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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CHARLES WATKINS,)

Petitioner-Appellee,) Filed October 28, 1987

vs.) 320

STATE OF IOWA,) 7-174
86-1221

Respondent-Appellant.)

Appeal from the Iowa District Court for Lee County (No. CL 1041), R. David Fahey, Judge.

The State appeals from the district court's grant of petitioner's application for postconviction relief. **REVERSED.**

Thomas J. Miller, Attorney General, and Lucille M. Hardy and Sarah J. Coats, Assistant Attorneys General for respondent-appellant.

Michael J. Schilling of Ford Law Offices, Burlington, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ. Snell, J., takes no part.

DONIELSON, J.

The State appeals from the district court's grant of petitioner's postconviction relief, contending the district court erred in finding there was not "some evidence" on the record to support the prison disciplinary committee's findings that petitioner had violated four penitentiary rules. We reverse.

We first address the issue under consideration sua sponte whether this court has jurisdiction to consider the appeal. An order was filed August 12, 1987, requesting the parties to submit additional briefs on this issue, which have now been reviewed by this court.

Rule 5(a), Iowa R. App. P., provides that an appeal must be taken within 30 days from the entry of judgment. An appeal is taken and perfected by filing a notice with the clerk of court where the judgment was entered. Iowa R. App. P. 6(a). Rule 6(a) contains three other requirements: (1) the appellant shall serve the notice on the other party; (2) the notice presented to the clerk of the trial court shall be accompanied by a proof of service; and (3) promptly after filing the notice of appeal with the trial court clerk, appellant shall deliver to the supreme court clerk a copy of the notice.

In this case judgment was rendered by the district court on July 11, 1986. On August 8, 1986, the State served its notice of appeal on opposing counsel and mailed the notice of appeal to the district court. An "informational copy of notice of appeal" was docketed with the supreme court clerk on August 8. The present notice of appeal was not filed in the district court until August 21, 1986, approximately ten days after the appeal should have been filed in order to be timely.

The State argues that it "did everything within its power to perfect the appeal in a timely fashion but due to circumstances beyond its control, the document did not reach its destination timely." An affidavit was attached to

the State's brief attesting to the mailing of the notice of appeal on August 8, 1986, to the district court.

Mandatory filing of a notice of appeal with the district court clerk is timely if service is timely and actual filing is completed within a reasonable time thereafter. Iowa R. Civ. P. 82(d); Gordon v. Wright Co. Bd. of Sup'rs, 320 N.W.2d 565, 567 (Iowa 1982). The term "reasonable" allows consideration of all the existing circumstances. Cook v. City of Council Bluffs, 264 N.W.2d 784, 787 (Iowa 1978). Under similar circumstances in Cook, 264 N.W.2d at 787, a 26-day delay between service and filing was "near the line" but considered reasonable.

Examining all of the existing circumstances, we note that (1) the State desired to appeal and did all in its power to perfect its appeal; (2) the State timely served its notice of appeal on Watkins on August 8, 1986; (3) the supreme court docketed its "informational notice of appeal" on August 8, 1986; (4) an affidavit was filed stating the notice of appeal was mailed on August 8, 1986 to the Lee County District Court Clerk; (5) there appears to be no negligence on the part of the State; and (6) the notice of appeal was filed in district court on August 21, 1986, approximately 40 days after the lower court's judgment.

We find that actual filing of the notice of appeal with the clerk of the district court was completed within a reasonable time after the timely service (approximately 13 days). We further find that Watkins has not been misled or prejudiced by the technical delay in the filing of the notice of appeal. Thus, we hold that we have jurisdiction of the appeal. We therefore now consider this case on the merits.

On August 8, 1984, a prison disciplinary committee found petitioner guilty of four penitentiary rule violations (assault, threats, disruptive conduct and attempt) and sentenced him to ten days detention, one year of administrative

segregation, loss of all good time, cancellation of his honor contract, and invocation of any suspended disposition. The committee based its decision upon several memorandums and a signed statement from a confidential inmate informant and the results of a P.S.E. examination passed by that informant indicating the truthfulness of his responses. The alleged assault was not witnessed by any staff members; there was no medical evidence to confirm the fact an assault had occurred; and Watkins denied any knowledge of the assault. The warden's executive assistant denied petitioner's appeal on August 13.

On August 29, petitioner filed an application for postconviction relief, challenging, inter alia, the sufficiency of the evidence against him. The district court granted petitioner's application based upon a lack of "substantial evidence" in support of the committee's decision. On appeal by the State, this court vacated the district court's ruling and remanded with directions that the district court should apply the "some evidence" or "any evidence" standard mandated in Wilson v. Farrier, 372 N.W.2d 499, 502 (Iowa 1985). On July 11, 1986, the district court again granted the petitioner's application, ruling that a signed statement by a confidential informant and the P.S.E. examination did not constitute "some evidence" in support of the committee's decision. This appeal by the State followed.

There is but one issue for this court to decide: Did the district court err in concluding there was not "some evidence" to support a prison disciplinary committee's finding that petitioner had violated four penitentiary rules?

Our supreme court set out the law in Wilson, 372 N.W.2d at 501, to determine the minimum record required to support a disciplinary committee's decision:

> We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced. . . ." Ascertaining whether this standard

> is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context.

Id., citing Walpole v. Hill, 472 U.S. 445, 455, 105 S.Ct. 2768, 2774-75, 86 L.Ed.2d 356, 365 (1985).

The role of the district court is not to afford a de novo review of the disciplinary board's factual findings. Willis v. Ciccone, 506 F.2d 1011, 1018 (8th Cir. 1974). 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. Walpole, 472 U.S. at 455, 105 S.Ct. at 2774, 86 L.Ed.2d at 365. Otherwise, the court would assume the task of retrying all prison disciplinary disputes. Willis, 506 F.2d at 1018. A modicum of evidence, even if it is meager and is not direct, is enough. Walpole, 472 U.S. at 455, 105 S.Ct. at 2774, 86 L.Ed.2d at 364.

The State argues that the "some evidence" test should be interpreted to mean if any evidence at all exists that Watkins assaulted another inmate, the decision of the disciplinary committee should be affirmed and the trial court's granting Watkins postconviction relief should not be granted. The State relies on the language in Walpole wherein the court states that the relevant question is "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." (Emphasis added). Id., at 455.

105 S. Ct. at 2774, 86 L. Ed. 2d at 365. Petitioner contends an "any evidence" test was not sanctioned by Walpole.

We do not need to decide whether the "some evidence" test is consistent with a test for "any evidence," which petitioner asserts is the fighting issue in this case. Regardless which characterization is used as the standard, we need to determine whether the evidence is of such a quality that the decision is neither arbitrary nor without support and that the decision has some basis in fact, in line with those principles earlier outlined in Wilson, 372 N.W.2d at 501. We also take note of those policy considerations discussed in Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), as follows:

> [T]here would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account . . . .

Id. at 563, 94 S. Ct. at 2978, 41 L. Ed. at 955.

The State argues that the prison disciplinary committee had six pieces of evidence upon which to adjudicate the guilt of Watkins:

> a. An inmate memo (unsolicited) from a confidential informant who was personally present at the time of the assault.
>
> b. A second memo, signed by the same confidential informant which elaborated on the facts given in the first memo, including the date, time, and exact place of the assault.
>
> c. The signed transcript of a statement given to investigator Lynch by the same confidential informant which included specific answers to specific questions asked by investigator Lynch.
>
> d. The further correspondence addressed to the investigators' office from the same confidential informant concerning additional problems which were occurring.
>
> e. The results of the P.S.E. examination given to the confidential informant by Major Harry Grabowski.

f. The confidential informant passed the P.S.E. examination.

The reasons given by the disciplinary committee for believing the confidential informant were:

(1) committee unaware of motivation on part of informant to falsify;

(2) statement sounds credible under circumstances;

(3) person taking statement believed information to be reliable;

(4) informant tested with polygraph.

The trial court made the following conclusions: (1) The evidence was nothing more than an accusation by one convicted felon against another. (2) Absent are any of the "indicia of reliability" needed to bolster confidential informants' stories. (3) The four reasons the committee chose to believe the informant were either nonsensical or false. (4) There was little knowledge about the ability of a P.S.E. examination to detect truth or falsity. (5) The only evidence available was the bald, totally uncorroborated accusation of the confidential informant.

Specifically, the trial court ruled that:

> A signed statement by an inmate accusing a fellow inmate (no matter how oft repeated) cannot, standing absolutely alone, constitute sufficient evidence to support a finding of the disciplinary violation. The accusation must be supported by some corroborative evidence to insure that the ultimate disciplinary sanction does not rest solely upon the fertile imagination of an accusing inmate.

We find that the trial court erred in assessing the credibility of the confidential informant and in weighing the evidence, in contravention to the law as outlined in Walpole and Wilson relating to the standard of evidence required. "Some" evidence or "any" evidence does not need corroboration by other evidence, which is what the trial court was requiring.

Wilson, 372 N.W.2d at 502, involved similar circumstances. The court held in that Wilson a confidential informant's statement standing alone was

sufficient evidence to uphold the disciplinary committee's decision. "The Committee had the right to rely on the information from the informant and to disbelieve the Petitioner's denial." Id. at 502.

Even if reliability could be considered, the investigator who obtained the statement was in a position to assess the informant's credibility. It was his opinion that the information was reliable. The committee is not precluded from adopting the investigator's finding of reliability. Niday v. State, 353 N.W.2d 92, 95 (Iowa 1984). The trial court was concerned with the possibility that the confidential informant had a motive to lie. However, we are also aware of the fact that the informant had a motive not to lie, i.e., retaliation. See Wolff, 418 U.S. at 562, 94 S. Ct. at 2978, 41 L. Ed. at 954.

We find that the disciplinary committee's decision was based on some evidence; i.e., an informant's statements which were thought to be reliable and corroborated by a P.S.E. examination, albeit the foundation of its validity is somewhat weak. The trial court also appeared to be saying that because the confidential informant was a convicted felon, he should be disbelieved. If we were to adopt this reasoning, prison officials would be severely hampered in administering quick and decisive disciplinary action when the safety of other inmates is involved.

We therefore reverse the decision of the district court and uphold the decision of the disciplinary committee. We hold there was sufficient evidence in the record to support the prison disciplinary committee's decision.

REVERSED.

Oxberger, C.J., and Hayden, J., specially concur.

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The Iowa Supreme Court has not decided the issue of the admissibility of unstipulated polygraph tests. I find it unnecessary to cite the polygraph test of some evidence in this case.

Hayden, J., joins this special concurrence.