

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

OCTOBER 3, 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. 95-0408

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

TIM D. JOHNSON,

Plaintiff-Appellant,

v.

MAJOR JAMES ZANON,
LT. BRANT
and LT. WELLENS,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Tim Johnson, formerly an inmate at the Green Bay Correctional Institution, appeals a summary judgment that dismissed his 42 U.S.C § 1983 lawsuit against prison officials. Johnson's § 1983 lawsuit alleged that prison officials denied him both due process and his Eighth Amendment

right to freedom from cruel and unusual punishment when it placed him in a control segregation cell for three days, either naked or in his underwear, with only a blanket for protection. The trial court ruled that summary judgment affidavits contained no disputes of material fact and that prison officials deserved judgment as a matter of law. We agree with the trial court's conclusion and therefore affirm the summary judgment.

For purposes of this appeal, we are assuming, without deciding, that Johnson has a bona fide due process liberty interest at stake; such interests do not automatically arise, however, every time prison officials exert control over prisoners. See *Sandin v. Conner*, 115 S.Ct. 2293, 2300 (1995). Due process requires that the State's actions reasonably relate to legitimate penological interests. See *Washington v. Harper*, 494 U.S. 210, 223 (1990). Due process is a flexible concept, authorizing courts to balance the precise governmental function against the private interest. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Eighth Amendment's bar against cruel and unusual punishment uses a two part test: (1) the deprivation must be sufficiently serious; and (2) prison officials must have a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The first test is objective, the second subjective. *Id.* The trial court correctly decided such matters on summary judgment if prison officials showed undisputed material facts and deserved judgment as a matter of law. *Powalka v. State Mut. Life Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972).

Johnson's affidavit alleged that prison officials placed him in a control segregation cell for three days, with only a blanket and without a mattress. Johnson's affidavit claimed he was naked; prison officials claimed he had underwear. In light of the fact a blanket was furnished, we deem the discrepancy insignificant. Prison officials placed Johnson there after he participated in a disturbance, during which eight inmates threw unknown liquids on staff, blocked their cell doors with bedding, greased their bodies and cell floors, and took other steps to thwart prison staff, including the staff's expected use of chemical agents. Johnson refused a number of orders to come to his cell doors for handcuffs and removal before the cell extraction unit subdued him with a chemical agent. While confined in control segregation, Johnson shouted obscenities and threw his food tray out of his cell. Prison records disclose that prison officials checked on Johnson every half hour during his three-day stay in control segregation. At one point, he spoke with a nurse; later, he refused a T-shirt and socks.

These facts did not support viable due process or Eighth Amendment claims. Prison officials were dealing with a riot; they had legitimate penological interests in using all reasonable means to reassert control over individual inmates and to restore order at large. Under such circumstances, prison officials could rationally choose the control measures that Johnson claims they applied against him. We see no actions by prison officials that were disproportionate to Johnson's conduct in particular, to the disturbance in general, or to the need to restore and maintain institutional order. From the facts developed thus far, no fact finder could conclude that prison officials acted unreasonably in due process terms, that Johnson's confinement met the Eighth Amendment's seriousness standard, or that the prison officials' respective states of mind met the Amendment's culpability standard. If Johnson presented such proof at trial, prison officials could rightfully demand a directed verdict. In sum, the trial court correctly granted summary judgment dismissing Johnson's suit.

By the Court. – Judgment affirmed.

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