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DISTRICT IV

December 23, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2173 State ex rel. Marcus Deloney v. Robert Humphreys
(L.C. # 2018CV2725)

Before Blanchard, Kloppenburg, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Marcus Deloney appeals a circuit court order affirming a prison disciplinary decision. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

This case arises out of a Department of Corrections (DOC) conduct report charging that Deloney, an inmate at Kettle Moraine Correctional Institution (KMCI), violated WIS. ADMIN. CODE §§ DOC 303.36 and 303.43 (through November 2020), through "[e]nterprises and [f]raud," and possession of intoxicants.[2] The charges arose from an investigation into drug trafficking within KMCI. The investigation gave rise to statements from two confidential informants who gave corroborating accounts of Deloney's alleged involvement in drug trafficking. After a disciplinary hearing, a DOC hearing committee found Deloney guilty of both charges. Deloney appealed to Warden Robert Humphrey, who affirmed the decision. Deloney then sought certiorari review in the circuit court. The circuit court affirmed the DOC's decision, and Deloney now appeals.

"Judicial review on certiorari is limited to whether the agency's decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive, and the evidence of record substantiates the decision." ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). Here, Deloney argues that the evidence was insufficient to support a finding of guilt, that the hearing committee should have considered the credibility or reliability of the confidential informants, and that he was denied the right to call witnesses and present exculpatory evidence. For the reasons discussed below, we reject each of these arguments.

Turning first to Deloney's sufficiency of the evidence argument, we note that the test on certiorari for sufficiency of the evidence is the substantial evidence test. ***Stacy v. Ashland Cnty.***

[2] Unless otherwise noted, all references to the Wisconsin Administrative Code are to the November 2020 register, which was in effect for the cited code sections at all times relevant to this action.

Dep't of Public Welfare, 39 Wis. 2d 595, 602, 159 N.W.2d 630 (1968). The substantial evidence test requires that the agency have only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" ***Id.*** at 603 (quoted source omitted). Under WIS. ADMIN. CODE § DOC 303.80(6)(c), a finding of guilt is merited when a hearing officer finds it more likely than not that a disciplinary violation has occurred. Here, the certiorari record contains substantial evidence to support the hearing committee's finding of guilt on both charges.

Under WIS. ADMIN. CODE § DOC 303.43, "any inmate who possesses any intoxicating substance is guilty of possession of intoxicants." Deloney asserts in his appellant's brief that no drugs were found on his person or in his cell and that, therefore, the evidence does not support a finding of guilt for possession of intoxicating substances. We are not persuaded. Under WIS. ADMIN. CODE § DOC 303.02(27), "possession" is defined as "on one's person, in any area to which the inmate has been assigned, or under one's control." The Wisconsin Supreme Court has held that an individual may "control" an object "through the exercise of authority, direction, or command." ***State v. Brantner***, 2020 WI 21, ¶15, 390 Wis. 2d 494, 939 N.W.2d 546.

Here, two confidential informants alleged that Deloney was involved in bringing drugs into KMCI and directing the distribution of those drugs. Both informants stated that Deloney and another inmate, Fayne, used their girlfriends to smuggle drugs into the institution. In his own statement at the hearing, Deloney acknowledged that his girlfriend and Fayne's girlfriend rode together on two occasions for visits to KCMI. One of the informants identified Deloney as responsible for giving the drugs "to other guys" within the institution. In light of these allegations, we are satisfied that the evidence provided a reasonable basis for DOC to conclude that it was more likely than not that Deloney was guilty of possession of intoxicating substances.

Substantial evidence also supports DOC's finding that Deloney was guilty of violating WIS. ADMIN. CODE § DOC 303.36(1), which provides that an inmate is guilty of "enterprises and fraud" if he or she "engages in a business or enterprise, whether or not for profit" or "sells anything except as specifically allowed under other sections." The conduct report and the confidential informant statements describe a drug trafficking scheme that involved several units within the institution and several individuals. One of the informant statements described the payment method for the drugs, and referred to the drug trafficking scheme as Deloney and Fayne's "business." Deloney argues that the evidence is insufficient because there is no indication that he was involved directly with the exchange of money. However, a violation of § DOC 303.36(1) does not require the direct exchange of money; it is enough to be engaged in a "business or enterprise." The certiorari record contains substantial evidence to support the DOC's conclusion that Deloney was engaged in the business or enterprise of drug trafficking within KMCI.

We turn next to Deloney's argument that the statements of the confidential informants were not credible or reliable. It is not within the purview of this court to second guess an agency's credibility determinations. "The credibility of the witnesses and the persuasiveness of their testimony are for the agency to determine." ***Stein v. State Psychology Examining Bd.***, 2003 WI App 147, ¶33, 265 Wis. 2d 781, 668 N.W.2d 112. Additionally, WIS. ADMIN. CODE § DOC 303.84(6)(c) provides that "[t]wo confidential statements by different persons may be used to corroborate each other" and may be considered by the hearing officer. The Wisconsin Supreme Court has held that, even without more, two statements by confidential informants that corroborate one another are sufficient evidence of guilt to satisfy due process in a prison disciplinary proceeding. ***Jackson v. Buchler***, 2010 WI 135, ¶¶56-57, 330 Wis. 2d 279, 793

N.W.2d 826. Here, as in ***Jackson***, DOC properly considered and relied upon corroborating statements by confidential informants in reaching its decision.

Next, we address Deloney's argument that he was denied his due process right to call witnesses and present evidence. An inmate's due process rights in a prison disciplinary proceeding are "'subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.'" ***Id.***, ¶48 (quoted source omitted). Under WIS. ADMIN. CODE § DOC 303.84(4), DOC may deny an inmate's request for a witness if any of the following circumstances exist: (1) potential harm to the witness; (2) the witness is unavailable; (3) the witness's testimony is irrelevant to the question of guilt or innocence; or (4) testimony is cumulative of other evidence and would unduly prolong the hearing. Evidence also may be excluded if it is unreliable, marginally relevant, or unduly cumulative or repetitious. WIS. ADMIN. CODE § 303.87(2)(b).

Here, Deloney sought to call inmate Fayne as a witness to testify that Deloney never spoke to Fayne other than briefly when they had visitors. Deloney also sought to call as a witness an inmate known as "Lanky." Deloney wanted Lanky, alleged to be a known drug user, to testify regarding whether or not Deloney was a "go to guy" for obtaining drugs. In addition, Deloney requested permission to introduce evidence of drug test results, to show that Deloney never had a "dirty" urinalysis. The hearing committee denied Deloney's requests on grounds that the proposed testimony posed a risk of harm to the witnesses, and that the evidence Deloney sought to introduce would be irrelevant or cumulative of other evidence. We are satisfied that this decision reflects a proper exercise of DOC's discretion.

"Admission of evidence by an administrative agency is a matter of discretion." ***Stein***, 265 Wis. 2d 781, ¶28. With respect to witness Fayne, DOC properly disallowed his testimony because it was cumulative of testimony given by Deloney that he never spoke to Fayne other than "saying what['s] up on a visit." The proposed testimony from Lanky also was properly excluded. Even if Lanky could have testified that he never obtained drugs from Deloney, such testimony would have been irrelevant to Deloney's charges. Deloney was not charged with selling drugs directly to Lanky or any other inmate. Rather, he was named in the conduct report as one of several inmates involved in a conspiracy that was responsible for "the introduction, concealment and distribution of illegal drugs into KMCI." The hearing committee also properly exercised its discretion when it denied Deloney's request to introduce results of his drug test. The drug tests results were not relevant because Deloney was not charged with using intoxicants, but rather with possession of intoxicants. In fact, one of the confidential informants stated that Fayne didn't use drugs, or used them only "once in a while" because he didn't "mix business with pleasure." Upon our review of the certiorari record, we conclude that DOC properly exercised its discretion in denying Deloney's requests to introduce testimony from Fayne and Lanky, and his request to present evidence of his drug test results.

Finally, we address Deloney's argument that the circuit court erred when it denied his request to supplement the agency record with a police detective's report that was prepared after two inmates were believed to have overdosed on suspected fentanyl or heroin at KCMI. The detective's report mentions several KCMI inmates by name as having suspected connections to the distribution of drugs at KCMI, but does not mention Deloney by name. Deloney asserts that the report is exculpatory, citing ***Brady v. Maryland***, 373 U.S. 83 (1963), and should have been made part of the certiorari record. However, as the State points out in the respondent's brief,

Deloney's reliance on ***Brady*** is misplaced because there is no Wisconsin precedent that extends ***Brady*** to prison disciplinary actions. *See* ***Jackson***, 330 Wis. 2d 279, ¶71. Moreover, we are not persuaded that the detective's report is exculpatory simply because it does not mention Deloney. Accordingly, the circuit court properly exercised its discretion in denying Deloney's request to supplement the certiorari record.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals