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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ROBERT SMALLWOOD,)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 82-0893-AM
)	
J. P. MITCHELL, <u>et al.</u> ,)	
Defendants.)	

MEMORANUM OPINION

I. FACTUAL BACKGROUND

At the time of the events involved in this case, plaintiff was an inmate confined in the Virginia State Penitentiary. Plaintiff's case alleges improprieties in the disciplinary and classification proceedings to which he was subject during July and August, 1982. Plaintiff's account of the sequence of events during that period is somewhat unclear; therefore the description of events that follows draws heavily upon the account provided in defendants' responsive pleadings.

Prison officials commenced proceedings against the plaintiff on July 3, 1982, after J. E. Stroble, a captain at the Penitentiary, received confidential information from a source that had proven reliable in the past that the plaintiff had threatened another inmate named Rash. Stroble placed a written charge against the plaintiff for threatening bodily harm against Rash. About this same time, plaintiff apparently was also charged with a separate offense of having engaged in forcible

homosexual activities with another inmate named Sellers. However, the defendants insist that, while plaintiff was accused of a separate offense, none of the proceedings at issue in the present case involve the forcible sex charge.

On July 6, 1982, the Institutional Classification Committee met to determine if the charge against the plaintiff for threatening bodily harm warranted placing the plaintiff in a heightened level of incarceration. The chairman of the committee, Ed Wright, a Treatment Program Supervisor at the Penitentiary, presents an affidavit which states that the Committee decided to place the plaintiff in pre-hearing custody¹ because of the serious nature of the charge against the plaintiff and the threat he posed to prison security. See, Affidavit of Ed Wright, ¶3. Forms attached to the affidavit show that the only charge the committee considered in reaching its decision was the charge of threatening bodily harm. The Committee's decision was later approved by Warden J. P. Mitchell.

On July 7, 1982, the plaintiff sent a form complaint to the prison administration demanding that the alleged victim of the forcible homosexual activities incident submit to polygraph and medical tests. The warden replied that plaintiff would be given a hearing later on the charges against him. The plaintiff's July 7 letter proves critical to his present case, because he believes, for reasons elaborated below, that the prison officials response prevented him from mounting an adequate defense to the charge of threatening bodily harm.

The plaintiff appeared before the Institutional Adjustment Committee July 12, 1982. Based upon Stroble's testimony and a notarized letter from the confidential source, plaintiff was convicted of the charge of threatening bodily harm. He was sentenced to a period in isolation², with credit for the time spent in pre-hearing detention. The matter was also referred to the Institutional Classification Committee for further proceedings.

On July 16, 1982, the plaintiff again appeared before the Institutional Classification Committee (ICC). The Committee recommended that the plaintiff be placed in segregation³ for 30 days, or until the disposition of the remaining adjustment committee charge (relating to forcible homosexual activities) placed against him. The reasons given for the ICC's decision were that the conviction for threatening bodily harm, plaintiff's past incarceration history, and the pending charge against him were found to "contraindicate release into the General Population." The Warden approved the committee's recommendation that the plaintiff should be assigned to the administrative segregation.

On August 17, 1982, the plaintiff again appeared before the Institutional Classification Committee. The Committee recommended that the plaintiff be released into the general population, because the plaintiff had "adjusted to segregation" and because the inmate against whom plaintiff had threatened bodily harm was no longer assigned to the general population. The plaintiff was released into the general population August 17,

1982. The charges of forcible homosexual activity were subsequently dismissed due to an insufficient amount of available evidence.

Plaintiff's complaint alleges that throughout these proceedings that led to increased levels of custody he was deprived of the procedural safeguards to which he was entitled under prison guidelines, and thus was deprived of his liberty without due process of law, for which he is entitled to recover under 42 U.S.C. §1983. He seeks expungement of prison records, reversal of the charges, and \$1,000 damages. He names as defendants J. P. Mitchell, the Prison superintendent; J. E. Stroble, the reporting officer; Ed Wright, the Classification Committee chairman; and a person of uncertain identity named only as "McCann." The plaintiff's complaint turns primarily on the absence of medical tests proving forcible homosexual activity. The defendants point out that since plaintiff was never tried on the forcible sex charges, the presence or absence of the medical tests is irrelevant in plaintiff's present procedural due process claim. On that basis, they now move this court for summary judgment.

The court is significantly hampered in reviewing plaintiff's complaint because of plaintiff's confused presentation. But upon diligent examination, the court believes it has determined the true nature of plaintiff's complaint. In Paragraph 5 of the complaint, the plaintiff states that he was "convicted of one of the charges of allegedly threatening bodily harm whos [sic] only source of information was through inmate J. Sellers, to Capt. J.

E. Stroble." Plaintiff's complaint thus turns on his belief that his unnamed accuser on the threatening bodily harm charge was J. Sellers, the inmate against whom plaintiff was alleged to have committed forcible homosexual activities.

The plaintiff repeats this claim that Sellers was his accuser on the threat charge in paragraph 8 of the affidavit he supplied in response to the defendants' motion for summary judgment. The plaintiff contends that Sellers told Stroble that the plaintiff had threatened Rash "through J. Sellers, stating that if J. Sellers doesn't stay away from J. Rash he would see J. Rash." Plaintiff apparently believes both charges were the product of these two inmates' fabrications. The critical point in his allegations is the subsequent showing that the forcible sex charge was false. The absence of medical evidence proving forcible sex shows that Sellers was lying about that charge; Thus, Sellers could not have been a credible informant on the charge for which the plaintiff was found guilty.

Plaintiff's claims that the panel which convicted him of the threatening bodily harm charge knew that Sellers's claims of forcible sex had been medically disproven, but they nonetheless relied on the Sellers's statements to support conviction on threatening bodily harm charge. Plaintiff claims that reliance on such testimony, proven unreliable, and presented in a form which made it impossible for him to impeach, deprived him of due process. Further, plaintiff alleges that no medical records were available at his hearing, or otherwise made available to him, by which to impeach his accuser's credibility. Plaintiff also

contends that his inability to challenge his unnamed accuser deprived him of this due process rights.

The defendants' response to plaintiff's position is simply that plaintiff was convicted of threatening bodily harm, not forcible homosexual activities. The defendants add that the forcible sex charge is irrelevant, and that the "plaintiff should address the only clear issue he has alleged, namely, that his due process rights were violated with regard to the 'Threatening Bodily Harm' charge..." See Supplement to Defendants' Motion to Dismiss. Without meaning to suggest that the defendants are being fatuous or disingenuous, the court finds that plaintiff has addressed the very issue to which the defendants allude. It is to that issue the court now turns: was the plaintiff denied his rights to procedural due process in his conviction on the threatenting bodily harm charges?

II. LEGAL ANAYLSIS

At the outset, the court notes that plaintiff's contention that he was convicted on unreliable, impeachable hearsay, is entirely dependant on his unverified assertion that the unnamed informant was, in fact, J. Sellers. If someone other than Sellers supplied the information on the threatening bodily harm charge, the plaintiff's claims in the present case are groundless. The material before the court does not reveal the informant's true identity. However, at the summary judgment stage, the material before the court "must be viewed in the light most

favorable to the opposing party." Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Facts asserted by the non-moving party, if supported by affidavits, are regarded as true for purposes of the motion. See, e.g., Computer Servicecenters, Inc. v. Beacon Mfg. Co., 443 F.2d 906 (4th Cir. 1971). See also Wright, Miller & Kane, Federal Practice and Procedure, §2727 (1983).

The plaintiff's claim that Sellers was his accuser on the charge for which he was convicted is supported by his own affidavit. Therefore, the court is willing to presume, for purposes of this motion, that Sellers was plaintiff's accuser on the charge of threatening bodily harm. The question then becomes whether plaintiff's inability to challenge his principle accuser's credibility constituted a denial of his right to due process entitling him to relief under 42 U.S.C. §1983.

The preliminary question the court must face before reaching the issue whether plaintiff was deprived of due process is whether the plaintiff actually possessed a liberty interest entitling him to the protections of the due process clause during the various proceedings at issue in this case. The United States Supreme Court has recently observed that "as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the constitution, the Due Process Clause does not itself subject an inmate's treatment by prison authorities to judicial oversight." Helms v. Hewitt, ___ U.S. ___ 51 U.S.L.W. 4124, 4127 (Feb. 22, 1983). See also Montayne v.

Haynes, 427 U.S. 236, 242 (1976). The Supreme Court in Helms observed that the "transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the term of confinement ordinarily contemplated by a prison sentence." Id. And the United States Court of Appeals for the Fourth Circuit has held that segregated confinement alone does not constitute cruel and unusual punishment. See Sweet v. South Carolina, 529 F.2d 854, 861 (4th Cir. 1975).

Thus, the mere fact that plaintiff was placed in a higher level of security does not by itself entitle plaintiff to the protections of the due process clause. In order to show that he is entitled to such protections, the plaintiff "must have more than an abstract need or desire for it. He must, instead, have a legitimate claim or entitlement to it." Board of Regents v. Roth, 408 U.S. 568, 577 (1972). In determining whether a claimant has such a legitimate claim, the court must look to "rules or understandings that stem from an independent source, such as state law." Id.

The question thus becomes whether Virginia law provides a sufficient basis for affording state prisoners a protected liberty interest in remaining in the general population. Plaintiff's removal from the general population involved three phases: (i) pre-hearing detention, during the period July 3 through July 12; (ii) disciplinary isolation, during the period July 12 through August 2; and (iii) segregation, during the period August 2 through August 17. Only the second period involved punitive confinement; the other two periods involved administrative confinement.

The U. S. Supreme Court's recent decision Helms v. Hewitt, supra, examined whether Pennsylvania's statutes and regulations entitle inmates in that state's institutions to a protected liberty interest in remaining in the general prison population. The court noted that the mere adoption of procedural guidelines, "without more, suggests that it is these requirements alone, and not those federal courts might also impose under the Fourteenth Amendment, that the state chose to require." Id., at 4127. But the court found that Pennsylvania had "gone beyond mere procedural guidelines. It had used language of an unmistakable mandatory character, requiring... that administrative segregation will not occur absent specified substantive predicates..." Id. The court found that "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest." Id.

But once having determined that Pennsylvania's prison inmates possess a protected liberty interest in remaining in the general prison population, the Helms court did not go on to examine whether the prisoner had been accorded procedures mandated by the Pennsylvania statutes and regulations. Rather, having decided that Pennsylvania's mandatory language entitled inmates to a liberty interest, the court then looked to federal constitutional law to determine what procedural safeguards the prisoners were entitled prior to being deprived of their liberty. Id.; see also Jones v. Board of Governors, ___ F.2d ___, No. 83-1121 (4th Cir., April 1, 1983) (source of procedural

guarantees to be found in due process clause rather than any specific procedures provided by the state, citing Helms). The court concluded that due process required only "an informal, non-adversary review of the information supporting respondent's administrative confinement, including whatever statement respondent wished to submit, within a reasonable time after confining him to administrative segregation." Id. Thus, after concluding that constitutional rights were at hazard, the court concluded that due process required only the most narrow protection.

The plaintiff in this case cites as the source of his protectable liberty interest a prison administrative regulation, Virginia Department of Corrections Adult Division Guideline No. 861, which regulates inmate discipline. His claim is thus, in its most basic form, qualitatively different from the prisoners' claims in Helms. Those prisoners based their claim on the entire statutory and regulatory scheme. This prisoner does not refer to statutes; nor is that omission due to mere ignorance of the law. The Virginia scheme differs from the Pennsylvania scheme, in that Virginia's regulatory procedures do not appear to be statutorily mandated. The only statutory reference to prison discipline appears at Va. Code §53.1-32, which provides that it "shall be the general purpose of state correctional facilities to provide... discipline and control of prisoners committed or transferred thereto... ." This general statement differs dramatically from the mandatory language in the Pennsylvania statutes. (See Helms v. Hewitt, supra, at fn. 6, for the text of the Pennsylvania statutes and regulations).

But, the regulations which appear in Guideline No. 861 contain much of the mandatory language contained in the Pennsylvania regulations⁴. The question then becomes whether mandatory language in regulations alone create a constitutionally protected liberty interest. The Helms decision itself is inconclusive on this point; its holding is based on the presence of statutes and regulations. But the Court does cite its own prior summary affirmance of a district court opinion holding that prison regulations alone may create liberty interests, in support of its own ultimate holding. See Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976), aff'd 434 U.S. 1092 (1978).

The decisions of the United States Court of Appeals for the Fourth Circuit prior to Helms on the issue whether Virginia prison regulations alone create protected liberty interests consistently hold that they do not. In Gorham v. Hutto, 667 F.2d 1146, 1148 (4th Cir. 1981), the Fourth Circuit held that Virginia's prison administrative regulations do not entitle state prisoners to a liberty interest protecting them against disciplinary transfers within the state prison system, including transfers to facilities of a higher security level. Gorham relied on Cooper v. Riddle, 540 F.2d 731 (4th Cir. 1976), which held that the predecessor regulation to the one involved in the present case did not entitle prisoners to a liberty interest against transfers for administrative purposes to maximum security. Cf. Matthews v. Simpson, No. 79-6523 (4th Cir., Nov. 4, 1982)(if evidence does not indicate punitive transfer to isolation, procedural safeguards not necessary); Fitzgerald v.

Morris, No. 82-6486 (4th Cir. Nov. 29, 1982) (violation of administrative regulations such as prison guidelines do not necessarily violate constitutional guarantees); Green v. Fullerton, No. 82-0426-R (E.D.Va. Oct. 26, 1982) (Guideline No. 861 does not create liberty interest entitling prisoner to notice of charges prior to preventive detention).

The question the court now faces is whether the U.S. Supreme Court's Helms decision affects the principles the Fourth Circuit enunciated in Gorham and other cases; that is, following Helms, would the Fourth Circuit now hold that Virginia's prison regulations, standing alone, would entitle a prisoner to a constitutionally protected liberty interest in remaining the the general prison population? Under Helms, the test is whether the language used in the procedural specifications justifiably raise expectations amounting to a constitutional entitlement.

The court finds that, based on Helms, the Fourth Circuit might well modify its previous holdings and find that the prison regulations do create a protected liberty interest in remaining in the general population. These regulations, like the regulations in Helms, repeatedly employ "explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest." Id. See also Detweiler v. Commonwealth of Virginia Department of Rehabilitative Services, ___ F.2d ___, No. 82-1968 (4th Cir., April 14, 1983) (Virginia's personnel regulations entitled employee to property interest in continued employment).

But even if this court were to conclude that the Fourth Circuit would modify its position, the mere conclusion that state prisoners possess a liberty interest protecting against pre-hearing detention and disciplinary custody does not dictate what process the prisoners are due before they may be subjected to such conditions. Helms held that before submitting state prisoners to administrative segregation, prison officials were "obligated to engage only in an informal, nonadversary review of the information supporting respondent's administrative confinement, including whatever statement respondent wished to submit, within a reasonable time after confining him in administrative segregation." 51 U.S.L.W. at 4127.

The plaintiff in this case was deprived of his putative liberty interest in remaining in the general population by being placed in administrative segregation on two occasions, once when he was placed in pre-hearing detention, and once when he was placed in administrative segregation following completion of his disciplinary term. On July 6, three days after his initial placement in pre-hearing detention (thus, within "a reasonable time"), he received a hearing at which he was present and represented by a prison counselor before a special tribunal convened for the purpose of reviewing his administrative segregation. On July 16, 1982, the plaintiff again appeared before a tribunal, which approved his assignment to administrative segregation. The record is clear that on each occasion, the plaintiff was extended an opportunity to present his view of the case. When these two proceedings are measured

against the minimal standards enunciated in Helms, it is clear that, at least as to these two proceedings, the plaintiff received all of the process to which he would be due even if he had a protected liberty interest. In addition, on August 17th, the plaintiff's administrative confinement was reviewed at yet another hearing. (Compare, Helms, at fn 9, suggesting need for such periodic reviews.).

Thus, the plaintiff's alleged inability to confront his witnesses, and cross-examine impeachable hearsay, are irrelevant in the context of the July 6th and July 16th hearings. At least as to those hearings, plaintiff has failed to allege facts which would state a cognizable constitutional claim, even if he successfully established a protected liberty interest.

The July 12 hearing differed in several critical respects from the other two proceedings. It was not a predicate to administrative segregation, but was a disciplinary proceeding. Conditions of isolated confinement, to which the prisoner was sentenced, are incrementally harsher and more restrictive even than administrative segregation. A conviction in a disciplinary proceeding, unlike assignment to administrative segregation, carries the "stigma of wrongdoing or misconduct." Helms v. Hewitt, supra, at 4127. Because the deprivation to be suffered is more extensive, the procedures that must proceed the deprivation are also more involved.

But while greater procedural safeguards may be mandated, that does not establish that a prisoner has a right to confront and cross-examine all witnesses against him. The Supreme Court

said in Wolff v. McDonnell, 418 U. S. 539, 568 (1974) that "the constitution should not be read to impose [cross-examination] at the present time and that adequate basis for decision in prison disciplinary cases can be arrived at without cross-examination." The Court was particularly concerned with potential disruption of prison security that might result if prisoners were entitled to confront and cross-examine ~~all witnesses against them in prison~~ disciplinary proceedings. The Court's concerns were greatest where a prisoner proposes to confront and cross-examine an unknown fellow inmate, "since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question." Id. The Court recognized that there may be cases, such as the one presently before this court, where "interest balancing may well dictate cross-examination"; however, in the final analysis, since such balancing will involve considerations of prison security, the "better course" is to "leave these matters to the sound discretion of the officials of state prisons." Id., at 569.

Thus, under the Wolff standards, the only question remaining before this court is whether the officials' failure to permit the plaintiff to impeach his accuser's credibility constituted an abuse of discretion amounting to a deprivation of any liberty interests the plaintiff may possess. The court cannot find that the officials' conduct constituted an abuse of discretion.

Captain Stroble's affidavit states that his unnamed source had "proven reliable in the past." See Affidavit of J. E. Stroble, at ¶3. Further, even if the informant was, as plaintiff claims, the alleged victim of the forcible sex, those charges had not yet been dropped, and so credibility did not appear to be at issue. And, if Sellers was plaintiff's accuser, to have permitted impeachment would have been an admission by the officials that plaintiff's accuser was an inmate against whom plaintiff was already accused of directing violent conduct. Clearly, the officials were within the realm of sound discretion when they refused to expose their unnamed source. Thus, the process plaintiff received fell within the range of process he would have been due even if he presented this court with a protected liberty interest.

Because plaintiff has failed to establish a cognizable constitutional violation, he has failed to state a claim under 42 U.S.C. §1983. Accordingly, the defendants' motion for summary judgment is granted, and plaintiff's case dismissed.

FOOTNOTES

1. Pre-hearing detention is a custody level equivalent to segregation, which is defined in footnote 3.

2. Guideline No. 861.1, Division of Adult Service, Commonwealth of Virginia Department of Corrections, defines "isolation" as a "disciplinary measure to exert control over inmates found guilty of major institutional rule violations." Inmates placed in isolation lose visitation privileges, are subject to frequent security inspections, temporarily forfeit all personal property except legal, religious, and hygiene materials, are deprived of commissary privileges, and have greatly restricted exercise opportunities.

3. Guideline No. 861.1 defines "segregation" as a "protective care and custodial management measure exercised by the institution or unit." It is "not a disciplinary measure but a means of preventive control." While a prisoner in segregation is deprived of opportunities available to prisoners in the general population, he does not suffer the same deprivation as prisoners in isolation. He retains visitation and commissary privileges, has access to greater exercise opportunities, and is permitted to retain certain personal property (such as magazines and radios).

4. Guideline No. 861, Division of Adult Services, Commonwealth of Virginia Department of Corrections mandates that an inmate charged with disciplinary infractions be given written notice of the charges, that he be advised that he has "rights" to a hearing at which he may be represented by retained counsel, cross-examine the accusing officer, and present voluntary witnesses. Further, the rule specifies that an inmate may not be held in pre-hearing detention for more than 2 days without an appearance before an administrative tribunal to determine whether such detention is justified. The regulations address only disciplinary detention and pre-hearing detention; they do not specify what procedures are necessary prior to imposition of administrative segregation. However, because the court finds that the plaintiff received all of the process to which he was due even if he has a protected liberty interest against all levels of restricted custody, the court does not find it necessary to examine the text of those regulations.

DATE: April 25, 1983

Richard L. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ROBERT SMALLWOOD,)
)
 Plaintiff,)
)
 v.) Civil Action No. 82-0892-AM
)
 J. P. MITCHELL, et al.,)
)
 Defendants.)

ORDER

This matter comes before the court on defendants' motion for summary judgment. See F.R.C.P. 56(b). For reasons stated in the accompanying memorandum opinion, the defendants' motion is GRANTED. Accordingly, plaintiff's case is DISMISSED. Plaintiff has thirty days within which to notify the Clerk of his desire to appeal the court's ruling.

Let the Clerk send a copy of this order and accompanying memorandum opinion to the plaintiff and to counsel for the defendants.

DATE:

April 25, 1983

Richard L. Wilbourn
UNITED STATES DISTRICT JUDGE