COURT OF APPEALS
DECISION
DATED AND RELEASED

November 16, 1995

No. 95-0700

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

STATE OF WISCONSIN EX REL. CHARLES L. TYLER,

Petitioner-Appellant,

v.

GARY MCCAUGHTRY,
JANE DIER-ZIMMEL,
LAURIE BONIS,

Respondents-Respondents.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Charles L. Tyler is an inmate confined to the custody of the Wisconsin Department of Corrections. He appeals from an order affirming a decision by the Waupun Correctional Institution Program Review Committee (PRC) to deny him eligibility for the intensive sanctions program (DIS) and dismissing his writ of certiorari. We affirm.

Tyler is serving a twenty-one year sentence for a robbery conviction. At all times relevant to this action, he was classified as maximum security. On July 29, 1993, Tyler appeared before the PRC for review of his security classification and program assignment. In his social worker's summary and appraisal of Tyler's program review request, the social worker stated:

> Regular recall. Mr. Tyler will appear. He wishes to discuss DIS with the committee. He was advised that he is not eligible due to the assaultiveness of his offense. Social worker recommends retain max WCI based on sentence structure.

In its decision, the PRC stated:

> DIS rescreened 7/13/93: Not eligible, assaultive crime.
>
> Mr. Tyler is being seen at his scheduled recall and the recommendation is for retention in maximum custody at WCI. Mr. Tyler advised the committee that he is interested in assignment to DIS. He was advised that he does not appear eligible based upon the nature of his offense. Mr. Tyler stated to the committee that he had contacted DIS and received the response and he felt that his offense was not an issue. The committee advised Mr. Tyler that if he disagrees with the committee's assessment of his eligibility for DIS that he can appeal directly to the Division of Intensive Sanctions.
>
> The committee notes that Mr. Tyler has involved himself in recommended programming and that he is low in all areas of the Risk Rating instrument except for sentence structure. It is further noted that he does not reduce in sentence structure until 3/98.
>
> Based upon the social worker's comments, A&E recommendations, nature and severity of offense and sentence structure, the committee is unanimous in recommending retention in MAX/WCI.

Tyler sought review of the PRC's decision by filing a petition for a writ of certiorari. In his petition, Tyler made two arguments. First, Tyler alleged that the PRC's decision was arbitrary and capricious because it was based on the assaultive nature of his offense, a factor which Tyler contends is no longer to be considered by the PRC in determining eligibility for DIS. He alleged that he informed the PRC at the hearing that he believed the PRC was relying on outdated department of corrections rules and that the current rules no longer contain a provision that inmates with assaultive offenses are not eligible for DIS. According to the petition, the PRC responded that it was not aware that the rule denying eligibility for DIS to inmates with assaultive offenses was no longer in effect and that he should contact his social worker for a referral.[1]

Second, Tyler alleged that his social worker, relying on a memorandum from Mickey Richards, deputy administrator of the division of intensive sanctions, improperly refused to give him a referral required for eligibility for DIS under WIS. ADM. CODE § DOC 333.04(1)(d).[2] According to Tyler, the memorandum provides that inmates with assaultive offenses are not eligible for DIS and that social workers should not prepare case plans for inmates with assaultive offenses.

The trial court issued the writ and the respondents filed a return of the record concerning Tyler's denial of eligibility for DIS.[3] The trial court then affirmed the PRC's decision and dismissed the writ of certiorari.

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[1] Tyler uses the terms "referral" and "case plan" interchangeably.

[2] WISCONSIN ADMINISTRATIVE CODE § DOC 333.04(1)(d) provides that an inmate is eligible for a minimum security DIS classification if transferred to DIS by the division of adult institutions provided the inmate has a case plan.

[3] In his brief, Tyler maintains that he was classified as medium security by the PRC in February 1994. He contends the respondents erred in submitting "old PRC reports" and that the trial court erred in not considering his most recent PRC classification summary. We reject this argument. Tyler's petition sought review of the PRC's July 29, 1993 denial of DIS eligibility, and the respondents submitted a return of the record of this proceeding on April 19, 1994, approximately ten months before the PRC classification summary of February, 1995. The trial court is confined to the return on certiorari review, *see* ***State ex rel. Conn v. Board of Trustees***, 44 Wis.2d 479, 482, 171 N.W.2d 418, 420 (1969), and the trial court appropriately disregarded Tyler's arguments regarding the PRC's classification

On certiorari, we are limited to determining: (1) whether the agency kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable; and (4) whether the evidence presented was such that the agency might reasonably make the determination it did. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 63, 267 N.W.2d 17, 20 (1978). The test on certiorari is whether reasonable minds could arrive at the same conclusion reached by the agency. ***State ex rel. Palleon v. Musolf***, 120 Wis.2d 545, 549, 356 N.W.2d 487, 489 (1984).

DISCUSSION

Tyler contends on appeal that the PRC's decision denying him eligibility for DIS was arbitrary and capricious because it was based on the assaultive nature of his offense. In Tyler's view, the assaultive nature of an offense is no longer a factor to be considered in determining eligibility for DIS. We disagree.

Section 301.048, STATS., governs eligibility for DIS. It provides in pertinent part that an inmate is eligible for the program if he or she is serving a felony sentence and the department of corrections directs him or her to participate.

In accordance with § 301.048(10), STATS.,[4] the department has promulgated rules regarding eligibility for the program. WISCONSIN ADMINISTRATIVE CODE § DOC 333.04(1)(d) provides that a person is eligible for a minimum security DIS classification if transferred to DIS by the division of adult institutions in accordance with § 301.048(2)(b), STATS., and WIS. ADM. CODE § DOC 302.20, provided the inmate has a case plan. The case plan must include an intended residence, either a school or job placement or an acceptable alternative, and a proposal for meeting treatment goals in the community. ***Id.***

(..continued)
summaries after July 29, 1993.

[4] Section 301.048(10), STATS., provides: "The department shall promulgate rules to implement this section."

WISCONSIN ADMINISTRATIVE CODE § DOC 302.20, to which WIS. ADM. CODE § DOC 333.04(1)(d) refers, states that a transfer of an inmate from one institution to another[5] requires the approval of the classification chief, upon recommendation of the PRC at which the inmate is residing. In evaluating a transfer, the criteria listed in WIS. ADM. CODE §§ DOC 302.14, 302.145 and 302.16 may be considered.

The criteria set out in WIS. ADM. CODE § DOC 302.14 include an evaluation of the nature of the offense and its seriousness, including the physical danger posed to another by the offense, the harm done in the commission of the offense, and whether the inmate exhibited physical aggressiveness that exposed another to harm. *See* WIS. ADM. CODE § DOC 302.14(1)(a)-(d).[6]

A plain reading of WIS. ADM. CODE § DOC 302.14 indicates that the assaultive nature of the inmate's offense is a factor the PRC can rely on in denying eligibility for DIS. In light of the fact that a DIS placement is a minimum security placement and that an inmate eligible for DIS will be released into the community early, the emphasis placed by the PRC on the assaultive nature of the offense was not unreasonable.

Tyler also contends that his social worker, relying on a memorandum from the deputy administrator of the division of intensive sanctions, erroneously refused to prepare a case plan which is required for eligibility for DIS. According to Tyler, this memorandum states that inmates with assaultive offenses are not eligible for DIS and instructs social workers not

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[5] The intensive sanctions program is operated as an institution. Section 301.048(4)(b), STATS.

[6] Other factors the PRC may consider under WIS. ADM. CODE § DOC 302.14 include: the inmate's criminal record, the length of the sentence being served, the motivation for the crime, the inmate's attitude toward the crime and sentence, the inmate's vulnerability to assault by other inmates, the inmate's prior record of adjustment, the length of time the inmate has been in a particular security classification and institution, the inmate's medical needs, time already served for the offense, the reaction to the inmate in the inmate's community or in the community where the institution is located, the inmate's conduct and adjustment in the institution, the inmate's performance in programs, the existence of a detainer, and the inmate's risk rating under the department's risk rating system.

to make case plans for inmates with assaultive offenses, thereby depriving the PRC the opportunity to transfer the inmate to DIS. Tyler also contends that because this memorandum established factors to be considered in making DIS eligibility determinations, it should have been adopted pursuant to formal rulemaking procedures under ch. 227, STATS.

We reject this argument for two reasons. First, as already indicated, the memorandum Tyler refers to is not in the return. A reviewing court may not consider matters outside the return to the writ of certiorari. ***State ex rel. Conn v. Board of Trustees***, 44 Wis.2d 479, 482, 171 N.W.2d 418, 420 (1969).[7] Second, and more significantly, the alleged failure of his social worker to prepare a case plan occurred *after* the PRC's decision. Certiorari lies only to review a final agency determination. ***State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n***, 54 Wis.2d 535, 539, 196 N.W.2d 742, 744 (1972). The only final agency decision Tyler seeks to challenge is the PRC's decision on July 29, 1993, to deny him eligibility for DIS. Events which occurred following the PRC's decision are beyond the scope of our review.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[7] While a party may move to amend the return when the return does not state the whole record, *see* ***State ex rel. Paulson v. Town Bd.***, 230 Wis. 76, 80, 283 N.W. 360, 362 (1939), Tyler did not do so.

No. 95-0700(D)

SUNDBY, J. (*dissenting*). Inmate Charles L. Tyler appeals from an order entered January 31, 1995, dismissing his writ of *certiorari*. He sought review of a decision of the Waupun Program Review Committee (PRC) concluding that he is ineligible for assignment to the Division of Intensive Sanctions (DIS) because of the "assaultive nature of his offense." The respondents, Warden Gary McCaughtry and two members of the PRC, present the following issue for review:

> Did [respondents] act in accordance with law when they denied [Tyler] *eligibility* to participate in the DIS program *based on the assaultive nature of his offense*?

(Emphasis added.) Respondents could have presented the usual *certiorari* issues: Whether the PRC acted contrary to law or arbitrarily and capriciously when it refused to transfer Tyler to MS/DIS (Minimum Security/Division of Intensive Sanctions) based on the statutory and administrative criteria. Apparently, however, respondents wish to have resolved the question whether an inmate incarcerated for an assaultive offense is *automatically* ineligible for the intensive sanctions program. This makes sense because overbedding has forced the Department of Corrections to seek alternatives to prison incarceration. One of those alternatives is to admit inmates incarcerated for assaultive offenses to MS/DIS, if they are otherwise eligible.

It is undisputed that the PRC and the social worker responsible for preparing a case plan for Tyler found that he was ineligible for MS/DIS because he was incarcerated for an assaultive offense.

The PRC's return to the writ of *certiorari* consists of the Inmate Classification Summary for Tyler dated July 13, 1993, and his risk assessment of the same date. The Summary states: "[Tyler] was advised he is not eligible due to the assaultiveness of his offense." I emphasize that there is a vast difference between being "eligible" for MS/DIS and being found "suitable" by PRC for the program. The question before us is: "On July 13, 1993, was Tyler ineligible for MS/DIS because of the assaultive nature of his offense?" The answer to this question requires that we examine the statutes and administrative rules which establish the conditions of eligibility for MS/DIS. I emphasize, however, that the sole issue presented is whether the statutes or the administrative rules make Tyler ineligible *solely* because of the assaultive nature of his offense.

Section 301.048, STATS., creates the Intensive Sanctions Program. The conditions of eligibility which apply to Tyler are contained in sub. (2)(b) which reads:

> A person enters the intensive sanctions program only if he or she has been convicted of a felony and only under one of the following circumstances:
>
> ....
>
> (b) He or she is a prisoner serving a felony sentence not punishable by life imprisonment and the department directs him or her to participate in the program.

Tyler is a prisoner serving a felony sentence not punishable by life imprisonment. However, the department has not directed him to participate in MS/DIS. Respondents do not claim that the department has unreviewable discretion whether to deny otherwise eligible prisoners participation in MS/DIS. The department has adopted rules pursuant to § 301.048(10), STATS., to determine whether it would direct an otherwise eligible prisoner to participate in MS/DIS.

WISCONSIN ADM. CODE § DOC 333.04 provides:

A person is eligible for an MS/DIS confinement classification if ...:

(1) The person is any of the following:

....

(d) Transferred to DIS by DAI in accordance with s. 301.048(2)(b), STATS., and s. DOC 302.20, provided that the inmate *has a case plan* that includes an intended residence, either a school or job placement or an alternative acceptable to the PRC and a proposal for meeting treatment goals in the community.

(Emphasis added.)

The PRC did not reach the factors presented in WIS. ADM. CODE § DOC 302.14 in assigning a security classification because they considered Tyler *automatically* ineligible. The PRC simply rejected Tyler's application because he was incarcerated for an assaultive offense. That disqualification is not prescribed by § 301.048, STATS., or an adopted rule. This disqualification is found in the so-called "Richards memo" which instructed all wardens as of May 3, 1993, to not consider prisoners incarcerated for assaultive offenses for MS/DIS to save the paperwork of preparing a case plan by a social worker and consideration by the PRC of the criteria.

The eligibility requirements for MS/DIS cannot be added to by memorandum or policy; a rule is necessary. Section 227.10(1), STATS. The respondents do not mention the so-called "Richards memo" in their brief. They attempt to "restate" Tyler's claim: They state that he "is challenging the ability of the department to refuse to transfer him to the intensive sanctions program through the program review process." That is not Tyler's challenge. He argues that the PRC cannot declare him ineligible for MS/DIS simply because he is incarcerated for an assaultive offense. He also argues that the social worker could not refuse to prepare a case plan for him because of the nature of his offense. WISCONSIN ADM. CODE § DOC 333.04(1)(d) makes it a precondition for MS/DIS that the social worker prepare a case plan to present to the PRC for an inmate who seeks MS/DIS classification.

Because I agree with Tyler's arguments in both respects, I respectfully dissent.