

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 2194

JOSEPH V. FOSTER, JR.

VERSUS

**LOUISIANA DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONS**

Judgment Rendered: **JUN - 8 2012**

On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
Docket No. 5595,019, Section 27

The Honorable Todd Hernandez, Judge Presiding

Joseph V. Foster, Jr.
St. Gabriel, La.

Appellant
Pro Se

William L. Kline
Baton Rouge, La.

Counsel for Defendant/Appellee
James M. Leblanc

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Handwritten initials "JVF" and a signature, possibly "William L. Kline", in the left margin.

HUGHES, J.

Joseph V. Foster, Jr., an inmate in the custody of the Louisiana Department of Public Safety and Corrections (DPSC), appeals a judgment of the Nineteenth Judicial District Court that amended and affirmed a final decision of DPSC. Based on our review, we amend the judgment and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On May 20, 2010 Mr. Foster allegedly “admitted to having been in a fist fight with Offender Charles Van Vorst 111690. The fist fight occurred approximately 4 weeks ago in the D.C. Carpenter Shop,” according to Officer James Tillman in his disciplinary report. Fighting is a Schedule B violation of the *Disciplinary Rules and Procedures for Adult Offenders*. Mr. Foster was immediately placed into administrative segregation¹ pending his appearance before the disciplinary board. Pursuant to LAC 22:I.349, offenders placed into administrative segregation pending a hearing have a right to a hearing before the disciplinary board within 72 hours. Although Mr. Foster’s hearing was originally scheduled timely, he was on “call out” during his appointed time.² Thus, the hearing was re-scheduled and not held until May 26, 2010. On that basis, Mr. Foster requested a dismissal of the charge. However, the board determined that a good faith effort to provide Mr. Foster a timely hearing had been made and denied the motion to dismiss.

¹ Administrative segregation is a temporary holding area, preferably a cell, where an offender is housed when the offender’s continued presence in the general population poses a threat to life, property, self, staff, or other offenders, the security or orderly running of the institution or the offender is the subject of an investigation. In addition, offenders who are pending transfer to another institution or pending assignment or re-assignment within an institution may be held in administrative segregation. LAC 22:I.345, promulgated in accordance with LSA-R.S. 15:823 in LR 27:414 (March 2001) and amended in LR 34:2195 (October 2008.)

² The record suggests that the department had taken Mr. Foster to the infirmary at the time that he was scheduled for the disciplinary board hearing.

After the conclusion of the evidence, Mr. Foster was found guilty of fighting and was sentenced to: pay \$5.00 restitution; a change to a working cell block; and four days extra work duty.

Pursuant to LAC 22:I.361(B)(1), Mr. Foster appealed the disciplinary board's decision to the warden. On June 18, 2010 the warden issued a decision wherein he vacated the portion of the sentence that changed Mr. Foster's custody to a working cellblock, but affirmed the portion of the sentence that ordered him to pay restitution and receive four days of extra work duty.³ Unsatisfied with the warden's decision, Mr. Foster filed for review by the Secretary on July 7, 2010. LAC 22:I.361(C)(1). The Secretary denied any further relief.

On September 24, 2010 Mr. Foster filed for administrative review of the disciplinary board's decision in the Nineteenth Judicial District Court, pursuant to LSA-R.S. 15:1177.

After review, the commissioner prepared a recommendation for the district court judge, wherein he concluded that the restitution portion of Mr. Foster's sentence was not authorized and should be vacated. However, the commissioner concluded that the extra work duty portion of his sentence was authorized by the rules and thus that portion of the decision should be affirmed.⁴ The district court judge accepted the recommendation of the commissioner and rendered judgment vacating the restitution portion of the sentence. The district court further ordered court costs to be split equally

³ This relief was granted on the basis of Mr. Foster's argument that his sentence was more excessive than the sentence imposed on his co-defendant, who allegedly had a history of disciplinary violations. Notwithstanding that relief, Mr. Foster still assigns error herein to his "excessive" sentence, on the same basis, in assignment of error number 6.

⁴ The office of the commissioner of the Nineteenth Judicial District Court was created by LSA-R.S. 13:711 to hear and recommend disposition of criminal and civil proceedings arising out of the incarceration of state prisoners. The commissioner's written findings and recommendations are submitted to a district court judge, who may accept, reject, or modify them. LSA-R.S. 13:713(C)(5).

between the parties. Mr. Foster appeals, and makes the following assignments of error:

1. The DPSC erred in placing him into administrative segregation, requiring a dismissal of the charges;
2. The DPSC erred in finding him guilty of an offense not set forth in the Rules as an offense;
3. The DPSC failed to conduct a 72-hour hearing within 72 hours as mandated, requiring a dismissal of the charges;
4. The DPSC erred in convicting him of fighting without any corroborating evidence, as required;
5. The DPSC erred in failing to consider and investigate his alibi defense;
6. The DPSC erred in imposing a more excessive sentence upon him than his allegedly "guiltier" co-defendant; and
7. The DPSC erred in allowing an observer to participate in the disciplinary hearing.

In brief, Mr. Foster also argues that the district court erred in assigning half of the costs of court to him, reasoning that court costs are greater than any amount of recovery he could have hoped to gain. However, in light of the judgment we find no abuse of discretion in the district court's equal division of the costs and we decline to amend the assessment.

LAW AND ANALYSIS

In Mr. Foster's administrative appeal, he challenged both the finding of guilt of a disciplinary offense, and his sentence of restitution and four days extra work duty. Louisiana Revised Statutes 15:1177(A)(9) sets forth the standard of review by the district court, as follows:

(9) The court may reverse or modify the DPSC decision only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) In violation of constitutional or statutory provisions.
- (b) In excess of the statutory authority of the agency.

(c) Made upon unlawful procedure.

(d) Affected by other error of law.

(e) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(f) Manifestly erroneous in view of the reliable, probative and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

(10) An aggrieved party may appeal a final judgment of the district court to the appropriate court of appeal.

Mr. Foster argues several procedural violations committed by the DPSC, including the failure to provide him with a full hearing within 72 hours of his placement into administrative segregation. It is true that a prisoner has certain rights when appearing before the disciplinary board. LAC 22:I.341, *et seq.* All rights and procedural requirements must be followed unless waived by the accused. LAC 22:I.349(B). An inmate accused of a disciplinary violation has a right to a hearing within 72 hours of placement in administrative segregation. LAC 22:I.349. Specifically, LAC 22:I.349(A)(16), states, in part, that:

Official holidays, weekends, genuine emergencies, or good faith efforts by the administration to provide a timely hearing are the only exceptions. When it is not possible to provide a full hearing within 72 hours of placement in administrative segregation, the accused must be brought before the board, informed of the reasons for the delay, and be remanded back to administrative segregation or released to his quarters after a date for a full hearing has been set[.]

We agree with Mr. Foster that DPSC cannot claim a “good faith effort” to bring him before the board when it was DPSC that transported him to the infirmary at the time of his scheduled hearing. However, we cannot agree with Mr. Foster’s argument that the failure of the department to

comply with procedural rules mandates that the conviction be reversed and the charges dismissed. See **Davies v. Stalder**, 762 So.2d at 1239.

“[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” **Sandin v. Conner**, 515 U.S. 472, 485, 115 S.Ct. 2293, 2301, 132 L.Ed.2d 418 (1995). The Due Process Clause procedural protections are not triggered by any substantial deprivation imposed by prison authorities. **Giles v. Cain**, 99-2001 (La. App. 1 Cir. 6/23/00), 762 So.2d 734, 738, **Meachum v. Fana**, 427 U.S. 215, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976). In order to invoke the protections of the Due Process Clause, a prisoner must show an imposition of an atypical and significant hardship in relation to the ordinary incidents of prison life. **Sandin v. Conner**, 515 U.S. at 483-84.

The district court reversed the portion of the sentence ordering Mr. Foster to pay restitution. Thus, in the appeal before us, only the finding of guilt itself, and the sentence of four days extra work duty, are reviewable. As stated earlier, for an offender to be entitled to relief on appeal, he must first allege sufficient facts to show that his substantial rights were prejudiced by the department’s decision. LSA-R.S. 15:1177(A)(9); **Giles v Cain**, 762 So.2d at 738. Mr. Foster failed to prove that his extra work duty resulted in a loss of a liberty interest which is protected by the Due Process Clause. He has not shown that the extra duty was atypical and a significant hardship in relation to ordinary incidents of prison life.

Moreover, the jurisprudence holds that the imposition of a sentence of extra work duty **does not** involve a “liberty interest,” or other protected due process right. **Davies v. Stalder**, 00-0101 (La. App. 1 Cir. 6/23/00), 762 So.2d 1239. Having failed to meet that burden, Mr. Foster is not entitled to

any further judicial review. Stated differently, even accepting as true Mr. Foster's allegations, because the guilty verdict in his case resulted in only four days extra work duty, a minor and authorized penalty, no substantial right has been prejudiced and there is no basis upon which this court could grant any further relief. See Davies v. Stalder, 762 So.2d at 1239.

CONCLUSION

The judgment of the district court is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Mr. Joseph V. Foster, Jr.

AFFIRMED.