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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re WAYNE FULLER,
on Habeas Corpus.

A106096

(Solano County
Super. Ct. No. FCR210470)

I. INTRODUCTION

After he submitted a urine sample that tested positive for marijuana use, petitioner Wayne Fuller, who was then an inmate at the California Medical Facility, in Vacaville was found guilty of possession of a controlled substance in violation of prison regulations and assessed a 121 day credit forfeiture. Fuller filed a writ of habeas corpus in Solano County Superior Court challenging the disciplinary action taken against him. That court, relying on *People v. Spann* (1986) 187 Cal.App.3d 400 (*Spann*), granted the writ. T. A. Schwartz, the Warden of the California Medical Facility (Warden), then filed this writ of habeas corpus, arguing that the Superior Court erred in applying the “some evidence” standard. We agree and grant the petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2002, a urine sample Fuller provided to staff at the Department of Corrections testified positive for THC (cannabinoids). Fuller was charged with possession of a controlled substance, a violation of California Code of Regulations, title 15, section 3016. On January 3, 2003, Fuller pled guilty and was penalized with a loss of 121 days of good time credit and the loss of 90 days of contact visiting privileges and 90

days of non-contact visiting. He was also placed on one year of mandatory monthly random drug testing.

Fuller then filed an administrative appeal, in which he challenged the disciplinary action because he had been denied a witness. This appeal was granted and on May 6, 2003, Fuller had a new hearing on the rule violation. At that time, he pled not guilty. He admitted that he had been under the influence of marijuana, but denied possession of a controlled substance.¹ Based solely on the positive test result for marijuana use, Fuller was found guilty of possession of a controlled substance in violation of prison regulations and assessed a 121 day credit forfeiture.

Fuller filed a petition for writ of habeas corpus in Solano County Superior Court on September 8, 2003. The trial court granted the writ on February 11, 2004, on the ground that, a positive drug test is not, under *People v. Spann, supra*, 187 Cal.App. 3d 400, “some evidence” of possession of a controlled substance. The Warden filed this timely appeal.

III. DISCUSSION

A. *Mootness*

Fuller argues the Warden’s appeal is moot because his anticipated release date was, after taking into account his 121 day credit loss for the rules violation, December 18, 2003. He contends that a prisoner’s release while there is a pending appeal concerning prison conditions renders that appeal moot. (*In re Olson* (1974) 37 Cal.App.3d 783; *Frias v. Superior Court* (1975) 51 Cal.App.3d 919, 923 and *In re Banks* (1979) 88 Cal.App.3d 864, 872.)

We disagree. Fuller was released on parole on December 18, 2003.² Any credits to which he might be entitled may reduce his parole period and, as a result, this matter is

¹ This statement was not used as evidence in the hearing.

² Pursuant to Evidence Code sections 459, subdivision (a) and 452, subdivision (c), the Warden has moved for judicial notice of certified copies of documents from Fuller’s file maintained by the California Department of Corrections. Fuller does not oppose this motion, which we grant. The documents provided by the Warden indicate

not mooted by his release from custody. (*In re Reina* (1985) 171 Cal.App.3d 638, 642.) Accordingly, we consider the merits of this appeal.

B. “Some Evidence” of Possession

Fuller was charged with possessing a controlled substance in violation of prison regulations. (Cal. Code Regs., tit. 15, § 3016, subd. (a).) The trial court in this matter, relying on *Spann*, concluded that “a positive test, alone without other evidence, cannot establish the elements of possession. Because it cannot, it cannot be even ‘some evidence’ of possession. It is instead, no evidence at all.” Fuller and the Warden agree that due process requires only “some evidence” of possession of a controlled substance to sustain the findings made during prison disciplinary proceedings. (*Superintendent v. Hill* (1985) 472 U.S. 445, 455-456.) Therefore, on review, our task is to determine whether there is any evidence in the record to support the Warden’s decision. We conclude there is.

As Fuller acknowledges, just last year our colleagues in Division Four of this district held in *In re Dikes* (2004) 121 Cal.App.4th 825 (*Dikes*), that a THC-positive urinalysis result, standing alone, is sufficient evidence to support a finding that an inmate possessed a controlled substance in violation of prison regulations. (Cal. Code Regs., tit. 15, § 3016, subd. (a).) The *Dikes* court pointed out that the issue before it was not whether the THC-positive urine sample was sufficient to “support the burden of proof in a criminal conviction,” as was the issue in *Spann* “but rather whether the THC in [the inmate’s] urine sample is ‘some’ or ‘any’ evidence that he had possessed marijuana in violation of prison rules.” The *Dikes* court concluded that “[a]lthough evidence of drug use is not by itself sufficient to support a criminal conviction for possession, our Supreme Court has acknowledged that ‘evidence of being identifiably under the influence of a specific drug or other evidence of having introduced it into one’s body, tends to prove having knowingly, and hence unlawfully, possessed it.’ [Citation.] While it is possible

that Fuller was paroled on December 18, 2003, and that Fuller was returned to custody on September 15, 2004, following the revocation of his parole.

to ingest a controlled substance without the knowledge, dominion and control necessary to sustain a criminal conviction [citation], we conclude the presence of THC in [the inmate's] body is some evidence to sustain the finding that he possessed it.” (*Dikes, supra*, 121 Cal.App.4th at pp. 831-832.) We agree with this reasoning and conclusion. Therefore, under the “some evidence” standard, Fuller’s positive drug test is “some evidence” of possession.

Beyond pointing out the myriad of ways in which he disagrees with the *Dikes* court’s reasoning and conclusion, arguments we do not address here because they are thoroughly considered in *Dikes*, Fuller contends he was denied due process because he was not on notice that “use of,” or “being under the influence” of a controlled substance, could be punished as “possession.” We disagree.

Prison regulations provide that, “[t]he test results from a urine sample submitted for testing for the presence of an unauthorized controlled substance that has been confirmed as positive by a laboratory may be considered as sufficient evidence to charge the user with having had possession of the controlled substance.” (Cal. Code Regs., tit. 15, § 3290, subd. (f).) As the *Dikes* court observes, “[t]his provision indicates . . . both that the Department’s regulations show an intent to discipline inmates for possession of controlled substances based on a positive drug test, and that inmates are on notice of this intention.” (*Dikes, supra*, 121 Cal.App.4th at pp. 832-33.) Due process was satisfied here.

IV. DISPOSITION

The trial court's order is reversed and the case remanded to it with instructions to deny the writ.

Haerle, Acting P.J.

We concur:

Lambden, J.

Ruvolo, J.