NOT DESIGNATED FOR PUBLICATION

No. 126,698

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

FAYVUN MANNING,
Appellant,

v.

TIM EASLEY, WARDEN, et al.,
Appellees.

MEMORANDUM OPINION

Appeal from Pawnee District Court; BRUCE T. GATTERMAN, judge. Submitted without oral argument. Opinion filed June 7, 2024. Affirmed.

Fayvun Manning, appellant pro se.

Jon D. Graves, legal counsel, Kansas Department of Corrections, for appellees.

Before GARDNER, P.J., MALONE, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Fayvun Manning appeals the district court's summary denial of his K.S.A. 60-1501 petition arising from a disciplinary hearing in which he was found guilty of possessing dangerous contraband. He raises two issues on appeal. First, he contends his due process rights were violated because the administrator conducting the hearing was not impartial. Second, he alleges there was insufficient evidence introduced at the hearing to support the guilty finding. After our review of the record, we affirm the district court's dismissal of Manning's petition.

FACTUAL AND PROCEDURAL HISTORY

Manning is an inmate at the Larned Correctional Mental Health Facility. In January 2022, officers conducted a shakedown search of Manning's cell and locker. During the search, an officer "opened a jar of peanut butter and didn't notice anything." But he "then tipped the container over and notice[d] a clear substance" and "reached into the peanut butter and pulled out a clear plastic bag." A tiny black box that can hold a micro-SD, CF, or SD card—called a card reader by the witnesses here—was found inside the plastic bag. Manning was charged with violating administrative regulation K.A.R. 44-12-901, which prohibits inmates from possessing dangerous contraband.

In February 2022, the disciplinary hearing administrator—Joel East—conducted a disciplinary hearing.

As Manning entered the hearing room, he heard East say, "send in my next victim." There does not appear to have been any immediate response to the comment from Manning. When asked if he knew what he was accused of, Manning indicated he was unsure which subsection of K.A.R. 44-12-901 he was accused of violating. East then obtained a rule book and directed Manning to the applicable subsection, summarizing it for Manning as follows:

> "[T]he item in question ie. a card reader that can be utilized to access information or implant information, malware on a facility computer would be deemed as 'dangerous' to the Department of Corrections and further no resident is able to obtain one of these items through proper means, ie. canteen and is certainly not permitted or authorized by the Secretary of Corrections. Further, [a](2) could apply if it were deemed appropriate by EAI to pursue felony charges through the court system, which at this time, it is not believed to be the case."

The record regarding what happened next is less than crystal clear. It appears Manning completed a waiver of rights form, as would be appropriate for a guilty plea. The record suggests he said "guilty" at some point, but then retracted the guilty statement, explaining that he "was attempting to acknowledge a plea of guilt regarding a fan that was seized in his cellmate's property but not to the 44-12-901 of record." In any event, Manning clarified he was entering a plea of not guilty.

After the rule book was reviewed, the disciplinary report was read into the record. Manning asked that the charge be dismissed as the hearing got underway. The two officers involved in the search testified. Manning questioned them asking, "'[W]hen and where [the] alleged black box was found and how inside peanut butter[?]'" One officer answered he found a bag in a peanut butter container during the routine cell search, and he was uncertain what was inside the baggie. The officer deduced the locker in which the peanut butter was found belonged to Manning because of a picture taped inside the locker door that had Manning's name and number on it.

The other officer testified that the card reader was found in the baggie. At first, however, the officers wrote in the shakedown search report that "'peanut Butter w/baggie unknown'" was found. Manning questioned why the card reader wasn't specifically listed—as he contended was required—in the log of items seized. The officers explained they initially did not know what the tiny black box was or what it held. But after the search report was written, the box was identified as a card reader. The search and disciplinary reports were modified accordingly.

Manning requested three other officers be called to testify. East denied Manning's request because "it would result in [officers working] overtime which is against the security needs of the facility," and the two testifying officers had provided enough information. East acknowledged he had broad discretion in permitting or denying the

witness request. And although East denied Manning's request that the officers appear and testify, the narrative report of one of the officer's was read into the record at the hearing.

Manning questioned witnesses about whether East had questioned them outside of Manning's presence. All answered no, and Manning established that there was no video recording of the shakedown search. All of Manning's 24 questions were submitted in writing and answered at the hearing. After the testimony concluded, Manning was permitted to give a closing argument. He again moved to dismiss the charge. This time, he made multiple accusations to support the motion, including: (1) There was insufficient evidence recorded to uphold a dangerous contraband conviction; (2) the disciplinary report did not state what K.A.R. 44-12-901 subsection Manning violated; (3) a reporting officer, investigator, or witness could not be the hearing officer; (4) testimony and evidence could not be received by the hearing officer or introduced outside Manning's presence; (5) Manning's due process rights were violated because the hearing officer was not impartial; and (6) responses from various officers to Manning's questions demonstrated he was denied a right to a fair hearing.

In turn, East responded to each of Manning's arguments: (1) The shakedown and search report expressly stated the peanut butter and "'unknown item'" were properly recorded at the time of the search; (2) the subsection was identified at the beginning of the hearing; (3) East was not a reporting officer, investigator, or witness in the case; (4) there was no evidence nor testimony presented to East outside the presence of Manning, "with the exception of what was originally provided as basis for the case"; (5) East strongly believed Manning initially pleaded guilty, but thereafter Manning was afforded the opportunity to plead his case and confront the evidence so he was not denied due process; and (6) three of the officers Manning listed were not present during the hearing, and Manning's assertion that the testimony of the other two officers deprived him of a fair hearing was unsupported.

After the motion to dismiss was denied, Manning questioned the impartiality of East, referring back to East's comment of "'send in my next victim.'" Acting as the hearing officer, East addressed Manning's allegation of partiality, as reflected in the written summary of events:

> "Manning stated that he already knew that he was guilty when he first came in and [East] made a statement 'send in my next victim' that he knew he would have to fight the case. He asked if [East] remembered saying that to which [East] makes similar comments with copious amounts of sarcasm to many individuals who come into the Disciplinary Office and even stated as much during the initial conversation with Mr. Manning and explained that as there was a plea of 'guilty' already as a matter of record and as such a hearing was not necessary, but was being afforded to Manning as a matter of courtesy and absolutely ensuring that Due Process rights of the accused were not going to be compromised or violated. These proceedings have in fact been fair and impartial. Further, that at no point in the process, did [East] nor any other individual, violate Mr. Manning's rights. To which Manning acknowledged we did speak of these issues and understanding."

Manning was again permitted to make a closing argument to address his due process complaint. He stated he "did get a fair [hearing] in a way and not fair in a way." At the end of the hearing, East found by a preponderance of the evidence that (1) the officers found a suspect item; (2) the officers adequately completed the shakedown and search report; (3) the item was identified as a card reader, which is an item that qualifies as dangerous contraband under K.A.R. 44-12-901; and (4) Manning was in possession of the card reader. East thus found Manning guilty of violating K.A.R. 44-12-901 and imposed 15 days of disciplinary segregation and a $20 disciplinary fine.

In February 2022, Manning appealed to the Secretary of Corrections. After the Secretary rejected his appeal and approved East's decision, Manning filed a pro se petition for writ of habeas corpus under K.S.A. 60-1501 in the Kansas Supreme Court, setting forth various contentions. Relevant to this appeal, Manning claims in the petition

that his constitutional rights were violated, the primary argument being that he was denied a fair trial and due process because East was not impartial. His petition refers to East's "victim" comment multiple times as evidence of East's partiality. Manning also contends that East improperly coached witnesses and that legal documents in support of his appeal to the Secretary of Corrections were removed from the appeal. He believes he did not receive an impartial hearing because the goal of the hearing was to find him guilty "[n]o [m]atter [w]hat [e]vidence [h]e [p]resented." Finally, Manning contends there was insufficient evidence to establish his guilt. He requested that his disciplinary conviction be overturned, that he be reimbursed for the court filing fee and the disciplinary fine, and that he be awarded damages for the 15 days he served in disciplinary segregation.

In September 2022, the Kansas Supreme Court denied Manning's request for default judgment on his habeas corpus petition and transferred the case to Pawnee County District Court. The district court issued a writ of habeas corpus notifying the Secretary of Corrections to respond to Manning's petition. After receiving and reviewing the response, the district court summarily dismissed Manning's K.S.A. 60-1501 petition.

Manning timely filed his notice of appeal.

ANALYSIS

I. *The district court did not err in dismissing Manning's habeas corpus petition.*

Manning cites several sources of law for his contentions that his due process rights were violated. He argues his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. He also argues his rights under the First, Ninth, and Eighteenth Amendments to the Kansas Constitution were violated. Manning also cites K.A.R. 44-13-101; the Internal Management Policy and Procedure (IMPP) 12-

103D and 02-118D; and General Order 09-108 as additional authority for his contention that his rights were violated.

Standard of Review

Whether an inmate received due process in a habeas proceeding is a legal question. *Norwood v. Roberts*, 53 Kan. App. 2d 772, 775, 393 P.3d 169 (2017). A denial of due process must be adjudged from the facts as they exist in each particular case and from a totality of such facts. *Miller v. Crouse*, 346 F.2d 301, 306 (10th Cir. 1965).

Discussion

To begin, apart from Manning's claim about East's "victim" comment, our ability to review Manning's due process claims is significantly hampered by his failure to comply with Kansas Supreme Court Rule 6.02 (2024 Kan. S. Ct. R. at 35). His statements of "fact" are a compilation of his arguments, rather than facts, and are not tied to the record by volume and page number as required by the rule. At various points, Manning cites to broad sections of the record, for example citing pages "1-80" or "107-205." Although Manning filed his K.S.A. 60-1501 petition as a self-represented litigant, and therefore his pleadings must be liberally construed, his pro se status does not allow him to ignore appellate procedures. *State v. Gilbert*, 299 Kan. 797, 798, 326 P.3d 1060 (2014); *Joritz v. University of Kansas*, 61 Kan. App. 2d 482, 498, 505 P.3d 775 (2022). Nor can courts "'assume the role of advocate or search the record and construct arguments for a pro se litigant.'" 61 Kan. App. 2d at 499. Any material statement made without a reference to the record on appeal's volume and page number "'may be presumed to be without support in the record.'" *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 623, 244 P.3d 642 (2010).

We focus on addressing Manning's chief concern with his due process rights—East's comment "'send in my next victim,'" which occurred before the beginning of his disciplinary hearing. Manning believes this comment reflects that East was not fair and impartial and consequently he was denied a fair hearing. We acknowledge that Manning's brief also alleges other issues, but they are unsupported by reference to any specific facts. For example, he contends that East discriminated against him by showing favoritism towards the testifying officers "due to there being an officer inmate separation"; that East interfered with witnesses by ensuring testifying officers "were on the same page" by "lead[ing] and coach[ing] the witnesses during the hearing to make statements that were not correct"; and that Tim Easley, the warden at the Larned facility, allowed East to violate Manning's constitutional right to a fair hearing. We find no factual support in the record for these claims.

Manning also asserts the record on appeal is missing records and was "tampered with," but he fails to cite any evidence in the record to support this claim. He maintains four pages of the disciplinary hearing transcript are missing and asserts witness testimony is missing, including the statement East made acknowledging he called Manning a victim. But in his habeas petition, Manning included two copies of the disciplinary hearing transcript—one containing the full transcript and the other had missing pages. Thus, the record shows it is Manning who included the incomplete transcript in the record. Regardless, there are three complete copies of the transcript in the record, and Manning has provided no evidence to show the record on appeal has been tampered with.

But the record supports Manning's assertion that East said "send in my next victim" as Manning was entering the room, and it is clear that this statement forms the primary basis of Manning's due process violation claim, so we focus our analysis on that claim.

When analyzing due process claims, a court must first analyze whether the State has deprived the petitioner of life, liberty, or property. If so, a court next determines the extent and the nature of the process due. *Johnson v. State*, 289 Kan. 642, 649, 215 P.3d 575 (2009). Protected liberty interests arise from two sources: (1) the Due Process Clause and (2) the laws of the states. *Shepherd v. Davies*, 14 Kan. App. 2d 333, 335, 789 P.2d 1190 (1990).

"'[A] State creates a protected liberty interest by placing substantive limitations on official discretion.'" *Davis v. Finney*, 21 Kan. App. 2d 547, 554, 902 P.2d 498 (1995). To constitute a protected interest for purposes of the Fourteenth Amendment to the United States Constitution, Manning must have a legitimate claim of entitlement to it, and the interest must be more than an abstract need or desire. *Murphy v. Nelson*, 260 Kan. 589, 598, 921 P.2d 1225 (1996). Here, the imposition of the disciplinary fine implicates the Due Process Clause of the Fourteenth Amendment. *Anderson v. McKune*, 23 Kan. App. 2d 803, 807, 937 P.2d 16 (1997).

We now move to determining the extent and nature of the process that Manning was due. Procedural due process requires there to be "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *League of Women Voters of Kansas v. Schwab*, 63 Kan. App. 2d 187, 214, 525 P.3d 803 (2023). When there is a constitutionally protected interest, an impartial decisionmaker is necessary. See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831,106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986) (Brennan, J., concurring) (An impartial judge is a "fundamental requirement of due process."); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972) ("Petitioner is entitled to a neutral and detached judge.").

Due process "'is not a technical conception with a fixed content unrelated to time, place, and circumstances.'" *Hogue v. Bruce*, 279 Kan. 848, 851, 113 P.3d 234 (2005). In *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the

United States Supreme Court established that there must be "mutual accommodation between institutional needs and objectives" and the rights of the prisoner in a prison disciplinary proceeding and that "'the full panoply of rights due a defendant in [criminal] proceedings does not apply.'" *Hogue*, 279 Kan. at 851. Courts should not, however, interfere with the maintenance and administration of penal institutions unless constitutional rights are "clearly infringe[d] upon" and are "of such character or consequence as to shock general conscience or be intolerable in fundamental fairness." *Levier v. State*, 209 Kan. 442, 451, 497 P.2d 265 (1972). The rights that a prisoner has in a prison disciplinary proceeding include "'an impartial hearing, a written notice of the charges to enable inmates to prepare a defense, a written statement of the findings by the factfinders as to the evidence and the reasons for the decision, and the opportunity to call witnesses and present documentary evidence.'" *Hogue*, 279 Kan. at 851. Manning's assertion on appeal implicates his right to an impartial hearing.

The district court noted that "the [send in my next victim] comment by East as the hearing officer prior to commencement of the hearing was inappropriate," and we fully agree. East's use of sarcasm in the course of Manning's disciplinary hearing was deeply offensive to Manning, unnecessary, and diminished the importance of East's role as administrative hearing officer. But we find it does not rise to the level of "shocking and intolerable conduct." *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009).

East's lone comment, made before the hearing began, does not provide a sufficient basis to demonstrate partiality or bias towards Manning during the hearing. And, in fact, Manning has cited no evidence of other actions or comments by East during the hearing which show he acted inappropriately. The record indicates East was fair to Manning at the beginning of the hearing. When Manning inquired what K.A.R. 44-12-901 subsection he was being charged under, East promptly obtained a rulebook to analyze the subsections and explain the charges to Manning. East allowed Manning to present his case and spent time answering Manning's questions throughout. He also allowed

Manning to present a closing argument and two motions to dismiss. Overall, the record demonstrates that East conducted the hearing fairly and thoroughly, and we conclude Manning's due process rights were not violated.

II. *The district court correctly found "some evidence" supports Manning's guilty finding.*

Standard of Review

To state a claim for relief under K.S.A. 60-1501 and avoid summary dismissal, a petition must allege "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." 289 Kan. at 648. Summary dismissal is proper "if, on the face of the petition, it can be established that [the] petitioner is not entitled to relief, or if, from undisputed facts, or from uncontrovertible facts, such as those recited in a court record, it appears, as a matter of law, no cause for granting a writ exists." 289 Kan. at 648-49, see K.S.A. 2023 Supp. 60-1503(a). In reviewing a prison disciplinary rule violation conviction, Kansas courts must look to whether the conviction is supported by "'some evidence.'" *Sammons v. Simmons*, 267 Kan. 155, 159, 976 P.2d 505 (1999). An appellate court exercises de novo review of a summary dismissal. *Johnson*, 289 Kan. at 649.

In his 1501 petition, Manning asserts that East's determination was insufficient due to lack of evidence and witness testimony being contrary to statements and evidence. On appeal, Manning largely discusses his due process rights being violated. But in requesting relief, he asks this panel to reverse his disciplinary conviction "due to insufficient evidence."

Discussion

Manning was charged with possessing dangerous contraband under K.A.R. 44-12-901, which reads in part:

> "(a) Dangerous contraband shall be defined as any of the following:
>
> (1) Any item, or any ingredient or part of or instructions on the creation of an item, that is inherently capable of causing damage or injury to persons or property, or is capable or likely to produce or precipitate dangerous situations or conflict, and that is not issued by the department of corrections or the facilities, sold through the canteen, or specifically authorized or permitted by order of the secretary of corrections or warden for use or possession in designated areas of the facility; [or]
>
> (2) any item that can be the basis for a charge of felony for its possession under the laws of Kansas or the United States."

East summarized K.A.R. 44-12-901(a)(1) and noted it applies because "a card reader that can be utilized to access information or implant information, malware on a facility computer would be deemed as 'dangerous' to the Department of Corrections and further no resident is able to obtain one of these items through proper means." Manning does not contest that the card reader qualified as "dangerous contraband" for purposes of K.A.R. 44-12-901.

The district court found testimony at the disciplinary hearing, physical evidence produced at the disciplinary hearing, and the disciplinary report were "more than some evidence to support Manning's conviction." It also noted the disciplinary report issued mirrored the testimony presented at the disciplinary hearing.

We agree with the district court's assessment and find sufficient evidence to support the disciplinary finding. Both the disciplinary report and testimony noted the peanut butter jar was pulled from Manning's locker. The officers knew it was Manning's locker "by a picture that was taped to the inside of the locker door that had Manning's name and number on it." The disciplinary report and testimony also noted a plastic bag with the card reader was in the peanut butter jar. Hearing testimony also confirmed the

card reader could not have been found in another shakedown search because Manning's cell was the only search the officers had participated in that day. The contraband was identified as a card reader, and Manning does not suggest otherwise.

The Kansas Supreme Court has refined the "some evidence" standard by articulating that the evidence can even "be characterized as meager." *May v. Cline*, 304 Kan. 671, 674, 372 P.3d 1242 (2016). Here, the evidence is well beyond meager. Manning did not controvert this evidence during his disciplinary hearing or on appeal with actual facts and evidence, just arguments with his view of the incident. The evidence is sufficient to show that Manning possessed dangerous contraband in his locker as confirmed by the disciplinary hearing testimony and the disciplinary report.

Affirmed.