

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1156

Cir. Ct. No. 2006CV3238

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. JOHN H. SMITH,

PETITIONER-APPELLANT,

V.

JODINE DEPPISCH AND MATTHEW FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. John Smith appeals an order affirming a prison disciplinary decision. He contends that the evidence was not sufficient for the committee to find him guilty of the charged offense. The standard of review is whether any reasonable view of the evidence supports the committee's decision.

See State ex rel. Ortega v. McCaughtry, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). We decide this issue de novo. *See id.*, 387. Because we conclude that the evidence does not support the committee's finding of guilt, we reverse.

¶2 The basic facts are not in dispute. Smith was an inmate at Waupun Correctional Institution in April 2006. On April 4 he and another inmate were being returned to the institution from a work release site, in a van driven by a third inmate. A corrections officer saw the van make an unauthorized stop, and reported her sighting to the institution. Consequently, when the inmates returned to the institution they, and the van, were searched for contraband. None was initially found. However, corrections officers found a bottle of vodka on the ground near where the van was parked, which was not there before the van arrived. Smith was charged with possession of intoxicants, in violation of WIS. ADMIN. CODE § DOC 303.43 (Dec. 2000), as were the other two inmates. The disciplinary committee found all three inmates guilty of possessing the vodka based on the facts recounted above. The decision finding Smith guilty was affirmed in the ensuing administrative review, and by the trial court on certiorari review.

¶3 WISCONSIN ADMIN. CODE § DOC 303.02(16) (Dec. 2000) provides that in WIS. ADMIN. CODE § DOC ch. 303 "possession" means, in relevant part, "on one's person ... or under one's physical control." The evidence recounted above reasonably allows the inference that one or more persons in the van possessed the bottle of vodka, but does not allow any inference as to which inmate or inmates possessed it. There was not, for example, any evidence of when, where, or by whose initiative the vodka was obtained. Evidence showing, or permitting a reasonable inference, that Smith had the bottle of vodka on his person

or under his control was necessary. Because no such evidence was presented, the disciplinary committee could only speculate that Smith committed the violation.

¶4 Our decision makes it unnecessary to address the other issues Smith raises on appeal. We direct the trial court on remand to enter an order requiring the respondent to expunge the violation from Smith's record.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

