COURT OF APPEALS
DECISION
DATED AND RELEASED

December 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 94-2920

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

STATE OF WISCONSIN EX REL.
EDDIE FALKNER,

Petitioner-Appellant,

v.

GARY R. MCCAUGHTRY,
SUPERINTENDENT,

Respondent-Respondent.

APPEAL from an order of the circuit court for Dodge County: THOMAS W. WELLS, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Eddie Falkner appeals from an order partly affirming and partly reversing a prison disciplinary decision. The Waupun disciplinary committee found Falkner guilty on two charges, one of which the trial court reversed on a confession of error. The issues are whether that error

required either dismissing both charges or a remand, and whether Falkner received sufficient notice of the disciplinary hearing. We affirm on both issues.

Falkner was charged with attempted battery and disruptive conduct after allegedly striking his wife during a visit on October 15, 1993. The conduct report describing the charges was served on him three days later, as was a Notice of Major Disciplinary Hearing Rights, and a Waiver of Formal Due Process (Major Hearing). The latter two documents both stated that he would receive a hearing on the charges within two to twenty-one days. On October 26, Falkner signed a form waiver of his right to a formal due process hearing and also checked a box indicating "I waive the two-day time limit and have no objections to a hearing sooner." The hearing followed on October 29.

Falkner was found guilty on both charges. As punishment, he received eight days adjustment segregation, 360 days program segregation, and the loss of visits from his wife for thirty days. The warden, Gary McCaughtry, affirmed the decision and Falkner commenced this action for certiorari review.

On review, the trial court vacated the finding on the disruptive conduct charge after McCaughtry conceded that it was a lesser-included offense of attempted battery. The court affirmed the attempted battery charge.

On appeal, Falkner argues that the trial court should have dismissed the greater offense as well as the lesser and, alternatively, should have allowed the department to determine which offense to dismiss. We reject both arguments. The evidence included an eyewitness description of Falkner striking his wife with a forearm, knocking her against a wall. That evidence was more than sufficient to prove an attempted battery. Because it so strongly supported the charge, there was no reason for the trial court or the department to dismiss the greater offense.

Falkner received adequate notice of the hearing. WISCONSIN ADM. CODE § DOC 303.81(9) provides that "[t]he hearing officer shall prepare notice of the hearing and give it to the accused ...." Falkner contends that the committee violated this rule by failing to provide him the exact time and date of the hearing. However, the notices served on October 18, that informed Falkner that

the hearing would occur within two to twenty-one days, have been deemed constitutionally adequate. ***Saenz v. Murphy***, 153 Wis.2d 660, 681, 451 N.W.2d 780, 788 (Ct. App. 1989), *rev'd on other grounds*, 162 Wis.2d 54, 469 N.W.2d 611 (1991). WISCONSIN ADM. CODE § DOC 303.81(9) provides Falkner with no greater right to notice than the due process clause. ***Id***. at 680, 451 N.W.2d at 788. In any event, Falkner waived the right to advance notice of the hearing when, on October 26, he consented to an immediate hearing. He cannot reasonably contend that he was prejudiced when the hearing occurred three days after he communicated his readiness to proceed immediately.

Because Falkner was punished on the basis of two charges, he was entitled to reconsideration of that punishment. However, as Falkner notes in his reply brief, he has already served his punishment terms. The question is therefore moot.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.