STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Washington Unit **Docket No. 763-12-15 Wncv**

MICHAEL LEWIS
Plaintiff

v.

LISA MENARD, Commissioner,
Vermont Department of Corrections
Defendant

DECISION
Cross-Motions for Summary Judgment

Plaintiff Michael Lewis is an inmate in the custody of the Vermont Department of Corrections, currently housed in a facility in Michigan. He seeks Rule 75 review of a disciplinary conviction after he *preliminarily* tested positive for Suboxone. It was a random drug test. There was no admission of guilt. There was no other evidence of guilt. No *mandatory* confirmation test was conducted. Mr. Lewis was convicted based on the preliminary test alone. On review, the State argues that the preliminary test is sufficient to affirm the conviction under the "some evidence" standard even though its own policies required a confirmatory test. It offers no explanation for failing to have performed the confirmatory test.

This case is virtually identical to *Foster v. Menard*, No. 65-1-16 Wncv (Vt. Super. Ct.). The only difference is that, in *Foster*, the State attempted to persuade the court that additional evidence of guilt existed in the form of an admission before relying exclusively on the some evidence standard. However, there was no admission or any other additional evidence of guilt. The court ordered the conviction expunged because the preliminary test alone is insufficient even under the "some evidence" standard:

> The State argues that the Court should affirm the conviction because there is "some evidence" of guilt in the record. That evidence apparently consists exclusively of the preliminary drug test result and Mr. Foster's failure to more affirmatively deny drug use at his disciplinary hearing. In the circumstances of this case, the Court cannot conclude that the some evidence standard is met.
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> This was a random drug test. It was not undertaken based on any evidence or belief that Mr. Foster would test positive. When he did test positive, Mr. Foster clearly objected that he does not consume drugs, the test must be wrong, and the sample should be sent out for confirmation. *DOC policy in no uncertain terms requires exactly that absent an admission.* [See DOC Directive #409.04, Procedural Guidelines § 2(d)(iv).] The hearing officer can be presumed to know the DOC's directives and the evidence described above was before him. In this

> context, there is no fair way to construe Mr. Foster's statement that he had no case to put on, moments after saying he was not guilty, as an admission. *There are no findings or circumstances in this case that might explain why the DOC would deviate so significantly from the plain requirements of its directive. And there are no other circumstances that might point toward Mr. Foster's guilt.*
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> In these circumstances, the Court concludes that the conviction is not predicated on some evidence and must be expunged from Mr. Foster's record.

Foster v. Menard, No. 65-1-16 Wncv, slip op. at 3–4 (Vt. Super. Ct. Aug. 31, 2016) (emphasis added; citation omitted; copy attached); See DOC Directive #409.04, Procedural Guidelines § 2(d)(iv) ("If the preliminary test is positive and the inmate fails to admit to use of a prohibited substance, a confirmation test **must** be conducted by a State-contracted testing laboratory." (emphasis in original)). The State offers no rationale for any different outcome here.

Mr. Lewis protested when the sample was taken that a prescribed medication of his would cause a false positive. He insisted on a confirmatory test. He raised the same issue at his hearing. No evidence was presented at his hearing to the contrary. With no explanation from the State, then or now, no confirmatory test ever was done.

On review here, the State has come forward with evidence to the effect that Mr. Lewis takes no potentially confounding medication. That evidence, however, is too little too late. If it were material at all, it had to be presented during the administrative proceeding so that Mr. Lewis could have some opportunity to confront it. More importantly, however, in the circumstances of this case it is completely irrelevant. Regardless whether one believes Mr. Lewis, the point is that he did not admit to the positive response from the preliminary test, there was no confirmatory test, and there was no other evidence of any kind as to his guilt. The preliminary test, by itself, is not good enough in these circumstances.

ORDER

For the foregoing reasons, Mr. Lewis's motion for summary judgment is granted and the State's is denied: the conviction is reversed and the DOC is ordered to expunge it from Mr. Lewis's record.

Dated at Montpelier, Vermont this 21st day of December 2016.

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Mary Miles Teachout
Superior Judge