IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-470 / 94-1173

HERBERT SPELLER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Lee County, D. B. Hendrickson, Judge.

Speller appeals the denial of his application for postconviction relief.

AFFIRMED.

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

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

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

PER CURIAM

Herbert Speller was disciplined for failing to obey a lawful order. On appeal to the warden, Speller contended he was denied due process because he was not allowed to have a live witness. The warden denied the appeal. Speller then appealed to the department of corrections, but did not raise the witness issue. On appeal, Speller's claims were again rejected.

Speller then filed an application for postconviction relief in which he argued: (1) he was inappropriately denied the right to call live witnesses; (2) there was insufficient evidence to support the decision; and, (3) the penalty imposed was unduly harsh. After a hearing, the district court denied the application. The court found Speller had defaulted on the witness issue because he had not raised it before the department of corrections.

Speller appeals. He contends the State did not argue a failure to exhaust administrative remedies and, therefore, the court erred in failing to reach the merits of the complaint. The State responds by arguing procedural default and failure to exhaust administrative remedies are different principles and the district court properly held Speller's claim was not preserved.

I. Standard of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). When a postconviction petitioner

asserts a violation of constitutional rights, however, we make our own evaluation based on the totality of the circumstances. *Id.* Here Speller asserts his due process rights were violated. As a result, our review of Speller's first claim is denovo; review of the other two issues is for errors at law.

"We are obligated to affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the court based its holding." *Citizens First Nat'l Bank v. Hoyt*, 297 N.W.2d 329, 332 (Iowa 1980). This court declines to address the procedural default questions raised in this appeal and affirms on the merits.

II. Due Process Rights.

Prison disciplinary proceedings are not part of criminal prosecution, and full panoply of rights due a defendant in such proceedings does not apply. *Mahers v. State*, 437 N.W.2d 565, 567-68 (Iowa 1989). *Wolff*, however, requires certain minimal procedural safeguards to protect against a due process violation in disciplinary proceedings. Wolff, 418 U.S. 539, 571-72, 94 S.Ct. 2963, 2980, 41 L. Ed. 2d 935, 960 (1974).

Among the limited rights reserved to inmates in prison disciplinary actions is the right to call defense witnesses. *Hrbek v. State*, 478 N.W.2d 617, 619 (Iowa 1991). 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. *Id.* An unjustified

refusal to permit live testimony of a defense witness will warrant reversal of the disciplinary committee's decision. *Id.*

After Speller was charged with failure to obey a lawful order, an investigator spoke with Speller to get his side of the story and to identify possible witnesses Speller may want at the hearing. Speller told this investigator he wanted his neighbor as a witness. The very same day the investigator got a written witness statement from inmate Rekshynshi, Speller's neighbor. The neighbor, however, was not allowed to testify at the hearing. Speller alleges his due process rights were violated by the failure to allow a live witness at his hearing.

In this case we determine there was not an unjustified refusal to allow live testimony. Evidence indicates Speller may not have requested live witnesses in a timely manner. Apparently, the administrative law judge did not receive Speller's memo requesting live witnesses until after the hearing was held. Clearly, the failure to grant live witnesses under such circumstances is justified.

Furthermore, the procedures followed did assure fundamental fairness in the disciplinary proceeding. The committee based its decision on the written report of the guard and the statements of Speller *and* his neighbor. The committee did not base its decision on an incomplete record.

III. Sufficiency of the Evidence.

A disciplinary decision should be upheld if there is some evidence to support it. *James v. State*, 479 N.W.2d 287, 291 (Iowa 1991). The threshold for determining whether some evidence exists is low and can be satisfied by the report of a correctional officer. *Mahers v. State*, 437 N.W.2d 565, 569 (Iowa 1989). We believe there is "some evidence" to support the disciplinary action in this case.

Speller was disciplined for violating rule 23 (disobeying a lawful order). The supreme court discussed prison rule 23 in *Harper v. State*, 463 N.W.2d 418, 420-21 (Iowa 1990). In *Harper*, as in *Wilson v. Farrier*, 372 N.W.2d 499, 501 (Iowa 1985), the supreme court required there be evidence an order was given by a person in authority and the order was communicated to the inmate. *Giles v. State*, 511 N.W.2d 622, 626 (Iowa 1994); *Harper*, 463 N.W.2d at 420-21.

In the case at bar, these elements have been satisfied. Finding Speller disobeyed a lawful order was supported by a correctional officer's disciplinary report. A guard walking by the cell "observed inmate Speller and Rekshynski passing an item that appeared to be candy." The guard then ordered Speller to hand the item out. Speller refused.

The disciplinary committee correctly based their decision on the written disciplinary report of the correctional officer and also considered the statements of

Speller and Rekshynski. We are satisfied the evidence in this case was sufficient to show Speller violated disciplinary rule 23

IV. Severity of the Penalty.

As a result of this rule violation, the committee imposed a sanction of fifteen days of disciplinary detention, loss of sixteen days good conduct time. Speller contends the disciplinary action taken by the State was excessive and unduly harsh. We disagree.

In holding the department of corrections had authority to impose particular sanctions, our supreme court stated, "it is appropriate for courts to recognize the unique problems of penal environments by invoking a policy of judicial restraint. We should accord prison administrators wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." We hold the department had authority to impose the sanction of fifteen days disciplinary detention, loss of sixteen days good conduct time.

V. Conclusion.

In summary, we determine Speller's due process rights were not violated when he was denied the right to call a live witness. There was sufficient evidence to support the decision Speller had failed to obey a lawful order. Furthermore, the penalty imposed on Speller was not unduly harsh.

AFFIRMED.