

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



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February 27, 2024

By the Court:

No. 23-2921	JERRY A. SMITH, Petitioner - Appellant v. JOHN GALIPEAU, Respondent - Appellee
Originating Case Information:	
District Court No: 3:23-cv-00355-MGG Northern District of Indiana, South Bend Division Magistrate Judge Michael G. Gotsch, Sr.	

This cause, docketed on October 5, 2023, is **DISMISSED** for failure to timely pay the required docketing fee, pursuant to Circuit Rule 3(b).

form name: c7_FinalOrderWMandate (form ID: 137)

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NOTICE OF ISSUANCE OF MANDATE

February 27, 2024

To: Chanda J. Berta
UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend, IN 46601-0000

No. 23-2921	JERRY A. SMITH, Petitioner - Appellant v. JOHN GALIPEAU, Respondent - Appellee
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Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

TYPE OF DISMISSAL:

Circuit Rule 3(b)

STATUS OF THE RECORD:

no record to be returned

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JERRY A. SMITH,

Petitioner,

v.

CAUSE NO. 3:23-CV-355-MGG

WARDEN,

Respondent.

ORDER

Jerry A. Smith, a prisoner without a lawyer, filed a habeas corpus petition challenging the disciplinary decision (WCC-21-9-368) at the Westville Correctional Facility in which a disciplinary hearing officer (DHO) found him guilty of possessing a cellular device in violation of Indiana Department of Correction Offense 121. Following a disciplinary hearing, he was sanctioned with a loss of eighty days earned credit time and a demotion in credit class.

To start, Smith has filed interrogatories directed to the Warden to which the Warden has not responded. ECF 20. Rule 6 of the Rules Governing Section 2254 Cases allow the parties to conduct discovery in habeas cases like this one only upon leave of court. This rule also requires the party requesting discovery to provide specific reasons for the discovery requests. Smith has not sought leave to conduct discovery in this case, and the court has not granted it. Nor would the court have granted leave to serve the interrogatories filed by Smith if asked to do so. While these interrogatories relate to the incident described in the conduct report, they are largely irrelevant to the ultimate issue

in this case as to whether the prison disciplinary proceedings violated Smith's procedural rights. To the extent that some of the interrogatories bear some relevance to the procedural issues, the Warden's answers are not necessary to resolve the specific claims in this case. As a result, the Warden is not required to respond to these interrogatories, and the court will proceed to the merits of Smith's claims.

Smith argues that he is entitled to habeas relief because the administrative record lacked sufficient evidence to support the finding of guilt. He notes discrepancies among the witness statements and with the date of the signatures on the conduct report. He contends that he had been subjected to a wand device that did not detect a cellular device on his person.

[T]he findings of a prison disciplinary board [need only] have the support of some evidence in the record. This is a lenient standard, requiring no more than a modicum of evidence. Even meager proof will suffice, so long as the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary. Although some evidence is not much, it still must point to the accused's guilt. It is not our province to assess the comparative weight of the evidence underlying the disciplinary board's decision.

Webb v. Anderson, 224 F.3d 649, 652 (7th Cir. 2000).

The administrative record includes a conduct report in which Officer O'Marrah represented that, on September 27, 2021, Smith suffered seizure-like symptoms inside a mop closet in the school building. ECF 18-1. According to the conduct report, as he rolled Smith into a recovery position, Officer O'Marrah found a baggie protruding from Smith's waistband that contained a cellular device. *Id.* The conduct report is signed by Officer O'Marrah, Officer Porter, and Captain Farley with a signature date of September

21, 2021 – six days prior to the date of the underlying incident. *Id.* The administrative record contains witness statements from Sergeant Remkus and Captain Farley that are entirely consistent with the conduct report. ECF 18-7 at 1-2. It also contains a witness statement from Lieutenant Bradford instead identifying Sergeant Remkus as the individual who retrieved the cellular device. *Id.* at 3. And it contains a photograph of the cellular device described by correctional staff. ECF 18-2.

The conduct report, witness statements, and photograph constitute some evidence that Smith possessed a cellular device. The administrative record contains some discrepancies with respect to the signature date and Lieutenant Bradford's witness statement, but they do not fatally undermine the finding of guilt. Smith suggests that these discrepancies are indicative of some nefarious retaliatory scheme, but it is at least equally likely that they amount to nothing more than typographical errors or honest misperceptions. Though Smith maintains that Captain Farley was not present, it is unclear how Smith has personal knowledge about who was present given his statements at screening and on administrative appeal that he did not know what happened because of the seizure and that he "black[ed] out". ECF 18-4; ECF 18-8. Further, Smith's account of being subjected to a wand device is vague, and it does not appear that Smith presented this account at the disciplinary hearing or on administrative appeal. ECF 18-6; ECF 18-8. Therefore, the argument that the administrative record lacked sufficient evidence is not a basis for habeas relief.

Smith argues that he is entitled to habeas relief because correctional staff did not hold the hearing within a particular timeframe¹ and searched him instead of rendering medical care during his seizure in violation of departmental policy. Holding a hearing within a particular timeframe is not listed among the requirements for procedural due process for prison disciplinary proceedings enumerated in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and the Supreme Court of the United States has indicated that this list of requirements is exhaustive. *White v. Indiana Parole Bd.*, 266 F.3d 759, 768 (7th Cir. 2001) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 324 (1976)). Nor is it clear how conducting a search on Smith amounts to a procedural violation with respect to the disciplinary proceedings regardless of the specific circumstances under which it was conducted. Additionally, the failure to follow departmental policy alone does not rise to the level of a constitutional violation. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (“state-law violations provide no basis for federal habeas relief”); *Keller v. Donahue*, 271 F. App’x 531, 532 (7th Cir. 2008) (finding that inmate’s claim that prison failed to follow internal policies had “no bearing on his right to due process”). Therefore, these claims are not a basis for habeas relief.

In the traverse, Smith also asserts that correctional staff denied his requests for a witness statement to show that a medical emergency signal occurred and video recording evidence to show that Captain Farley was not present when the cellular

¹ In the petition, Smith asserts that the date of the offense was January 27, 2021. ECF 1 at 2. While irrelevant to the legal analysis, the court observes nothing in the administrative record to corroborate this date.

device was found. Smith cannot obtain habeas relief on this claim because he did not present it on administrative appeal. *See Moffat v. Broyles*, 288 F.3d 978, 981-82 (7th Cir. 2002) (requiring petitioners challenging prison disciplinary proceeding to exhaust administrative remedies). Further, it seems unlikely that this evidence would have changed the outcome of the disciplinary hearing. *See Jones v. Cross*, 637 F.3d 841, 846 (7th Cir. 2011) (applying harmless error analysis to a prison disciplinary proceeding); *Piggie v. Cotton*, 344 F.3d 674, 677 (7th Cir. 2003) (same). The presence or absence of a medical emergency signal would not undermine the allegations in the conduct report, and Captain Farley's witness statement was cumulative of other evidence in the administrative record. Therefore, this claim is not a basis for habeas relief.

Because Smith has not asserted a valid claim for habeas relief, the habeas petition is denied. If Smith wants to appeal this decision, he does not need a certificate of appealability because he is challenging a prison disciplinary proceeding. *See Evans v. Circuit Court*, 569 F.3d 665, 666 (7th Cir. 2009). However, he may not proceed in forma pauperis on appeal because the court finds pursuant to 28 U.S.C. § 1915(a)(3) that an appeal in this case could not be taken in good faith.

For these reasons, the court:

- (1) DENIES the habeas corpus petition (ECF 1);
- (2) DIRECTS the clerk to enter judgment and close this case; and
- (3) DENIES Jerry A. Smith leave to proceed in forma pauperis on appeal.

SO ORDERED on September 21, 2023

s/ Michael G. Gotsch, Sr.

Michael G. Gotsch, Sr.

United States Magistrate Judge

**Additional material
from this filing is
available in the
Clerk's Office.**