

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, THIRD DEPARTMENT**

Thomassini v. Prack

111 A.D.3d 1201 (N.Y. App. Div. 2013) · Decided November 27, 2013

SUMMARY

The New York Appellate Division reviewed a CPLR article 78 proceeding challenging a prison disciplinary determination finding the petitioner guilty of violent conduct, assault, and weapon possession. The court held that substantial evidence supported the determination and that the reduced penalty was not disproportionate to the misconduct, confirming the determination and dismissing the petition.

OPINION

PER CURIAM.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision which found petitioner guilty of violating certain prison disciplinary rules. During the course of an investigation, correction officials learned that petitioner was involved in an incident in which he attacked two of his roommates by striking them with a hard object concealed in either a sock or a T-shirt.

One of the roommates suffered a fractured skull as a result, requiring his hospitalization and surgery. Petitioner was thereafter charged in a misbehavior report with engaging in violent conduct, assaulting an inmate and possessing a weapon. Following a tier III disciplinary hearing, he was found guilty of the charges. A penalty of 36 months of confinement in the special housing unit and loss of privileges, as well as 12 months of loss of good time was imposed.

The determination was later affirmed on administrative appeal. This CPLR article 78 proceeding ensued. We confirm. To the extent that petitioner raises the issue of substantial evidence, we find that the misbehavior report, documentary evidence and testimony of the inmates who were the victims of the attack and who identified petitioner as their attacker amply support the determination of guilt (see *Matter of McDaniels v Bezio*, 76 AD3d 1129, 1129 [2010]; *Matter of Benvenuti v Fischer*, 67 AD3d 1105, 1105 [2009]).

As for the severity of the penalty, respondents represent in their brief that the portion of the penalty requiring petitioner to be confined to the special housing unit has been reduced to 30 months and 29 days. Under the circumstances presented and given the seriousness of

petitioner's misconduct in assaulting two inmates, we do not find that the penalty is so disproportionate to the offense as to be shocking to one's sense of fairness (see *Matter of Rivera v Goord*, 38 AD3d 964, 964-965 [2007]; *Matter of Sheppard v Goord*, 264 AD2d 916, 917 [1999]).

Peters, EJ., Stein, Spain and Garry, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

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