COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

NOTICE

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, STATS.

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

No. 96-2175

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

STATE OF WISCONSIN EX REL. WILLIAM J. EVERS,

PETITIONER-APPELLANT,

V.

ANDREW MATSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

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

PER CURIAM. William J. Evers appeals from a circuit court order affirming a decision by which the program review committee (PRC) denied Evers access to the division of intensive sanctions (DIS). Because we conclude that the PRC did not act incorrectly, we affirm.

BACKGROUND

Evers is an inmate at Racine Correctional Institution serving a twenty-year sentence for multiple prostitution and racketeering offenses, as well as a theft offense. In May 1995, Evers came before the PRC for a review hearing. PRC denied Evers access to the DIS program because doing so would be the effective equivalent of a four-year override on his risk rating, because his security classification had not yet dropped to "minimum" from medium, because he had an internal "HSU facility only" designation,[1] and because of the "assaultive nature" of his offense. Evers commenced a certiorari action, contending that his offenses were not assaultive and that the PRC had erred. The writ was granted, and the respondent filed a return in October. In mid-November, during the pendency of the certiorari action, Evers again came before the PRC. The PRC again denied Evers access to DIS on the grounds that his offenses were assaultive in nature and because there was a strong community reaction against permitting Evers access to the community, even under DIS auspices.

On November 17, 1995, the respondent moved to quash the writ because the November PRC proceedings made the results of the May hearing moot. The circuit court denied the motion. Evers moved to expand the original writ to include the November proceedings, that motion was granted, a supplemental writ was issued, and a supplemental return was filed in February 1996.[2] In June 1996,[3] the circuit court issued an order affirming PRC's denial of DIS eligibility to Evers.

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[1] Unfortunately, no party has enlightened this court as to what this designation entails.

[2] Thus, the results of both the May 1995 and the November 1995 hearing were properly before the circuit court.

Evers appeals, alleging that he is entitled by statute to be classified as eligible for DIS, and that the PRC's actions in processing his DIS application and in classifying him ineligible denied him equal protection and due process.[4]

STANDARD OF REVIEW

Judicial review of certiorari actions is limited to determining whether the administrative tribunal kept within its jurisdiction, whether it proceeded on a correct theory of law, whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that the tribunal might reasonably make the determination in question. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment***, 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986). As to this last issue, the test is whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal. ***Id.***

A reviewing court on certiorari does not weigh the evidence presented to the administrative tribunal. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). Our inquiry is limited to whether any reasonable view of the evidence

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[3] Before the circuit court issued its order, Evers had come up again for a review hearing, and had again been denied eligibility for DIS. Respondent asks us to take judicial notice of the May 1996 hearing, but we will not do so because no showing has been made that that hearing was made part of the record in the proceedings below.

[4] A close reading of Evers' reply brief reveals that the only relief Evers is seeking is a holding that he is entitled by law to be considered eligible for the intensive sanctions program each and every time he appears before the PRC and/or the parole board. However, on certiorari review, we do not grant injunctive relief; our review is limited to the record. *See also* notes 7 and 8, below. We therefore consider only whether the PRC acted correctly in the two matters appealed to us, the May and November 1995 hearings.

Further, the underlying relief Evers seeks—a removal of reference to the "assaultive" nature of his crimes from his PRC reviews—has already occurred. As noted in the text, the State concedes that the crimes for which Evers is currently incarcerated are not "assaultive."

supports the tribunal's decision. ***State ex rel. Jones v. Franklin***, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989).

ANALYSIS

WISCONSIN ADM. CODE § DOC 333.04 makes eligible for DIS those who are not serving a life sentence *and* who have been transferred to DIS by the division of adult institutions under § DOC 302.20. That section, in turn, requires any transfers to be approved by the PRC of the inmate's institution. Section DOC 302.19 provides that the factors to be considered in making a transfer recommendation may include those stated in §§ DOC 302.14 and 302.16. Among the factors are the inmate's security classification, the nature of the inmate's offenses, the length of the sentence, and the reaction in the community. Evers does not argue that any particular factor is entitled to be accorded particular weight. The administrative code also does not indicate what weight is to be given to any particular factor. Therefore, we conclude that if an inmate fails on any one factor, the PRC may properly not recommend transfer to DIS in the exercise of the PRC's "judgment."

Evers complains that the PRC erred in classifying his offenses as "assaultive." Like the circuit court, we conclude that racketeering, theft and prostitution charges are not "assaultive." In addition, the State concedes the issue. Thus, it appears that the PRC erred in incorrectly considering the nature of Evers' offenses. However, the PRC also considered other factors, such as the length of his sentence and his inmate security classification. These are proper factors under the administrative code on which the PRC could reasonably rely in denying Evers access to DIS. Because a "reasonable view of the evidence" supports the PRC's May 1995 determination, we must affirm.

As a result of its November 1995 review, the PRC changed Evers' status. It determined that he was eligible for DIS, but was rejected. The PRC again recited the assaultive nature of Evers' offenses and also mentioned strong community response[5] against his release to DIS. Community response is a factor on which the PRC could properly rely, and we again must affirm.

Evers argues that the PRC failed to follow proper procedure in November when it denied his eligibility. We do not consider this argument further for two reasons. First, in certiorari review,[6] we are limited to a review of the record.[7] Under long-standing Wisconsin law, the correctness of the return cannot be challenged.[8] If Evers wishes to challenge the correctness of the proceedings, he

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[5] Evers argues that only a district attorney and a judge were polled, and that this does not constitute strong community opposition. In certiorari review, we do not weigh the evidence before the lower tribunal. Because the reactions of a district attorney and a judge are valid community responses, "reasonable evidence" in the record supports the PRC's findings, and we must affirm.

Evers also argues that the district attorney and the judge were biased against him for various personal reasons. However, we decline to consider contentions based on facts not of record. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

[6] Review of the record in this case confirms that the underlying proceeding was a classic certiorari case, commenced by writ. This is specifically permitted under ch. 781, STATS. The judicial council notes to that chapter specify that the writ procedure on certiorari action "remains available." Because this is not a civil action seeking a certiorari remedy (*cf.* judicial council notes to § 801.02, STATS.), but a certiorari action, certiorari law controls.

[7] In certiorari actions, the reviewing court must make its determinations "on solely the evidence in the record acted on by the [lower tribunal] and returned to the court ...." ***Kuehnel v. Wisconsin Registration Bd. of Architects***, 243 Wis. 188, 196, 9 N.W.2d 630, 634 (1943).

[8] *See, e.g.*, ***State ex rel. Gray v. Common Council***, 104 Wis. 622, 627, 80 N.W. 942, 943 (1899) (stating that in a certiorari action, the petitioner's motion was "an attempt upon affidavits to traverse the return, and to seek, through the medium of an order, an adjudication that the return is not true in fact .... This cannot be done. The return imports absolute verity so far as it is responsive to the writ.").

may not do so within the context of a traditional certiorari action like the one he commenced here, but must commence a separate action. Second, Evers' factual premise is incorrect. The result of the November 1995 hearing was not to declare him ineligible. To the contrary, he was specifically found "suitable." He was rejected despite his suitability, but this is not a finding of ineligibility in the first instance.

By the Court.—Order affirmed.

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