

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN WITHEROW,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
DAVID MELIGAN,
Respondent.

No. 38764

FILED

OCT 18 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Schank*
DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On May 31, 2000, July 26, 2000, and July 31, 2000, appellant filed three proper person post-conviction petitions for writs of habeas corpus regarding three separate prison disciplinary hearings in the district court.¹ Appellant also filed a motion for determination of jurisdiction. The State opposed the petitions and the motion. On October 19, 2001, the district court denied appellant's petitions. This appeal followed.

In all three of appellant's petitions, he claimed that his due process rights were violated at his prison disciplinary hearings, where he was referred for the loss of statutory good time credits, placed in disciplinary segregation, and lost many prison privileges, for various

¹On August 8, 2000, the district court ordered that appellant's three petitions be consolidated.

reasons. When a prison disciplinary hearing results in the loss of statutory good time credits, the U.S. Supreme Court has held that a prisoner's due process rights entitle him to (1) advance written notice of the charges, (2) a qualified opportunity to call witnesses and present evidence when the permission to do so would not be unduly hazardous to the institutional safety and goals, and (3) a written statement by the fact-finder stating the evidence relied upon.² In addition, the disciplinary board's decision must be supported by some evidence.³

In his first petition, appellant raised eight claims relating to his February 4, 2000, prison disciplinary hearing where he was found guilty of MJ-45, possession/use of a controlled substance. As a result of the hearing, appellant lost 60 days of statutory good time credits, was placed in austere housing for 90 days, and lost 30 days of visits, canteen privileges, television, and telephone use. Appellant claimed that he was denied due process at his disciplinary hearing when: (1) the standard of proof used at the hearing to determine his guilt was some evidence instead of a preponderance of the evidence standard; (2) the respondent failed to permit appellant to present relevant evidence and witnesses in support of his defense which included employees of the lab that tested appellant's urine and doctors who were experts in urine testing procedures all who could have testified to the fact that appellant's urine test was positive for drugs because he was taking cold/flu medication; (3) the respondent

²See Wolff v. McDonnell, 418 U.S. 539, 563-66 (1974); Superintendent v. Hill, 472 U.S. 445, 454 (1985).

³See Hill, 472 U.S. at 454.

refused to provide him with the operating manual of the machine used to test his urine sample for drugs; (4) the respondent failed to establish an adequate chain of custody for his urine sample; (5) the respondent conducted an ex-parte investigation and he did not receive advanced notice of a witness; (6) the respondent refused to allow him to present certain witnesses at the hearing; (7) the respondent failed to deliver a fair and impartial disciplinary decision; and (8) appellant was allegedly denied the right to be free from unreasonable searches and seizures when he was required to provide a urine sample.

Our review of the record on appeal reveals that the district court did not err in denying appellant's first petition. Appellant's due process rights were not violated at his prison disciplinary hearing. Appellant was given adequate prior notice of the charges against him on December 24, 1999. He was allowed to present one of his requested witnesses and was told that his other witnesses were denied because they were outside civilians. Appellant also made a statement in his defense at the hearing. Lastly, there was written statement by the disciplinary board stating that the evidence they relied upon in finding him guilty included the officer's report of the incident, the urine test reports, the memos of two witnesses, appellant's own statement, and the testimony of one of appellant's witnesses. The decision was supported by some evidence. Moreover, to the extent that appellant challenged the conditions

of his confinement, such challenges are not cognizable in a petition for a writ of habeas corpus.⁴

In appellant's second petition, he raised only one claim relating to his May 23, 2000 prison disciplinary hearing where he was found guilty of MJ-26, possession of contraband. As a result of the hearing, appellant lost statutory good time credits and was placed in disciplinary segregation for 90 days.⁵ Appellant again claimed that his due process rights were violated because the standard of proof used at the hearing to determine his guilt was some evidence instead of a preponderance of the evidence standard. He claimed that his presumption of innocence was violated by using the some evidence standard of proof.

We conclude that the district court did not err in denying appellant's second petition. Appellant's due process rights were not violated at this prison disciplinary hearing. Appellant was given adequate prior notice of the charges against him on May 1, 2000. Appellant did not request to have any witnesses to testify, but he did make a statement in his defense. The fact-finder stated in writing that the evidence relied on in determining appellant's guilt included the notice of charges and the

⁴See Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984) ("We have repeatedly held that a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof.").

⁵Appellant's May 23, 2000 prison disciplinary hearing dealt with appellant's charge of MJ-26 (the subject of the second petition) and MJ-44 (the subject of the third petition). One referral for the loss of credit was sent to NDOP. Appellant lost a total of 180 days of statutory good time credit.

photo of the contraband that was found in appellant's shoe and cell. The decision was based on some evidence. Moreover, to the extent that appellant challenged the conditions of his confinement, such challenges are not cognizable in a petition for a writ of habeas corpus.⁶

In appellant's third petition, appellant raised two claims relating to his May 23, 2000 prison disciplinary hearing where appellant was found guilty of MJ-44, refusal to submit a drug test. As a result of the hearing, appellant lost statutory good time credits, was placed in disciplinary segregation for 180 days to be served consecutively to the time he was already serving, and a loss of 180 days of visiting privileges.⁷ Appellant claimed that his due process rights were violated at his prison disciplinary hearing when his presumption of innocence was disregarded because his guilt was determined upon the some evidence standard of proof instead of the preponderance of the evidence standard, and when the respondent imposed a loss of visits as a sanction.

We conclude that the district court did not err in denying appellant's third petition. Appellant's due process rights were not violated at this prison disciplinary hearing. He was given adequate prior notice of the charge against him on May 1, 2000. He did not request any witnesses to testify, but he did make a statement in his defense. He was given written notice of the evidence that the fact-finder relied upon in finding

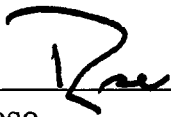
⁶See Bowen, 100 Nev. at 490, 686 P.2d at 250 (1984).

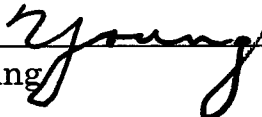
⁷As stated previously, one referral for the loss of statutory good time credit was sent to NDOP and appellant lost a total of 180 days for the violations that were resolved at the May 23rd, 2000 disciplinary hearing.

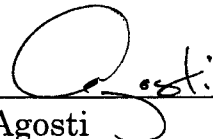
him guilty which included the notice of charges, and a form signed by appellant refusing to submit a urine sample for drug testing. The decision was supported by some evidence. Moreover, to the extent that appellant challenged the conditions of his confinement, such challenges are not cognizable in a petition for a writ of habeas corpus.⁸

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. William A. Maddox, District Judge
Attorney General/Carson City
John Witherow
Carson City Clerk

⁸See Bowen, 100 Nev. at 490, 686 P.2d 250 (1984).

⁹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.