

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY MILLER,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT
OF CORRECTIONS, JACKIE
CRAWFORD; DONALD HELLING, EX
WARDEN; AND SHELL ZAPPETTINI,
DISCIPLINARY CHAIRPERSON,
Respondents.

No. 39752

FILED

FEB 19 2003

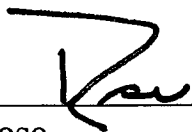
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK


ORDER OF AFFIRMANCE

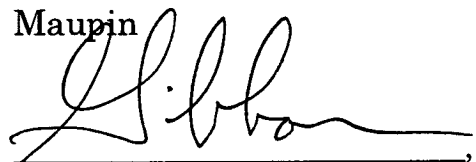
This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.

We have reviewed the record on appeal and for the reasons stated in the attached order of the district court, we conclude that the district court properly dismissed appellant's petition. Therefore, briefing and oral argument are not warranted in this case.¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Michael R. Griffin, District Judge
Timothy Miller
Attorney General Brian Sandoval/Carson City
Carson City Clerk

REC'D & FILED

1 Case No. 01-01727H

2 Dept. No. I

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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR CARSON CITY**
8

9 TIMOTHY MILLER,)
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Petitioner,)

vs.)

JACKIE CRAWFORD, Director of Nevada)
Department of Corrections, DONALD)
HELLING, Ex Warden, SHELL ZAPPETTINI,)
Disciplinary Chairperson,)

Respondents.)

ORDER

16 Petitioner filed a petition for writ of habeas corpus on November 29, 2001. Respondents filed
17 motion to dismiss the petition on January 24, 2002. Petitioner subsequently opposed the motion, and
18 Respondents replied to that opposition.

19 Miller was sentenced on July 17, 1998, to a maximum term of 72 months with a minimum
20 parole eligibility of 28 months for Trafficking in a Controlled Substance and a concurrent maximum
21 term or 72 months with a minimum parole eligibility of 28 months for Conspiracy to Sell a Controlled
22 Substance. On October 1, 1998, the Second Judicial District Court of the State of Nevada entered a
23 Amended Judgment, dated *nunc pro tunc* to July 17, 1998, sentencing Miller to a maximum term
24 72 months with a minimum parole eligibility of 28 months for Trafficking in a Controlled Substance
25 and a concurrent maximum term or 72 months with a minimum parole eligibility of 28 months for
26 Conspiracy to Sell a Controlled Substance and giving Miller credit for 80 days time served. As a
27 result of an Order issued by the Second Judicial District Court of the State of Nevada on March 1
28 1999, Miller was given credit for 100 days time served from April 8, 1998, to July 17, 1998.

1 March 2001, Miller lost 182 days of statutory good time credit as the result of a disciplinary proceeding.

2 In his petition, Miller states more than once that he only is challenging prison disciplinary
3 procedures where he lost 182 days of statutory good time. Petition at 2, lines 14-15; Petition at
4 lines 1-2; Petition at 6, lines 25-26. However, Miller also addresses issues other than the loss of 182
5 days of statutory good time credit, in both his petition and his Points and Authorities in Support of his
6 Petition for Writ of Habeas Corpus ("points and authorities"). For example, in ground two of his
7 petition, Miller claims that he will be subjected to double jeopardy if he is prosecuted by the attorney
8 general for the same behavior for which he was disciplined. Petition at 8, lines 7-12. In addition, in his
9 points and authorities, Miller refers to other disciplinary procedures other than the one in which he lost
10 182 days of statutory good time. While Miller discusses only the facts of the disciplinary proceeding
11 which he lost 182 days of good time credit, he asks for the time he lost in other proceedings to be
12 restored to him as well. Points and Authorities at 22. Miller also requests a permanent injunction
13 preventing the Nevada Department of Corrections ("NDOC") from using its current Code of Prison
14 Discipline ("CDP"). *Id.* Finally, Miller asks for immediate discharge from the custody of NDOC. *Id.*

15 Pursuant to *Wolff v. McDonnell*, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974), when an
16 inmate faces the loss of a protected liberty interest, he is entitled to certain due process protections.
17 *Reynolds v. Wolff*, 916 F.Supp. 1018 (1996), the United States District Court for the District of Nevada
18 determined that there is a state created liberty interest in the accumulation of good time credits.¹

19 The procedures in a prison disciplinary proceeding required by *Wolff* are that the inmate receive
20 adequate, written notice of the charges; that he receive this written notice at least 24 hours before the
21 hearing; that he have an opportunity, as limited by safety needs or correctional goals, to call witnesses
22 and present documentary evidence in his defense; that the factfinder make a written record of the
23 evidence relied upon and the reasons for the disciplinary action taken, and this written record must show
24 that the disciplinary committee's findings were based on some evidence; and, where circumstances
25 . . .

26
27 ¹ The statute that set forth the formula for calculating the good time credits at issue in *Reynolds* was NRS 209.443. Based
28 upon the date he committed his offenses, Miller's good time credits are calculated under a different statute, NRS 209.446.
However, the Court in *Reynolds* found that the statute at issue in that case creates the right to good time credits unless the
inmate has committed serious misbehavior and that in enacting that statute, Nevada created a right of "real substance."
NRS 209.4465 is very similar to the good time credit statute discussed in *Reynolds* and the same analysis would apply.

1 warrant, that an inmate should receive the help of an inmate or staff member. *Reynolds v. Wc*
2 916 F.Supp. 1018, 1022 (1996) (citations omitted).

3 In ground one of his petition, Miller asserts that his due process rights were violated when
4 was not allowed to confer with or be represented by an inmate law clerk before or at his disciplin
5 hearing. Petition at 8, lines 1-6. As discussed above, in the prison disciplinary process, Miller
6 entitled to the requirements of due process set forth in *Wolff* and nothing more. Due process in
7 context of prison disciplinary procedures requires that an inmate receive the help of an inmate or st
8 member *where circumstances warrant*. In *Wolff*, the U.S. Supreme Court clarified that:

9 [w]here an illiterate inmate is involved...or where the complexity of the
10 issue makes it unlikely that the inmate will be able to collect and present
11 the evidence necessary for an adequate comprehension of the case, he
12 should be free to seek the aid of a fellow inmate, or if that is forbidden, to
13 have adequate substitute aid in the form of help from the staff or from a
14 sufficiently competent inmate designated by the staff.

13 *Wolff v. McDonnell*, 418 U.S. 539, 570, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). Miller fails to expla
14 why his circumstances required the presence of an inmate law clerk. There is no indication that Mill
15 is illiterate or that the issue presented in his disciplinary hearing was complex. Further, Miller fails
16 assert that he was not allowed help from the staff or from a sufficiently competent inmate designated b
17 the staff. Miller was not entitled to the aid of an inmate law clerk, and this claim is therefore witho
18 merit.

19 In ground two of his petition, Miller asserts that he will be subjected to double jeopardy if he
20 criminally prosecuted for the behavior for which he was already subject to prison discipline. First
21 Miller does not claim that a criminal prosecution has been initiated against him for the same actions f
22 which he was subject to prison discipline, and Miller has failed to point to any such prosecution to dat
23 Therefore, this claim is not ripe. However, even if there were a criminal prosecution in progress or
24 one were to be initiated in the future, it would not violate double jeopardy provisions. Administrativ
25 sanctions imposed in the context of prison discipline do not constitute punishment so as to be a bar to
26 later criminal conviction. See *Carbonneau v. Warden*, 99 Nev. 172, 689 P.2d 875 (1983). This claim
27 therefore without merit.

28 ...

1 In ground three of his petition, Miller claims that the warden did not confer with the Director
2 Corrections or her designee before deciding Miller's appeal of his discipline. First, Miller offers
3 evidence of this other than his "information and belief." Regardless, the CPD does not require a warden
4 to confer with the Director or her designee before deciding an appeal of a disciplinary proceeding.
5 Section II(F) of the CPD addresses appeals and states, in pertinent part:

6 1. Notice to Inmate

7 Following a finding of guilt an inmate should be advised that he
8 may submit one appeal to the Warden. The appeal should be
9 directed to the Warden within 15 calendar days of the disciplinary
conviction. Appeals which are submitted after 15 days may be
rejected without review. The Warden's decision on all appeals is
final.

10 (emphasis added). Therefore, Miller's claim that he is entitled to habeas corpus relief on this ground
11 is meritless.

12 It should be noted that while there is no requirement that a warden confer with the Director
13 or her designee before deciding an appeal, Section VII(E) of the CPD provides, in pertinent part:

14 Director's Review

15 The Director, or an impartial official whom he designates, should review
16 the record in any disciplinary case, regardless of whether an appeal is taken,
when the sanction includes an aggregate term of disciplinary segregation
17 equal to or greater than 12 months. Such a sanction should not be
suspended pending this administrative review. This review is solely for
18 the purpose of evaluating whether, under the circumstances, the sanction
is proportionate to the rule violations...

19 Attached to Miller's points and authorities in support of his petition as Exhibit D is the Director's
20 review of Miller's discipline in this matter. Therefore, while not specifically part of Miller's grounds
21 three, it is noted that this particular requirement was complied with.

22 In ground four of his petition, Miller asserts that "reliable newly discovered evidence" obtained
23 after his disciplinary hearing are grounds for this Court granting his petition. Petition at 8, lines 19-20.
24 Miller states that an investigator with the state public defender's office interviewed Miller's victim,
25 Miller attaches as Exhibit B to his petition a document entitled "Confidential Internal Memorandum
26 that appears to be on the letterhead of the Nevada State Public Defender. Miller states that "nowhere in
27 this memo does Turley [Miller's victim] say that Miller ever touched Turley." Petition at 8, lines 19-20.
28 Miller is clearly attempting to use an out of court statement by his victim to prove the truth of the matter.

1 that he asserts, namely, that Miller never touched the victim. Such "evidence" is clearly hearsay and
2 will not be considered by this Court. Further, Miller states that his victim "lied stating Miller was
3 'Aryan Warrior' when Miller has never been in any prison gang during his incarceration in Nevada."
4 It is interesting to note that Miller attempts to use the "Confidential Internal Memorandum" to show beyond
5 a doubt that his victim was lying (i.e., that Miller was never in the Aryan Warrior) and that his victim was
6 not telling the truth (i.e., that Miller never touched the victim). Regardless, this evidence is improper
7 hearsay and will not be considered by this Court.

8 Beyond the claims set forth in his petition, Miller asserts further claims in his points and
9 authorities. In his points and authorities, Miller argues that the CPD is constitutionally deficient
10 because it does not contain provisions that an inmate is entitled to a presumption of innocence, that
11 prison officials bear the burden of proving an inmate guilty of a charged disciplinary violation, that
12 a disciplinary hearing officer must perform the functions of a fact-finder, and that a certain standard of
13 proof applies in prison disciplinary proceedings. Contrary to Miller's pronouncements, he is not
14 entitled to any procedures beyond those set forth in *Wolff*. "Prison disciplinary proceedings are not part
15 of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not
16 apply." *Wolff v. McDonnell*, 418 U.S. 539, 556, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974). The
17 "deficiencies" in the CPD claimed by Miller are not required by *Wolff* and thus are not deficiencies
18 at all. Miller's assertion to the contrary lacks merit.

19 Miller also challenges the standard of "some evidence" as it is used in the CPD. However,
20 revocation of good time credits is not comparable to a criminal conviction, and neither the amount of
21 evidence necessary to support such a conviction, nor any other standard greater than "some evidence"
22 applies in the prison disciplinary context. *Superintendent v. Hill*, 472 U.S. 445; 456, 105 S. Ct. 276;
23 86 L. Ed. 2d 356 (1985). See also *Edwards v. Balisok*, 520 U.S. 641. Therefore, Miller's claim with
24 regard to the standard of "some evidence" will be denied. Miller's further request that this Court set
25 a different standard of proof for prison disciplinary hearings will be denied as well, since there is already
26 a sufficient standard in place.

27 ...

28 ...

1 A habeas proceeding is not the proper proceeding in which to seek an injunction; regardless
2 Miller has failed to demonstrate any deficiency in the CPD. Miller's request for a permanent injunction
3 preventing NDOC from conducting any further proceedings under it shall be denied.

4 Miller also takes issue with the possible use of a confidential informant in the proceeding
5 against him. The procedural requirements set forth in *Wolff* do not require that Miller be informed
6 the use of a confidential informant. As *Wolff* sets forth the due process that must be afforded an inmate
7 in a prison disciplinary proceeding, and Miller has failed to demonstrate how any issues with regard to
8 possible confidential informant violated the due process requirements of *Wolff*, this claim shall
9 denied.

10 Finally, Miller states that the provision of the CPD that the director review any disciplinary case
11 in which the sanction includes a term of disciplinary segregation equal to or greater than 12 months
12 "could not have been complied with & as such, is yet another Due Process violation." Points and
13 Authorities at 20. However, as pointed out previously, Miller attaches the Director's review
14 Exhibit D to his points and authorities. This claim therefore lacks merit.

15 Miller also raises further argument in his opposition to Respondents' motion to dismiss. For
16 example, Miller argues that "the refusal to call [his] witnesses denied due process." Opposition at
17 Under this heading, Miller argues about whether he was entitled to call witnesses to his disciplinary
18 hearing. Miller also asserts what such witnesses would have testified to. Regarding the calling of
19 witnesses in prison disciplinary proceedings, the United States Supreme Court has explained that:

20 [o]rdinarily, the right to present evidence is basic to a fair hearing; but the
21 unrestricted right to call witnesses from the prison population carries
22 obvious potential for disruption and for interference with the swift
23 punishment that in individual cases may be essential to carrying out the
24 correctional program of the institution. We should not be too ready to
25 exercise oversight and put aside the judgment of prison
26 administrators....we must balance the inmate's interest in avoiding loss of
27 good time against the needs of the prison, and some amount of flexibility
28 and accommodation is required. Prison officials must have the necessary
discretion to keep the hearing within reasonable limits and to refuse to
call witnesses that may create a risk of reprisal or undermine authority, as
well as to limit access to other inmates to collect statements or to compile
other documentary evidence... The operation of a correctional institution
is at best an extraordinarily difficult undertaking. Many prison officials,
on the spot and with the responsibility for the safety of inmates and staff,
are reluctant to extend the unqualified right to call witnesses; and in our
view, they must have the necessary discretion without being subject to

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unduly crippling constitutional impediments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.

Wolff v. McDonnell, 418 U.S. 539; 566-67, 94 S. Ct. 2963; 41 L. Ed. 2d 935 (1974). Initially, Miller has failed to specifically allege that he attempted to call witnesses and was denied. However, even if Miller did make such an allegation, his claim would fail. Miller also failed to specify which witnesses he would have called; he refers only to generic "witnesses." Finally, Miller fails to adequately describe how calling witnesses in his case was not unduly hazardous to institutional safety or correctional goals. His conclusory statements to the contrary are not enough, and this claim fails.

As to other arguments raised in Miller's opposition, as pointed out previously, the due process requirements for prison disciplinary hearings are set forth in the *Wolff* case. Despite Miller's assertions to the contrary, that is the full extent of the due process to which he was entitled. Since Miller has failed to demonstrate that he did not receive the due process set forth in *Wolff*, his petition lacks merit.

Where it is clear from the face of the petition that no relief is warranted, the Court should dismiss the petition. If the Court determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, the court shall dismiss the petition without a hearing. NRS 34.770

For the foregoing reasons, and with good cause appearing,

IT IS HEREBY ORDERED that Respondents' motion to dismiss Miller's petition for writ of habeas corpus is GRANTED.

IT IS HEREBY FURTHER ORDERED that Miller's petition for writ of habeas corpus is DISMISSED.

DATED this 31 day of May, 2002.



DISTRICT JUDGE