COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2293 **Cir. Ct. No. 2010CV6216**

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

STATE OF WISCONSIN EX REL. TERRY D. MUELLER,

PETITIONER-APPELLANT,

V.

RICK RAEMISCH,

RESPONDENT-RESPONDENT.

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

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Terry Mueller appeals circuit court orders denying his petition for certiorari review of a prison disciplinary decision and his motion for reconsideration. He raises three claims on appeal: (1) the enterprise rule he was found to have violated was unconstitutionally vague; (2) the evidence

produced was insufficient to show that he requested or received compensation; and (3) prison officials failed to conduct a sufficient investigation to determine the credibility of the evidence produced. We reject each of these claims for the reasons discussed below and, accordingly, affirm the circuit court orders.

BACKGROUND

¶2 Prison officials issued Mueller a conduct report alleging that he committed a major offense when he engaged in a prohibited enterprise. According to the report, Mueller received compensation for providing legal services to another inmate. The enterprise rule states:

> Any inmate who engages in a business or enterprise, whether or not for profit, or who sells anything except as specifically allowed under other sections is guilty of an offense.

WIS. ADMIN. CODE § DOC 303.32(1). Mueller waived a formal due process hearing, but provided a statement denying that he committed the offense.

¶3 The primary evidence in support of the conduct report was a letter from an inmate's father to Mueller stating that he was sending "$400 for you to prepare documents for his [son's] case back to court;" in conjunction with Mueller's possession of the inmate's legal papers. Mueller freely admitted that he was acting as a jailhouse lawyer on the other inmate's behalf, but maintained that he never requested or received any payment for doing so. Mueller pointed out that his prison account did not show any corresponding deposit. He speculated that the father's reference to $400 probably referred to the $350 filing fee plus $50 for costs that Mueller had advised the other inmate he would need to obtain or get a legal loan to cover, and Mueller submitted a copy of a federal court fee schedule.

¶4 The hearing officer viewed Mueller's statement that he had not received any money to be self-serving and not credible, and found him guilty of the offense. After exhausting his administrative remedies (which resulted in an amended decision to correct some documentation errors), Mueller filed the present certiorari action.

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 (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) there was substantial evidence upon which 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. *See* ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980).

DISCUSSION

Vagueness Doctrine

¶6 Mueller claims that the enterprise rule he was found to have violated is unconstitutionally vague. The vagueness doctrine arises out of due process concerns about fair notice and proper standards for adjudication. *See* ***State v. Driscoll***, 53 Wis. 2d 699, 701-02, 193 N.W.2d 851 (1972). Specifically:

> The test of vagueness of a penal statute is whether it gives reasonable notice of the prohibited conduct to those who would avoid its penalties.…
>
> … [A] statute will be held to be vague in the constitutional sense only if it is so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability.
>
> A statute must also define the crime with sufficient definiteness that there is an ascertainable standard of guilt. The statute need not meet impossible standards of specificity, however, to survive a challenge under the vagueness doctrine. All that is required is a fair degree of definiteness.

State v. Tronca, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978) (citations omitted). The vagueness doctrine must be applied to the actual conduct charged, rather than hypothetical situations. ***Id.***

¶7 Mueller first argues that the rule is vague because it does not define the terms "business" or "enterprise." We disagree. There is no requirement that every key word in a statute or rule be separately defined. In the absence of a special definition, words are simply presumed to have their common meaning. Here, we are satisfied that the terms "business" and "enterprise" are easily understood to involve the exchange of money for goods or services.

¶8 Mueller also complains that the rule does not provide a sufficient basis for adjudication because it does not state that there is a required intent element. Although we agree that it would be fair to read an intent element into the rule, we do not agree it was necessary to parse the rule into numbered elements or to explicitly state that intent is required. The use of the term "engages" is sufficient to suggest that some active participation with knowledge or intent is required.

¶9 In sum, we conclude that the language of the rule is sufficiently precise to provide notice that the actual conduct alleged here—namely, being paid $400 to prepare legal documents for another inmate—would constitute a violation if proven. We view Mueller's contention that he did not ask to be paid, and therefore did not have the requisite intent to conduct a business or enterprise, as going to the sufficiency of the evidence rather than to the specificity of the rule.

Sufficiency of the Evidence

¶10 As noted above, the primary evidence supporting the disciplinary decision was the letter from the other inmate's father, which indicated that the father was sending Mueller $400. Mueller contends that, because there was no corroborating evidence that he either solicited or actually received the money, the letter itself was insufficient to support his adjudication of guilt. We disagree.

¶11 Under the substantial evidence test applicable in certiorari actions, we will sustain any decision that a reasonable person could have made based upon the evidence. ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998). Thus, we will not substitute our view for that of the agency as to the credibility of witnesses or which inference to draw where the evidence would support two or more conflicting inferences. ***Samens v. LIRC***, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984) (citation omitted).

¶12 Here, Mueller presented one plausible interpretation of the evidence: that he had informed the other inmate that the other inmate would need $400 to cover the filing fee and copies, and the other inmate's father had mistakenly thought that he was supposed to send the money to Mueller rather than to his own son. That was not the only reasonable inference that could be drawn from the evidence, however.

¶13 Another possible inference was that the father had sent Mueller $400 to prepare legal documents for his son because Mueller had asked for that amount. The fact that the $400 figure corresponded to the approximate amount that would be needed for a filing fee and copies could be seen as a coincidence, as a post hoc rationalization, or as part of a scheme in which Mueller would pay the filing fee and keep the remainder for himself. It could be further inferred that the reason the money had not been deposited in Mueller's prison trust account was because Mueller had made alternate arrangements to transfer the money out of the institution in order to avoid detection.

¶14 In choosing between these competing inferences, the hearing officer was entitled to rely upon its assessment of Mueller's credibility. We therefore conclude that the disciplinary decision was, in fact, supported by substantial evidence that Mueller had knowingly engaged in the enterprise of providing legal services for payment.

Procedural Fairness

¶15 Mueller complains that prison officials failed to take adequate procedural steps to determine the credibility of the letter because no one contacted either the other inmate, to ask whether Mueller had requested compensation, or the father, to ask if he ever actually sent a money order and if so, to whom and at what location. However, Mueller himself could have requested witness statements from either the other inmate or his father. Instead, by waiving his right to a full due process hearing, Mueller agreed to a more informal procedure in which he was allowed to see the conduct report and provide his side of the story without an advocate or witnesses. *See* WIS. ADMIN. CODE §§ DOC 303.75(4), 303.76. In short, Mueller was provided with all the process to which he was due.

By the Court.—Orders affirmed.

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