COURT OF APPEALS
DECISION
DATED AND RELEASED

November 27, 1996

No. 95-2843

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

STATE OF WISCONSIN ex rel.
RICHARD D. WINTERS, JR.,

Petitioner-Appellant,

v.

MARIANNE COOKE,

Respondent-Respondent.

APPEAL from an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Richard D. Winters, Jr. has appealed from a trial court order dismissing his petition for a writ of certiorari and affirming a prison disciplinary committee's decision finding him guilty of battery of another inmate in violation of WIS. ADM. CODE § DOC 303.12 and "group resistance and petitions" in violation of WIS. ADM. CODE § DOC 303.20.[1] The finding that

[1] Winters was initially also found guilty of conspiracy in violation of WIS. ADM. CODE § DOC 303.21. However, the record indicates that the finding of conspiracy was subsequently expunged

Winters violated the rule against "group resistance and petitions" constituted a determination that he committed the battery at the direction of a gang leader. As a result of the findings, Winters was given eight days of adjustment segregation, 360 days of program segregation and was ordered to pay $313 in restitution for the battered inmate's medical expenses.

We reverse the portion of the trial court's order affirming the restitution award and direct that the matter be remanded to the disciplinary committee to supplement its decision to show the basis in the record for the restitution award. If no basis exists in the record for the award, it must be set aside. We affirm the portion of the trial court's order upholding the remainder of the committee's decision.

On appeal of a trial court order sustaining a prison disciplinary decision, we review the decision of the disciplinary committee independently of the trial court. ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). Our review of the committee's decision is limited to the record created before the committee. ***Id.*** We determine: (1) whether the committee stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its decision was arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that it might reasonably make the decision it did. ***Id.***

Winters' first contention is that he was never given a copy of the "Notice of Major Disciplinary Hearing Rights" form. However, the record contains such a notice. It includes Winters' signature certifying that he had read the notice, or had it read to him, and understood it. The notice clearly stated that the hearing would be held not sooner than two days and not more than 21 days after the date he was given a copy of the conduct report, which was May 25, 1995. This notice satisfied both WIS. ADM. CODE § DOC 303.81(9) and Winters' due process rights. ***Saenz v. Murphy***, 153 Wis.2d 660, 680-81, 451 N.W.2d 780, 788 (Ct. App. 1989), *rev'd on other grounds*, 162 Wis.2d 54, 469 N.W.2d 611 (1991). Winters' claim that he was not given a copy of the notice or

(..continued)
by the Department of Corrections on the ground that it was a lesser-included offense of the "group resistance and petitions" charge.

adequate notice of the hearing is therefore not supported by the record, and provides no basis for relief.

Winters next argues that he was denied his right to select an advocate from a list of three as required by WIS. ADM. CODE § DOC 303.78(1)(b). However, while the record does not show the manner in which he received an advocate, it is clear that he received one. Since he has not shown that the fairness of the proceeding was affected by the procedure used in appointing the advocate, the failure to comply with WIS. ADM. CODE § DOC 303.78(1)(b), even if true, must be deemed harmless and does not entitle him to relief. *See* WIS. ADM. CODE § DOC 303.87.

In reaching this conclusion, we have considered Winters' argument that his advocate failed to fulfill her responsibilities by interviewing all necessary witnesses prior to the disciplinary committee hearing. Initially, we point out to Winters that there is no right to counsel, either retained or appointed, in disciplinary proceedings. ***Wolff v. McDonnell***, 418 U.S. 539, 570 (1974). While Department of Corrections rules provide for the appointment of an advocate, the advocate's purpose is merely to help the accused understand the charges and in the preparation and presentation of his or her defense. WIS. ADM. CODE § DOC 303.78(2). The advocate's responsibilities do not rise to the level of counsel's duties or permit the inmate to challenge the adequacy of the advocate's assistance under the standards applicable to effective assistance of counsel.

The record indicates that Winters' advocate interviewed various witnesses before the hearing. She obtained written statements from Sergeant Gallert and Lieutenant Harper, two witnesses requested by Winters, and presented their statements at the hearing. Two other witnesses requested by Winters appeared in person and testified at the hearing. Nothing in the record permits this court to conclude that the advocate was required to conduct more interviews to assist Winters. *Cf.* ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 126, 289 N.W.2d 357, 364 (Ct. App. 1980) (the failure of an inmate's advocate to interview every witness with potential information related to a prison fight does not deny due process).

We also reject Winters' argument that the findings of guilt should be reversed because Harper, the staff member who wrote the conduct report, did not appear at the disciplinary hearing. Winters' request for Harper's attendance was made more than two days after the notice of disciplinary hearing and was thus untimely under WIS. ADM. CODE § DOC 303.81(1).[2] Moreover, confrontation and cross-examination are not due process requirements at a prison disciplinary hearing, ***Wolff***, 418 U.S. at 568, and an inmate has no constitutional right to have the preparer of the conduct report appear to testify in every case. WISCONSIN ADM. CODE § DOC 303.81(4) provides that if the officer who reported the rule violation is unavailable at the time of the hearing, his or her signed statement may be used at the hearing.[3] In this case, Winters' advocate interviewed Harper prior to the hearing and recorded the questions and answers in writing. The questions and answers were made part of the evidence at the hearing.[4]

Winters next objects to the use at the hearing of statements from two confidential witnesses who implicated him in this case. However, WIS. ADM. CODE § DOC 303.86(4) provides that if a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement made under oath by the witness without revealing the witness's identity. It further provides that two anonymous statements by different persons may be used to corroborate each other.

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[2] Winters appears to argue that if a list of advocates had been timely presented to him pursuant to WIS. ADM. CODE § DOC 303.78(1)(b), he would have made his selection and known who his advocate was, and then could have timely requested his witnesses through the advocate pursuant to WIS. ADM. CODE § DOC 303.81(1). However, WIS. ADM. CODE § DOC 303.81(1) provides that if an inmate does not have an advocate, his or her request for witnesses must be sent directly to the security office, and it must be done within two days of the service of notice. If Winters did not have an advocate within two days of service of the notice of hearing, he should have sent his request for witnesses directly to the security office.

[3] The record before us does not include a finding of unavailability as to Harper. However, because Winters' request for his appearance was untimely, we conclude that the absence of this finding provides no basis for relief.

[4] While Winters objects that Harper failed to answer the written questions in a meaningful way, no basis exists to believe that they would have been answered differently if he had appeared to testify, nor has Winters demonstrated that Harper could have been compelled to answer in more detail.

The disciplinary committee found that testifying would pose a great risk of bodily harm to the confidential informants in this case. In addition, the confidential statements implicating Winters corroborate each other. As summarized in the statements given to Winters, each witness who implicated Winters indicated that he heard Winters say that he hit the victim. One witness indicated that Winters told him that he had to hit the victim because the victim had made disrespectful remarks about a gang that Winters was in and that Winters was ordered to hit the victim by another inmate known as "New York" (Felix Cuevas). The other witness indicated that he overheard Winters confront the victim about statements he had made concerning Cuevas and that Winters said the victim made disrespectful remarks about a particular gang and would be dealt with later. This witness also indicated that he later saw the victim with a black eye and that Winters stated that he hit him. These statements thus corroborate each other and were properly relied upon by the disciplinary committee.

Winters also claims that the disciplinary committee failed to adequately set forth the reasons for its findings of guilt and the penalty imposed. We disagree. In its decision, the committee stated that it relied upon the statement in the conduct report, the confidential witness statements and the remaining testimony in finding Winters guilty of the offenses. In a section labeled "Reason for Decision," the committee concluded that Winters was a gang member and that despite his contentions to the contrary his gang was affiliated with the gang led by Cuevas. It relied on Winters' admission that he hit the victim as alleged by the confidential informants and expressly found credible that Winters committed the battery on Cuevas' orders. It also delineated the specific sentencing considerations it relied upon in WIS. ADM. CODE § DOC 303.83 and expressly based the penalty imposed by it on the injury that resulted from the gang activity and battery. These explanations adequately set forth the reasons for the committee's findings and disposition.

Winters also challenges the sufficiency of the evidence to support the findings of guilt. The test on review by certiorari is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion that the committee reached. ***Whiting***, 158 Wis.2d at 233, 461 N.W.2d at 819. That test is satisfied here. Two confidential statements indicated that Winters admitted hitting the victim. One of those statements also indicated that Winters was seen running from the area where the battery occurred. The statements also indicated that Winters said he committed the

battery because of a gang-related disagreement and because he was ordered to do so by an inmate in the gang. The evidence was thus sufficient to find Winters guilty of both battery and group resistance and petitions under WIS. ADM. CODE §§ DOC 303.12 and 303.20.

While we affirm the trial court's order upholding the disciplinary committee's findings of guilt and the adjustment and program segregation ordered by it, we reverse the portion of the trial court's order affirming the $313 restitution award for medical expenses. Winters argues that the restitution award must be reversed because the medical bill for which restitution was ordered was never entered into evidence at the hearing.

In making its decision, the disciplinary committee is permitted to consider only the evidence presented to it and the inmate's records. WIS. ADM. CODE § DOC 303.76(6). While the record indicates that the battered inmate was sent to a hospital for treatment, the State concedes that the record transmitted on appeal does not show the basis for the disciplinary committee's selection of $313 as the amount to be awarded for those expenses. The matter therefore must be remanded to the trial court for remand to the disciplinary committee to designate the evidence upon which it relied in fixing the amount of restitution.

On remand, the disciplinary committee must supplement its decision to show the basis in the record for the restitution award. However, a remand order in a prison disciplinary proceeding may not direct the taking of additional evidence if doing so would offend considerations of due process and fair play. ***State ex rel. Lomax v. Leik***, 154 Wis.2d 735, 741, 454 N.W.2d 18, 21 (Ct. App. 1990). Consequently, if no basis exists for the restitution award in the evidence presented to the committee at the hearing or in the inmate's records, the award must be set aside. *Cf.* ***Snajder v. State***, 74 Wis.2d 312-13, 246 N.W.2d 665, 669 (1976) (due process does not permit supplementing the record on remand to shore up the evidence to support a finding of a violation of parole).

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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