison officials where security risks are posed. *Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991). An unjustified refusal to permit live testimony of a defense witness will warrant reversal of the disciplinary committee's decision. *Id.* at 619.

Upon receiving disciplinary notice, Poyner requested Young as a character witness. The request was denied because Young "would have no first hand knowledge of the incident." The disciplinary committee's decision identified, for the first time, inmate Johnson. Poyner appealed, claiming the committee denied him due process by refusing to permit him to call Johnson and Young as witnesses.[1] At the postconviction hearing, Poyner explained Johnson disliked him because of an incident involving the prison softball team. He believed Young had knowledge of the conflict between Poyner and Johnson.

No weapon was ever found in Poyner's possession. The State admits had inmate Johnson been identified in the disciplinary notice as a person with knowledge about the disciplinary matter, Poyner would have had an opportunity to call him as a witness, get a witness statement from him, or present witnesses to rebut his testimony.

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[1] In his initial appeal, Poyner reiterated his request Young be a witness. Poyner did not specifically request Johnson as a witness, but did indicate "I was unable to prepare a proper defense in that I should have heard about Johnson prior to the hearing so I could gather evidence regarding him." The ability to "prepare a proper defense" includes the ability to call Johnson as a witness or obtain a witness statement from him.

Once the disciplinary decision revealed new information, Poyner should have been permitted to call Young and Johnson as witnesses, or to obtain witness statements from them. The denial of the opportunity to call witnesses violated Poyner's procedural due process rights. Other inmates received a disciplinary notice following the July 1996 confiscation of weapons at ISP. Two inmates were granted rehearing because inmate Johnson was identified in the disciplinary decision but not the disciplinary notice. However, Poyner was not granted the same relief. We conclude the same procedure should have been followed in this case.

At oral argument, the State implied Poyner probably knew about Johnson's involvement in the alleged incident before the hearing. We disagree with the State's contention. The disciplinary notice does not indicate the specific day or time of the incident or the location within the institution where the incident allegedly occurred. The notice lacks specific facts surrounding the incident. The notice does not contain sufficient information such that Poyner would have known Johnson was involved prior to the disciplinary committee's decision.

Poyner contends the due process violations require the expungement of the disciplinary action against him. The expungement provision of the Disciplinary Policy and Procedures for the Government of the Iowa State Penitentiary Inmates Rule III (G)(2) states:

> If an alleged rule violation is not adjudicated in accordance with the procedure contained in this manual of Disciplinary Policy and Procedures, no punishment may be imposed for such rule violation, and all records of the alleged violation, including the reporting officer's incident report, shall be expunged from the inmate's treatment and legal files and from any other records which

> may be subject to review by the Board of Parole. PROVIDED HOWEVER: (a) that insubstantial and nonprejudicial deviation from these procedures shall not preclude punishment or require expungement; (b) that this rule shall not apply to any deviation from these procedures which is fully corrected during the disciplinary process or on remand following an appeal to the Warden; (c) that the rule shall not apply to any deviation from these procedures which the inmate fails to raise as an issue in an appeal to the Warden within seven days after receiving written notice of the disciplinary committee's decision. Nothing in this rule is intended to limit the availability of expungement or any other remedy as an option in cases not covered by this rule.

Disciplinary Policy and Procedures for the Government of the Iowa State Penitentiary Inmates, Rule III (G)(2) (revised May 1, 1994). The expungement rule does not apply to insubstantial and nonprejudicial errors. *Goodwin v. State*, 585 N.W.2d 749, 751 (Iowa App. 1998). Whether a deviation from the rules is substantial or insubstantial depends upon whether the applicable rule (1) directly protects the integrity of the adjudication of guilt or innocence, or (2) prevents the inmate from gaining access to evidence. *Hrbek*, 478 N.W.2d at 619.

We conclude, as in *Hrbek*, the denial of Poyner's request for witnesses, in violation of his procedural due process rights, was a substantial and prejudicial error. The deviation was not fully corrected during the disciplinary process. Therefore, the discipline should be expunged from Poyner's record. We sustain the writ and remand for an order directing the expungement of Poyner's record with regard to this case.

Confidential Information and Offer of Proof. Due to our decision to expunge the discipline against Poyner in this case, we need not address the remaining issues raised by Poyner.

WRIT SUSTAINED AND REMANDED WITH DIRECTIONS.