

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS SIMMONS,

Petitioner,

v.

STEPHEN HOBART,

Respondent.

ORDER

05-C-510-C

This is a petition for a writ of habeas corpus under 28 U.S.C. § 2241. Petitioner Thomas Simmons seeks reinstatement of 41 days of good time credit that he lost after testing positive for Oxazepam. Petitioner contends that he was not afforded due process in connection with the disciplinary hearing that followed his positive test. Petitioner has paid the \$5.00 filing fee for his petition.

Petitioner filed his petition in this court on August 22, 2005. In an order dated October 19, 2005, I ordered petitioner to submit a supplement to his petition describing in greater detail the basis for his claim. Petitioner filed his supplement on October 25, 2005. In an order dated October 27, 2005, I ordered respondent to show cause why a petition should not issue in this case. Respondent has since filed a response, supplemented with

documentary proof in opposition to petitioner's request for a writ of habeas corpus. Petitioner has not filed a traverse. The petition for habeas corpus relief is now before the court on its merits.

At the time he filed his petition, petitioner was detained at the Federal Correctional Institution in Oxford, Wisconsin. In his response, respondent states that petitioner was transferred from FCI-Oxford to the Grossman Center halfway house in Leavenworth, Kansas on October 24, 2005, the day before petitioner filed the supplement to his petition and four days before this court issued the order to show cause. Respondent is correct that this court may retain jurisdiction over the petition. The proper district for a § 2241 habeas corpus petition is the district in which the petitioner is confined at the time he files the petition, Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004), and the fact that a prisoner is transferred outside the district in which he filed his petition after filing it does not deprive the district court of jurisdiction over the petition. Ross v. Mebane, 536 F.2d 1199, 1202 (7th Cir. 1976). Because the uncontroverted facts indicate that petitioner's due process rights were not violated in connection with his disciplinary hearing, I will deny his petition.

In determining the facts, I accept the uncontroverted averments of the response as undisputed. 28 U.S.C. § 2248; Aleman v. United States, 878 F.2d 1009, 1013 n.9 (7th Cir. 1989).

FINDINGS OF FACT

On October 29, 2004, petitioner Thomas Simmons was incarcerated at the Grossman Center halfway house in Leavenworth, Kansas. That day, he complied with a request that he submit to a random urinalysis. On a "Urine Testing Log" sheet, petitioner indicated that he was taking two medications, Day Quil and Amitriptyline. His urine sample was sent to the Redwood Toxicology Laboratory for testing.

On November 4, 2004, petitioner's urinalysis results indicated that he had tested positive for Oxazepam, which is classified under the chemical class of Benzodiazepines. The next day, an incident report was prepared charging petitioner with using narcotics not prescribed by medical staff in violation of Code 112 of the disciplinary regulations. On November 8, 2004, petitioner was given a copy of the incident report and informed that his disciplinary hearing would be conducted that day. In addition, he was informed that he had the following rights at the hearing:

The right to have a written copy of the charge(s) against [him] at least 24 hours prior to appearing before the Center Discipline Committee;

The right to have a member of the staff who is reasonably available to represent [him] before the Center Discipline Committee;

The right to call witnesses and present documentary evidence in [his] behalf provided Center safety would not be jeopardized;

The right to remain silent; . . .

The right to be present throughout the Center Discipline Committee hearing except during Committee deliberations and except where Center safety would be jeopardized;

The right to be advised of the Center Discipline Committee recommendation and Bureau of Prisons' decision, the facts supporting the recommendation and decision, except where Center safety would be jeopardized, and the disposition in writing; and

The right to contest under Administrative Remedy procedures or by letter the Bureau of Prisons' decision to the Regional Director within 20 days of notice of the decision and disposition.

Because staff at the halfway house did not provide petitioner with a copy of his incident report at least 24 hours before his hearing, he was given the option of waiving his right to 24 hours' advance notice and proceed with the hearing. Petitioner agreed to waive his right to the 24 hours' advance notice and signed a waiver of this right at the bottom of BP-206 under the heading "Waiver of 24 Hour Notice."

The hearing took place on November 8, 2004. Petitioner elected not to exercise his right to call witnesses. Bureau of Prisons Form BP-207 informs an inmate of his right to call witnesses and provides space for an inmate to write the names of potential witnesses and a summary of the potential testimony. Petitioner did not write any names of potential witnesses on this form and signed the bottom of the form. After examining evidence and hearing petitioner's testimony, the Center Discipline Committee chair person found him guilty of the charged offense because there was sufficient evidence that he had violated

program rules by using the narcotic Oxazepam. As punishment, the chair person recommended that petitioner be removed from the halfway house.

The committee's packet was forwarded to Joetta Terrell, a discipline hearing officer, for review and disposition. After reviewing the packet, Terrell decided that clarification was needed concerning petitioner's use of medications before the urinalysis and their ability to cause a false positive for Oxazepam. After clarifying that petitioner's use of Day Quil and Amitriptyline would not cause a false positive for Oxazepam, Terrell reviewed the committee's findings and recommendation and completed a Checklist for Center Discipline Committee Certification form. She concluded that sufficient evidence existed that petitioner violated Code 112 and that all policies and procedures were followed in his disciplinary hearing. Petitioner was sanctioned with a loss of 41 days of good conduct time and a recommendation for a disciplinary transfer. On February 2, 2005, petitioner was transferred to the Federal Correctional Institution in Oxford, Wisconsin.

OPINION

The Fifth Amendment prevents the federal government from depriving an individual of life, liberty or property with due process of law. To prevail on a due process claim, an individual must prove that the government has deprived him of a liberty or property interest without proper procedures. Because petitioner lost good conduct time, his punishment

implicated a liberty interest. Thomas v. McCaughtry, 201 F.3d 995, 999 n.4 (7th Cir. 2000); Sweeney v. Parke, 113 F.3d 716, 718 (7th Cir. 1997); Meeks v. McBride, 81 F.3d 717, 719 (7th Cir. 1996). When the loss of good time credit is a possible sanction, an inmate must receive the following procedural safeguards during prison disciplinary proceedings: “(1) advance written notice of the disciplinary charges; (2) an opportunity . . . to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action.” McPherson v. McBride, 188 F.3d 784, 785-86 (7th Cir. 1999) (quoting Superintendent, Mass. Correctional Institution v. Hill, 472 U.S. 445, 454 (1985)). As for the quantum of evidence required to support a finding of guilt, “the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits.” Hill, 472 U.S. at 455. The “some evidence” standard does not require a court to re-examine the entire record, make independent assessments of the credibility of witnesses or weight the evidence. Id. Rather, it requires nothing more than a decision that is not arbitrary or lacking support in the record. McPherson, 188 F.3d at 786.

In the supplement to his petition, petitioner alleged that he was not allowed to call witnesses or present documentary evidence at his disciplinary hearing and that prison officials did not give him notice of the charges 24 hours before his hearing. The

uncontroverted facts indicate that petitioner did not receive 24 hours advance notice; however, they indicate also that petitioner was informed of this right and waived it. Similarly, the uncontroverted facts show that petitioner was informed of his right to present witnesses and documentary evidence at his hearing but declined to exercise that right. In both cases, petitioner signed a document waiving his rights. Inmates may waive their rights at disciplinary hearings. E.g., Bedoya v. Coughlin, 91 F.3d 349, 352 (2d Cir. 1996); Craig v. Franke, 478 F. Supp. 19, 21 (E.D. Wis. 1979); cf. United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (criminal defendants “may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution”). There is no suggestion that petitioner’s waivers of these rights were not knowing and voluntary. Therefore, I conclude that petitioner’s due process rights to 24 hours advance notice of the charge against him and to present witnesses at his hearing were not violated.

In addition, the uncontroverted facts show that the finding of guilt is supported by some evidence in the record. Petitioner’s urinalysis showed a positive test for Oxazepam. This is sufficient to satisfy the “some evidence” standard. Petitioner alleges that the disciplinary committee did not take the extra step of obtaining his medical records and verifying that none of his prescribed medications could have caused the positive test. However, in the course of reviewing petitioner’s disciplinary hearing, Joetta Terrell confirmed that neither Day Quil nor Amitriptyline, the medications petitioner was taking

when he tested positive for Oxazepam, could cause a false positive. Therefore, to the extent the committee erred in failing to check petitioner's medical records, this error was harmless.

ORDER

IT IS ORDERED that petitioner Thomas Simmons' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is DENIED and this case is DISMISSED. The clerk of court is directed to enter judgment in favor of respondent.

Entered this 30th day of January, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge