

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2012

Diane M. Fremgen
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. 2011AP200

Cir. Ct. No. 2010CV3646

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. KENDRIC J. WINTERS,

PETITIONER-APPELLANT,

V.

RICK RAEMISCH AND MICHAEL THURMER,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Kendric Winters appeals from a circuit court order denying his petition for a writ of certiorari challenging a prison disciplinary decision. Winters contends that the respondents: (1) failed to provide him with sufficient notice of temporary lock-up (TLU) under WIS. ADMIN. CODE § DOC

303.11(5); (2) failed to provide him with the evidence used against him at his due process hearing, contrary to WIS. ADMIN. CODE §§ DOC 303.81(5) and 303.86(4); (3) violated due process and their own rules by relying on anonymous, unsigned statements; (4) erred by relying on unreliable confidential informant statements; and (5) violated due process by submitting a supporting affidavit after the conclusion of the hearing. Winters also contends that WIS. ADMIN. CODE § DOC 303.86(2)(a) is unconstitutional as applied to him and that the evidence in his favor was stronger than the evidence against him. We reject these contentions and affirm.

BACKGROUND

¶2 On December 29, 2009, Winters was placed in TLU pending a conduct report for alleged involvement in gang activity, contrary to WIS. ADMIN. CODE § DOC 303.20. On January 19, 2010, Winters received a conduct report alleging that activity. The conduct report stated that security staff received anonymous information that the gang “Gangster Disciples” was organizing within the prison. According to the conduct report, the anonymous information was that certain inmates had placed themselves in leadership positions and were forcing other members to pay dues and memorize gang literature, and that Winters was distributing that gang literature and acting as an “enforcer,” punishing inmates who did not comply. The conduct report also stated that the attempts to locate the source of the anonymous information was unsuccessful, but that two confidential informants had provided signed, notarized statements indicating that the Gangster Disciples were forcing members to learn gang literature and pay dues. The first confidential informant reported that members of the Gangster Disciples planned to punish another inmate for disrespecting Winters, and the second confidential

informant reported that Winters was handing out gang literature for members to memorize.

¶3 Winters was provided a staff advocate and provided redacted copies of the confidential informant statements prior to his disciplinary hearing. The hearing officer found the reporting staff credible and found that the confidential informant statements and anonymous statement were corroborated by each other. The hearing officer determined that it was more likely than not that Winters was involved in inmate gang activities. Winters appealed to the warden, who affirmed the decision of the hearing officer. Winters then filed an offender complaint, which was dismissed. Winters filed a petition for certiorari review in the circuit court, and the circuit court denied the petition. Winters appeals.

STANDARD OF REVIEW

¶4 On certiorari review, we review the disciplinary decision of the Department of Corrections (DOC). See *State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶10, 256 Wis. 2d 787, 650 N.W.2d 43 (citation omitted). Our review is limited to the following, which we review de novo: (1) whether the DOC kept within its jurisdiction; (2) whether the DOC acted according to law; (3) whether the DOC's actions were arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the DOC might reasonably have made its decision. See *id.* (citation omitted).

DISCUSSION

¶5 Winters argues that he was not provided sufficient notice of TLU. Under WIS. ADMIN. CODE § DOC 303.11(5): "Institution staff shall document the reasons for TLU placement and shall notify the inmate of the reasons." Our

review of the record indicates Winters was provided with notice of TLU on the day he was placed in TLU. The notice explained that the decision to place him in TLU was based on an anticipated conduct report for engaging in gang activity and a belief that Winters' remaining in the general population may be disruptive to the operation of the institution. *See* WIS. ADMIN. CODE § DOC 303.11(4)(d). We discern no violation of the rules.

¶6 Next, Winters contends that the respondents violated his due process rights by failing to provide him with the evidence used against him at the due process hearing. Winters contends that he was not provided with the confidential informant or anonymous statements cited in the conduct report, as required under WIS. ADMIN. CODE §§ DOC 303.81(5) and 303.86(4).

¶7 Under WIS. ADMIN. CODE §§ DOC 303.81(5) and 303.86(4), a committee may consider a corroborated, signed statement under oath from a witness, without revealing the witness's identity, if the DOC determines that testifying would pose a risk of harm to that witness. "The adjustment committee shall reveal the contents of the statement to the accused inmate, though the adjustment committee may edit the statement to avoid revealing the identity of the witness." § DOC 303.81(5); *see also* § DOC 303.86(4). Here, the DOC determined that testifying in person would jeopardize the personal safety of the informants, and thus the full statements were not provided to Winters. However, Winters was provided with an accurate summary of the anonymous statements and with accurate redacted copies of the confidential informant statements. This procedure was in compliance with DOC rules, and we discern no due process violation on these facts.

¶8 Winters next contends that the respondents violated his due process rights and administrative rules by relying on two unsigned, unsworn anonymous statements to corroborate one of the confidential informant statements. Winters argues that the anonymous statements did not meet the criteria under WIS. ADMIN. CODE § DOC 303.86(4). However, we note that, under WIS. ADMIN. CODE § DOC 303.81(6), the hearing officer may consider other evidence of what a witness would say if it is not possible to obtain a signed, notarized statement. Here, the conduct report writer stated it was impossible to locate the source of the anonymous statements. Accordingly, the statements could be considered as evidence of what those inmates would say if called to testify.

¶9 Winters also argues that an affidavit submitted by the respondents during the certiorari process to establish the necessity of not disclosing the full anonymous statements to Winters is outside of the record and may not be considered by this court on review. In the affidavit, a DOC security director avers that if Winters is provided the full anonymous statements, he may be able to determine the identity of the anonymous inmates. The DOC security director further avers that this would put the inmates' safety at risk. We determine that we may properly consider this information on certiorari review under *Ponte v. Real*, 471 U.S. 491, 495-97 (1985) (if inmate alleges due process violation based on prison's failure to call witnesses at disciplinary proceeding, prison officials may offer court evidence of reasons for not calling witnesses to testify). The affidavit provided sufficient justification for withholding the full anonymous statements.

¶10 Winters also contends that the two confidential informant statements did not sufficiently corroborate each other because the only similarity they have as to Winters is mentioning Winters by name. Winters points out that the first confidential informant only mentions Winters to say that another inmate was

targeted by the gang for being disrespectful to Winters, and the second confidential informant stated that Winters was involved by passing out gang literature and threatening other inmates with punishment if they did not memorize the literature. Winters argues that the two statements did not provide any specific similar statements as to Winters to corroborate each other. However, the statements both alleged an increase in Gangster Disciples activity and identified the same inmates as involved. Both statements associated Winters with gang activity, the first by stating that another inmate was targeted by the gang for disrespecting Winters, and the other by stating that Winters was handing out gang literature and threatening punishment for failure to comply. We conclude that the confidential informant statements sufficiently corroborated each other under DOC rules.

¶11 Winters also argues that WIS. ADMIN. CODE § DOC 303.86(2)(a), which allows a hearing officer to consider any relevant evidence whether or not obtained in compliance with rules and the law, was unconstitutional as applied to him in this case. Winters again contends that the use of the anonymous statements to corroborate the confidential informant statements was contrary to the rules. However, we have already determined that the procedure in this case was in compliance with DOC rules. Because the DOC did not violate its rules in obtaining evidence, § DOC 303.86(2)(a) was not applied to Winters in this case. This defeats Winters' argument that § DOC 303.86(2)(a) was unconstitutional as applied.

¶12 Lastly, Winters contends that the more reasonable view of the evidence was that Winters did not commit the alleged violation. The conduct report alleged that Winters violated WIS. ADMIN. CODE § DOC 303.20. Section DOC 303.20(3) provides:

Any inmate who participates in any activity with an inmate gang ... or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Winters points to the short amount of time between when Winters began his job activity that allowed him access necessary for the alleged gang activity and the date he was placed in TLU, and to statements by other inmates on his behalf stating that Winters was not involved in any gang activity. Winters argues that there was no reason to find the confidential informants more credible. However, our review is limited to whether there is substantial evidence to support the hearing officer's decision, even though the evidence would also support a contrary decision. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). Here, the confidential informant and anonymous statements, together with the conduct report writer's statements that Winters is a confirmed, known member of the Gangster Disciples and that, based on the writer's experience and training, the writer determined that the gang activities reported were accurate, was substantial evidence supporting the finding of guilt. Accordingly, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

