IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MICHAEL AUER,
Appellant,
vs.
THE STATE OF NEVADA; WARDEN BILL DONAT; JAMES BACA, A.W.P.; ADAM WATSON, A.W.O.; DONALD HELLING, GRIEVANCE COORDINATOR; ADOLPH STANKUS, SERGEANT; AND JOSH RODGERS, SENIOR CORRECTIONAL OFFICER,
Respondents.

No. 52512

FILED

MAR 10 2009

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; William A. Maddox, Judge.

On March 12, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court challenging a prison disciplinary hearing, which resulted in a finding of guilt of MJ2 (Assault), MJ10 (Gang Activities), and MJ25 (Threats). Appellant was sanctioned as follows: (1) loss of phone and canteen privileges, (2) 24 months in disciplinary segregation, (3) restitution to be determined, and (4) forfeiture of 100 days of statutory good time credits. The State opposed the petition. Appellant submitted an amended 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 September 3, 2008, the district court denied appellant's petition and

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denied appellant permission to amend the original petition. This appeal followed.[1]

In his petition, appellant claimed that he was deprived of due process at the prison disciplinary hearing that resulted in the loss of 100 days of statutory good time credits.[2]

"Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). 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 of 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. Id. at 563-69. The Wolff Court declined to require confrontation and cross-examination in prison disciplinary proceedings because these procedures presented "greater hazards to institutional interests." Id. at 567-68. Although counsel is not required in a prison disciplinary hearing, the Wolff Court suggested that where there is an illiterate inmate or complex issues are involved, the inmate "should be free to seek the aid of a fellow inmate, or if that is

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[1]We conclude that the district court did not abuse its discretion in denying appellant permission to amend the petition. NRS 34.750(5).

[2]To the extent that appellant challenged his placement in disciplinary segregation, restitution or the loss of privileges, appellant's challenge was not cognizable in a petition for a writ of habeas corpus. See Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also Sandin v. Conner, 515 U.S. 472, 486 (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).

forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." Id. at 570. The requirements of due process are further met if some evidence supports the decision by the prison disciplinary hearing officer. Superintendent v. Hill, 472 U.S. 445, 455 (1985); see also N.D.O.C. A.R. 707 (3)(e)(11) (Inmate Disciplinary Manual).

First, appellant claimed that the notice of charges erroneously referred to a July 28, 2007 incident that he had previously been found not guilty of committing. Appellant failed to demonstrate any error in this respect. The inclusion of this information in the notice of charges did not violate any protected due process right. Appellant was provided with timely notice of the charges. Therefore, we conclude that the district court did not err in denying this claim, and we affirm the denial of this claim.

Second, appellant claimed that he should have received the assistance of inmate substitute counsel or staff because he was illiterate and because of the complexity of the issues. Appellant claimed that he had only a fifth-grade education. Appellant requested assistance on the form for the classification hearing that related to the charged incident, but the disciplinary hearing form was blank regarding a request for assistance.

The district court denied this claim on the basis that no right to inmate substitute counsel or staff assistance existed. This conclusion was not an accurate statement of the law. Although there is no right to counsel, as stated earlier, an illiterate inmate should be free to seek assistance within the bounds permitted by Wolff. Based upon the record before this court, we cannot affirm the district court's decision to deny this claim. The prison disciplinary hearing form does not provide an adequate answer to this question as the section relating to counsel is blank. The prison disciplinary hearing form indicates that the proceedings were

recorded, but it does not appear that the recorded proceedings were provided to the district court or consequently reviewed by the district court. Thus, we reverse the denial of this claim and remand this matter to the district court for further consideration of this claim after a review of the recorded proceedings.[3]

Third, appellant appeared to challenge whether there was some evidence to support the finding of guilt. Specifically, appellant claimed that in-camera evidence was erroneously considered as the in-camera evidence was not the result of information from a confidential informant. Because the information was not disclosed, appellant claimed that he was not able to refute the evidence. Appellant noted that the disciplinary hearing form was blank regarding the use of a confidential informant.

Although the requirements of due process are met if some evidence is presented, in the instant case, the record before this court does not permit a meaningful review of this issue. As noted above, the recorded proceedings were not part of the record on appeal. Further, the prison disciplinary hearing form, attached by appellant to his petition, does not clearly set forth the evidence relied upon in reaching the decision. Notably, while the section labeled "Institution Presentation" contains a written statement, the section labeled "Evidence Relied Upon/Comments" does not appear to have been utilized. As noted above, minimal due process requires the fact finder provide a written statement of the

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[3]The district court may conduct an evidentiary hearing on this issue if the district court determines that an evidentiary hearing is required to resolve this issue. NRS 34.770; Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The district court may also consider whether post-conviction counsel should be appointed in the instant case. NRS 34.750.

evidence relied upon. It further does not appear that the in-camera evidence was provided to the district court for a determination of whether it provided some evidence, but also whether the evidence was properly presented in-camera. Absent information coming from a confidential informant, it is unclear what authority permits the prison to present its case through the use of in-camera evidence.[4] If the in-camera evidence related to information from a confidential informant, the prison disciplinary hearing form does not indicate that the prison disciplinary hearing officer made determinations regarding reliability and safety as that portion of the form is blank. See Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987); N.D.O.C. A.R. 707(9). Meaningful review is simply not possible with the record as it exists at this time. Thus, we reverse the denial of this claim and remand this matter to the district court for further consideration of this claim after a review of the recorded disciplinary hearing proceedings and the in-camera evidence.[5]

Finally, appellant challenged the grievance process and suggested the prison disciplinary hearing was a pretext to allow the alleged victim to be transferred to a conservation camp. The district court

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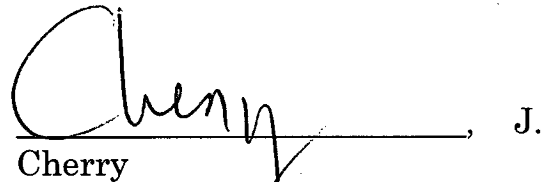
[4]Even assuming that in-camera evidence was permitted in the instant case, it is not clear that appellant was provided a summary of the evidence. See generally N.D.O.C. A.R. 707 (9)(E)(1) (providing that the prison disciplinary hearing officer should to the extent possible disclose the details of the testimony or statements of a confidential informant).

[5]The district court may conduct an evidentiary hearing on this issue if the district court determines that an evidentiary hearing is required to resolve this issue. NRS 34.770; Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). The district court may also consider whether post-conviction counsel should be appointed in the instant case. NRS 34.750.

correctly determined that these issues were not cognizable, and therefore, we affirm the denial of these claims.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[6]



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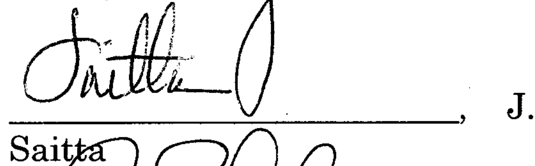

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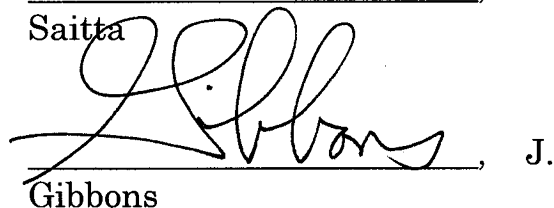

_______________________, J.
Gibbons

cc: First Judicial District Court Dept. 2, District Judge
John Michael Auer
Attorney General Catherine Cortez Masto/Carson City
Carson City Clerk

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[6]We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.