

NEW YORK COURT OF APPEALS

In the Matter of Anthony Bottom v. Anthony Annucci

26 N.Y.3d 983 (2015) · No. No. 135 · Decided October 22, 2015

OPINION

The Matter of Anthony Bottom v. Anthony Annucci 26 N.Y.3d 983

PER CURIAM.

This memorandum is uncorrected and subject to revision before publication in the New York Reports. No. 135 In the Matter of Anthony Bottom, Appellant, v. Anthony Annucci, &c., Respondent. Norman P. Effman, for appellant. Allyson B. Levine, for respondent.

MEMORANDUM: The judgment of the Appellate Division should be affirmed, without costs.

Petitioner Anthony Bottom appeals from a judgment confirming a disciplinary determination of respondent, the Acting - 1 - - 2 - No. 135 Commissioner of the Department of Corrections and Community Supervision (DOCCS), that petitioner violated DOCCS Rule 113.22. That rule states, "[a]n inmate shall not use or possess an article in an area where its use or possession [is] prohibited" (7 NYCRR 270.2 [b] [14] [xii]). Our review of petitioner's challenge is limited to determining whether the prison disciplinary determination is supported by substantial evidence (CPLR 7803 [4]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139

[1985]). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*id.* at 139, quoting 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180 [1978]).

Here, the administrative record establishes that while petitioner was an inmate at Attica Correctional Facility, he was subjected to a routine frisk as a part of a library call-out, during which he was found to be in possession of two, loose United States postage stamps, in direct violation of the Attica facility provision prohibiting loose stamps in the law library. At the Tier III disciplinary hearing, petitioner conceded the facts as charged, including that he was in possession of the stamps. Although he claimed he was unaware of the facility provision at the time of the incident, he admitted that the provision was set forth in the Attica inmate handbook. On its face, the record provides substantial evidence of respondent's determination. - 2 - - 3 - No. 135 Nonetheless, petitioner contends that the determination is not supported by substantial evidence that he violated an enforceable rule. As a threshold matter, petitioner has not preserved for our consideration his claim that the facility provision is unenforceable because, at the time of the incident, it had not been filed with the Secretary of State, as required by Article IV, § 8 of the New York State constitution (NY Const art. IV, § 8 ["No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or

commission shall be effective until it is filed in the office of the department of state"). Petitioner admits that he failed to raise the constitutionality of the provision during the administrative proceedings and in his Article 78 petition. Thus, his claim is not properly before us (see *Matter of Barbara C.*, 64 NY2d 866, 868 [1985] [dismissing appeal where the constitutional questions raised on appeal were not raised or preserved in the trial court]; *Rosa v Fischer*, 87 AD3d 1252, 1253 [3d Dept 2011] [claim, not raised in an article 78 petition, was unpreserved], lv denied 19 NY3d 802 [2012]; *Mingo v Annucci*, 49 AD3d 1106, 1107 [3d Dept 2008] [claim raised for the first time on appeal was unpreserved] lv denied 11 NY3d 707 [2008]; see also *Matter of Khan v New York State Dept. of Health*, 96 NY2d 879 [2001] [stating that in the article 78 context, the Appellate Division's power of review is - 3 - - 4 - No. 135 the same as the Court of Appeals]). Petitioner's preserved claims that, in fact, he did not violate the facility provision because he was found to be in possession of the loose stamps outside the library premises, and that any mistake on his part was unintentional, are without merit. Prison rules state explicitly that inmates who attempt "to violate institutional rules of conduct . . . [are] punishable to the same degree as violators of such rules [and] may be cited for attempts . . . whether or not the text of an actual rule contains such term[]" (7 NYCRR 270.3 [b]). Petitioner testified during the disciplinary hearing that he was carrying the loose stamps while on his way to the law library. Thus, by his own admission, he is guilty of an attempt to violate the provision, and as a consequence Rule 113.22. Furthermore, whether petitioner was aware that he was in violation of a restriction on loose stamps is irrelevant because Rule 113.22 applies regardless of the inmate's intent. The Appellate Division order should be affirmed because substantial evidence supports respondent's disciplinary determination that petitioner violated an enforceable prison rule, based on the misbehavior report, petitioner's admissions, and the Attica law library provision (see *People ex rel. Vega*, 66 NY2d at 139; *Matter of Bryant v Coughlin*, 77 NY2d 642, 647 [1991]).

- 4 - - 5 - No. 135 * * * * * Judgment affirmed, without costs, in a memorandum. Chief Judge Lippman and Judges Pigott, Rivera, Abdus-Salaam, Stein and Fahey concur. Decided October 22, 2015 - 5 -