IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK A. COSTANTINO,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 51934

FILED

FEB 06 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant Derek Costantino's post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

On March 21, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 16, 2006, appellant filed a motion requesting the district court to order the State to produce a copy of the transcript from the disciplinary hearing at issue, and a reply, with supporting exhibits, to the State's answer. The district court ordered the State to produce the transcript, but concluded that appellant's reply was unauthorized pursuant to NRS 34.750, and ordered it stricken from the record. On May 4, 2007, appellant filed a motion requesting the district court to accept the exhibits filed as part of his reply, and to order the State

to produce a full copy of his prison discipline file. On May 21, 2008, the district court denied appellant's May 4, 2007 motion, and denied appellant's habeas corpus petition. Appellant filed a "request for rehearing" on May 29, 2008. This appeal followed.[1]

In his petition, appellant challenged a May 26, 2004 prison disciplinary hearing that resulted in placement in disciplinary segregation, and forfeiture of statutory good time credits.[2] The disciplinary hearing followed an incident in which appellant and several others attacked another inmate with a "prison made weapon" immediately after "pill call." As a result, the hearing officer found appellant guilty of MJ2 (assault); MJ3 (battery); and MJ28 (organizing, encouraging, or

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[1]To the extent appellant appeals denial of his May 4, 2007 motion, we conclude that the district court did not abuse its discretion in denying the motion. To the extent that appellant appeals the denial of his motion for rehearing, this court lacks jurisdiction to consider this portion of the appeal, as no appeal may be made to this court from an order denying rehearing in a habeas proceeding. Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995).

[2]In his petition, it appears that appellant also challenged his placement in administrative segregation prior to the disciplinary hearing. Neither a challenge to placement in administrative or to disciplinary segregation is cognizable in a habeas corpus petition. See Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also Sandin v. Conner, 515 U.S. 472 (1995) (holding that liberty interests protected by the Due Process Clause will generally be limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life or action affecting the duration of a prisoner's sentence). The forfeiture of statutory good time credits may be reviewed as the forfeiture of such credits may affect the length of time served. See Sandin, 515 U.S. at 477-78.

participating in a work stoppage or other disruptive demonstration or practice).

The United States Supreme Court has held that minimal due process in a prison disciplinary hearing requires: (1) advance written notice of the charges; (2) written statement by the fact finders of the evidence relied upon and the reasons for disciplinary action; and (3) a qualified right to call witnesses and present evidence. Wolff v. McDonnell, 418 U.S. 539, 563-69 (1974). The United States Supreme Court has also recognized that due process requires an impartial decision maker. Id. at 571. The right to counsel is not required in prison disciplinary hearings; however, if an inmate is illiterate or the issues are complex, an inmate should be allowed to seek aid from another inmate or staff. Id. at 570; see also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976). Further, the requirements of due process are met if some evidence supports the decision by the prison disciplinary committee. Superintendent v. Hill, 472 U.S. 445, 455 (1985).

First, appellant claimed that his due process rights were violated because prison officials provided him with insufficient notice of the disciplinary hearing. A "Notice of Charges" was served to appellant on May 8, 2004. The disciplinary hearing did not take place until May 26, 2004. This notice indicated the charges appellant faced, and included a factual summary of the events giving rise to the charges. We conclude that this notice satisfied the requirements of due process outlined in Wolff. 418 U.S. at 564. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his due process rights were violated because he was not allowed to call witnesses or present other evidence at the disciplinary hearing. While inmates enjoy a qualified right to call witnesses in prison disciplinary hearings, prison officials have broad discretion to "keep the hearing within reasonable limits," and may refuse to call witnesses for reasons of institutional security, lack of necessity, or lack of relevance. Wolff, 418 U.S. at 566. In this case, the hearing officer concluded that any testimony by appellant's proposed witnesses would be irrelevant. Given the other evidence presented against appellant, we conclude that the hearing officer did not abuse his discretion in refusing to call appellant's proposed witnesses. Therefore, we conclude that the district court did not err in denying this claim.

Third, it appears that appellant also argued that insufficient evidence existed to support the charges against him. As stated above, the requirements of due process are met if some evidence supports the decision by the prison disciplinary committee. Hill, 472 U.S. at 455. The written report of the hearing officer indicated that he based his decision on the written report of the sergeant on duty. We conclude that this evidence was sufficient to meet the requirements of due process. Therefore, the district court did not err in denying this claim.

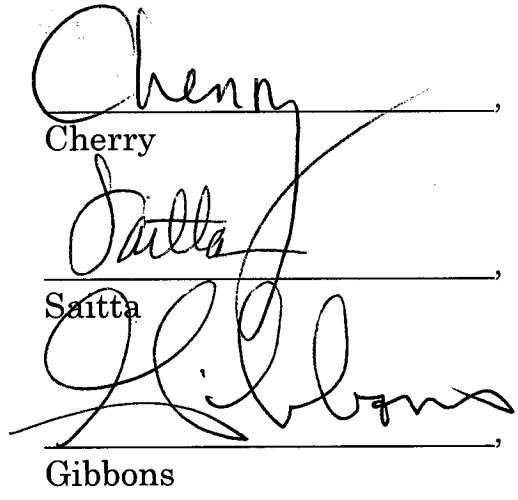
Fourth, appellant argued that the disciplinary hearing violated his Fifth Amendment right against self incrimination, and that he was not properly advised of his rights pursuant to Miranda v. Arizona. 384 U.S. 436 (1966). As established by the United States Supreme Court, prison disciplinary proceedings are civil, not criminal in nature. Baxter, 425 U.S. at 316. Therefore, the full panoply of rights provided by the Fifth

Amendment and the interpreting case law, such as Miranda, do not apply. Id. As established in Baxter, the Fifth Amendment does not "forbid[] drawing adverse inferences against an inmate from his failure to testify [in a prison disciplinary hearing]," so long as that silence does not form the sole basis for the hearing officer's decision. Id. at 316-17. Similarly, while any non-Mirandized statements made in a disciplinary hearing are likely not admissible in an ensuing criminal proceeding, prison officials are not required to advise inmates of their full Miranda rights prior to a disciplinary hearing. Id. at 315 (noting that "[t]he Court has never held, and we decline to do so now, that the requirements of [Miranda] must be met to render pretrial statements admissible in other than criminal cases"). In this case, the proceeding against appellant was a prison disciplinary hearing, and civil in nature. No party interfered with appellant's choice to remain silent, and the decision of the hearing officer was based on evidence beyond appellant's silence. Accordingly, we conclude that the district court did not err in denying this claim.

Fifth, appellant argued that the hearing violated his Sixth Amendment right to assistance of counsel. As indicated above, the right to counsel is not required in prison disciplinary hearings unless an inmate is illiterate or the issues are complex, in which case the inmate should be allowed to seek aid from another inmate or staff. Wolff, 418 U.S. at 570; Baxter, 425 U.S. at 315. Based on his petition and other filings before the district court, it appears that appellant fluently reads and writes the English language. The charges in this case involved simple assault and battery, and were not overly complex. Therefore, we conclude that the district court did not err in denying this claim.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Dan L. Papez, District Judge
Derek A. Costantino
Attorney General Catherine Cortez Masto/Carson City
White Pine County Clerk