COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0448 **Cir. Ct. No. 01-CV-1218**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL. JOSHUA SLAGOSKI,

PETITIONER-APPELLANT,

V.

PHIL KINGSTON, JON E. LITSCHER AND RICHARD VERHAGEN,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Joshua Slagoski appeals from a pair of orders dismissing his claims for certiorari review of a prison disciplinary decision and declaratory judgment regarding related administrative code provisions. We affirm for the reasons discussed below.

BACKGROUND

¶2 A search of the prison cell Slagoski shared with another inmate at Columbia County Correctional Institution revealed a screwdriver shaft and a bolt hanging by a string in an air vent, a spring in one of the ankle irons attached to the lower bunk (where his cellmate slept), and a piece of double wire cord hidden in the ledge of the desk. Slagoski was not allowed to be present during the search. As a result of the discoveries, prison officials issued Slagoski a major conduct report for possessing weapons and possessing contraband, contrary to WIS. ADMIN. CODE §§ DOC 303.45 and 303.47.

¶3 At the hearing, Slagoski denied that any of the items were his, but admitting using his cellmate's electrical cord to heat food. The prison disciplinary committee found that Slagoski "had knowledge of the contraband items and did not report their existence to staff," and adjudged him guilty of both offenses. The committee imposed 120 days of program segregation, and Slagoski's administrative appeal was denied.

¶4 Several months later, Slagoski wrote to the warden requesting a new hearing based on newly discovered evidence, claiming that an anonymous inmate had informed him that a prior resident of the cell was responsible for placing the items in the air vent. The warden denied the request, and Slagoski's additional attempts to obtain administrative relief through the inmate complaint review system were also unsuccessful. Slagoski then filed the present action seeking certiorari review of the prison disciplinary decision and the warden's refusal to grant a new hearing, and declaratory judgment stating that inmates have a right to be present during searches and that the administrative rules do not give adequate

notice that inmates will be subject to discipline if they have knowledge of a cell-mate's contraband and fail to inform officials.

STANDARD OF REVIEW

¶5 Our certiorari review is limited to the record created before the committee. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). With regard to the substance of the prison disciplinary decision, we will consider only whether: (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) the evidence was such that the committee might reasonably make the order or determination in question. ***Id***. We may, however, independently determine whether an inmate was afforded due process during administrative proceedings. ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997).

ANALYSIS

Dismissal of Declaratory Judgment Claim

¶6 Slagoski first contends that the trial court erred in dismissing the declaratory judgment portion of his complaint because joinder of distinct claims is generally permissible under Wisconsin law. While that may be true, WIS. STAT. § 806.04(6) (1999-2000)[1] gives the trial court discretion to "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Here, the declaratory judgment by which Slagoski sought to establish that inmates have a right to be present during searches and that the administrative rules do not give adequate notice that inmates will be subject to discipline if they have knowledge of a cellmate's contraband would not have automatically terminated the controversy over the disciplinary proceeding which was the subject of the certiorari claim. Therefore, the trial court had discretion to dismiss the declaratory judgment and deal only with the certiorari claim, regardless whether the initial joinder was proper.

Sufficiency of the Evidence

¶7 Slagoski claims that the evidence was insufficient to support the weapons possession charge because he testified that he had never seen the screwdriver shaft, and it was not found on his person or in the area where his personal property was kept. Under the administrative rules, however, any item within an inmate's quarters is, by definition, in his "possession." WIS. ADMIN. CODE § 303.02(16). It did not matter, therefore, whether the item was found in Slagoski's area of the cell. Moreover, the committee was not required to believe Slagoski's assertion that he had never seen the screwdriver shaft. It could permissibly infer, based on the fact that Slagoski had occupied the cell for six months and that he had admitted knowing about the contraband electrical cord, that Slagoski had also been aware of the screwdriver shaft.

Newly Discovered Evidence

¶8 Slagoski contends the warden erred by refusing to grant him a new hearing based upon newly discovered evidence. There is not, however, an administrative code provision which gives inmates the right to a new hearing

based on newly discovered evidence. WISCONSIN ADMIN. CODE § DOC 303.76(7)(e) gives the warden discretion to unilaterally review a conduct report at any time "as if there were an appeal." That provision merely allows the warden to review conduct reports regardless of whether there has been a timely appeal filed. It does not require that the warden grant a new hearing under any particular circumstances. Nor does Slagoski cite any authority showing that due process requires new hearings based upon newly discovered evidence in the prison conduct report context, as opposed to criminal proceedings or other situations where there is a statutory right to have newly discovered evidence considered.

¶9 Here, Slagoski requested a new hearing after the allotted time for administrative review had passed. The warden was under no obligation to reconsider a conduct report he had already reviewed, much less grant Slagoski the relief sought based upon vague facts from unidentified sources.

Notice

¶10 WISCONSIN ADMIN. CODE § DOC 303.76(3) requires that an institution wait at least two working days, but not more than twenty-one days, after giving an inmate a copy of the conduct report and hearing rights notice before holding a disciplinary hearing. Here, Slagoski received the conduct report and hearing notice on October 26, 2000, and the hearing was held on November 9, 2000, in compliance with the notice rule that was in effect at the time of his offense.

¶11 Slagoski claims that he was entitled to an additional notice under the version of the administrative code which was in effect at the time he began serving his sentence. However, Slagoski does not dispute that the provision upon which

he relies was repealed effective July 1, 2000. Due process does not require that prison officials comply with a repealed rule.

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.