

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1197

Cir. Ct. No. 00-CV-3396

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. RICHARD WINTERS AND
STATE OF WISCONSIN EX REL. AL CURTIS,**

PETITIONERS-APPELLANTS,

V.

GERALD BERGE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded.*

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

¶1 VERGERONT, P.J. Richard Winters and Al Curtis, inmates at the Supermax Correctional Institution, appeal the circuit court order quashing the writ of certiorari and dismissing their joint petition for certiorari review of decisions of the prison disciplinary committee. The ground for the dismissal as to Winters was that he failed to exhaust his administrative remedies as required by WIS. ADMIN.

CODE § DOC 310.04; the ground as to Curtis is that he failed to file the petition within forty-five days from the date of the decision appealed as required by WIS. STAT. § 893.735 (1999-2000).¹ We conclude that the petition sufficiently alleges that Winters exhausted his administrative remedies and the record shows that he did. We conclude that we are not confined to the allegations of the petition when determining whether Curtis timely filed the petition, but may use the date of the final administrative decision that is undisputed in the record and undisputed by the parties. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 In their petition for a writ of certiorari, Winters and Curtis make the following allegations relevant to this appeal. The disciplinary hearings of each took place on June 26, 2000. Both were found guilty of unauthorized forms of communication in violation of WIS. ADMIN. CODE § DOC 303.30 and each appealed the decision to the warden on June 27, 2000. The warden denied their appeals on July 24, 2000. On July 7, 2000, Winters and Curtis each filed an “inmate complaint.” Winters’ complaint was denied on September 1, 2000. The petition alleges that Curtis’s complaint was denied but does not allege a date. On or about August 10, 2000, each filed a “second step inmate complaint,” raising the same issues as in the July 7 inmate complaint, and in addition contending that Gerald Berge took more than ten days to hear each appeal. The petition alleges that Winters’ “second step inmate complaint” was denied on September 21, 2000 and that Curtis’s was denied on August 22, 2000.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 The petition was signed by each inmate on September 28, 2000. There is a stamp on the petition showing the petition was filed in Grant County Circuit Court on December 4, 2000. The record does not indicate when the petition was first received by the Grant County clerk of court, but it is evident that it was prior to December 4, 2000; December 4 was the date on which the filing fee was paid and therefore that is the date the clerk stamped it as filed. The State asserts that Winters signed a form authorizing money to be withheld from his trust account on October 22, 2000, Curtis signed a similar form on October 25, 2000, and both documents were stamped as filed in the court on October 26, 2000. We are unable to locate these documents in the record although the State's brief in the circuit court refers to them as attachments to that brief. However, since Winters and Curtis do not dispute the State's reference to or description of these documents, we will accept as accurate the State's description of the documents and the dates they were signed and filed.²

¶4 On December 13, 2000, the circuit court for Grant County ordered that the venue of the action be changed to Dane County, and a stamp shows that the petition was filed in Dane County Circuit Court on December 18, 2000. On January 8, 2001, the circuit court in Dane County ordered the State to file a certified copy of the record in the disciplinary proceedings. After the State filed the record, it moved to quash the writ of certiorari and dismiss the petition on the ground that Winters failed to properly exhaust his administrative remedies and Curtis failed to file the action within the time period required by law.

² The record contains a letter dated October 7, 2000, from Winters to the clerk of court for Grant County discussing release from inmate accounts to pay filing fees. In their brief, the inmates assert that they sent the petition to Grant County Circuit Court on or about October 7, 2000.

¶5 As to Winters, the State argued in its brief to the circuit court that by filing his second step inmate complaint (on or about August 10, 2000) before his first complaint was dismissed (on September 1, 2000), Winters failed to comply with the administrative rules governing the exhaustion of administrative remedies.³ Winters responded that WIS. ADMIN. CODE § DOC 310.12(3) authorizes an inmate to consider the first complaint to be dismissed if the inmate does not receive a decision within twenty-three working days of the ICE's receipt of the complaint and to appeal immediately, and that is what he did. In reply, the State acknowledged that Winters' reading of that regulation was correct; however, the State contended Winters should have asserted that regulation in the petition and should have filed the relevant documentation showing exhaustion of administrative remedies along with the petition as required by WIS. STAT. § 801.02(7)(c).⁴ The court's written order granting the State's motion stated that Winters failed to properly exhaust his administrative remedies, citing to WIS. ADMIN. CODE § DOC 310.04, the rule requiring exhaustion;⁵ but the court did not

³ After appealing an adverse disciplinary decision to the warden under WIS. ADMIN. CODE § DOC 303.76, inmates must exhaust remedies available under the Inmate Complaint Review System (ICRS) before filing an action in court. WIS. ADMIN. CODE §§ DOC 310.08(3) and 310.04. The first step is a complaint with an inmate complaint examiner (ICE), WIS. ADMIN. CODE § DOC 310.09(3). If the inmate is dissatisfied with that decision, the inmate may appeal to the corrections complaint examiner (CCE), WIS. ADMIN. CODE § DOC 310.13(1). This is often referred to as the second step inmate complaint, as in this petition. The secretary makes a final decision after receiving a recommendation from the CCE. WIS. ADMIN. CODE § DOC 310.14.

⁴ The State explained that it drafted the motion to dismiss based on the petition prior to receipt of the record, even though the motion was filed after the record was received.

⁵ WIS. ADMIN. CODE § DOC 310.04 provides:

(continued)

explain why it concluded that Winters had not exhausted his administrative remedies.

¶6 With respect to Curtis, the State argued that he did not file his petition within forty-five days of the decision he was appealing as required by WIS. STAT. § 893.735(2).⁶ The State pointed out that the petition alleged that

Before an inmate may commence a civil action or special proceedings against any officer, employe or agent of the department in the officer's, employe's or agent's official or individual capacity for acts or omissions committed while carrying out that person's duties as an officer, employe or agent or while acting within the scope of the person's office, the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary's decision under s. DOC 310.14. With respect to procedures used by the adjustment committee or hearing officer in a prison disciplinary action under DOC 303, an inmate shall appeal to the warden under DOC 303.76 and file an inmate complaint under s. DOC 310.08(3) in order to exhaust administrative remedies.

⁶ WISCONSIN STAT. § 893.735 provides in part:

Action by prisoner contesting a governmental decision.

(1) In this section, "prisoner" has the meaning given in s. 801.02 (7) (a) 2.

(2) An action seeking a remedy available by certiorari made on behalf of a prisoner is barred unless commenced within 45 days after the cause of action accrues. The 45-day period shall begin on the date of the decision or disposition, except that the court may extend the period by as many days as the prisoner proves have elapsed between the decision or disposition and the prisoner's actual notice of the decision or disposition

(3) In this section, an action seeking a remedy available by certiorari is commenced at the time that the prisoner files a petition seeking a writ of certiorari with a court.

The State explained that, since the petition did not allege the date on which Curtis's first complaint was denied, the petition did not show that Curtis had filed the second-step complaint before receiving a denial on the first complaint.

Curtis's second step inmate complaint was denied on August 22, 2000, and forty-five days from that date was well before October 26, 2000, the date on which Curtis filed the authorization to withdraw funds from his inmate account to pay the filing fee.⁷ Curtis responded that the record the State filed showed that the date of the final adverse decision on the second step inmate complaint was September 22, 2000, not August 22, 2000, and thus the October 26 filing was well within the forty-five days. In reply, the State did not dispute that the relevant decision for purposes of the forty-five day time limit was issued on September 22, 2000; but it argued that Curtis had not provided the documentation showing this fact along with the petition as required by WIS. STAT. § 801.02(7)(c). The court granted the State's motion as to Curtis stating that the petition was untimely filed under WIS. STAT. § 893.735, but the court did not explain how it came to that conclusion.

DISCUSSION

¶7 On appeal Winters contends that the trial court erred in ruling that he had not exhausted his administrative remedies, repeating his argument that the timing of his second step inmate complaint was proper under WIS. ADMIN. CODE § DOC 310.12(3) and also pointing out that the circuit court in Grant County had

⁷ The State used the date of October 26, 2000, rather than the filing date of December 4, 2000, because we held in *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶17, 238 Wis. 2d 393, 617 N.W.2d 201, that the forty-five day deadline is tolled once the clerk of court receives the petition for certiorari, the request for a fee waiver, the affidavit of indigency, and the certified copy of the prisoner's trust account statement, provided the prisoner has authorized the prison to make any appropriate payments toward the filing fees from his or her account.

already decided that he had exhausted his administrative remedies.⁸ Curtis repeats his argument that the forty-five day deadline runs from September 22, 2000, and he points to the document in the record filed by the State that shows this date on the secretary's final decision. In response, the State does not address Winters' argument regarding § DOC 310.12(3), nor does it dispute that the decision Curtis is appealing was dated September 22, 2000, rather than August 22, 2000. The State's position appears to be twofold: (1) we should confine our analysis to the petition, and we should take as true every allegation in the petition even if the record shows otherwise; and (2) the inmates did not file copies of the documents showing they had exhausted their administrative remedies along with their petition, as required by WIS. STAT. § 801.02(7)(c).

¶8 Before addressing the State's position, we resolve the initial contentions of Winters and Curtis in their favor. We conclude the plain language of WIS. ADMIN. CODE § DOC 310.12(3)⁹ did authorize Winters to consider his first complaint dismissed when he did not receive a decision within twenty-three working days of July 7, 2000, and to file an appeal under WIS. ADMIN. CODE § DOC 310.13 without waiting for a response. We also conclude there is no

⁸ Attached to the reply brief is a copy of an "Order on Prisoner's Petition for Waiver of Fees/Costs" by the Grant County Circuit Court dated October 27, 2000. The caption is "Al Curtis vs. Gerald Berge." This order finds that the prisoner has submitted all required documentation and the prisoner has either exhausted all administrative remedies or is not required to do so. The order conditionally grants the petition, with the court finding that the prisoner is partially indigent and that, upon payment of \$62, the balance in his trust account as shown by the certified copy of his trust account statement, the action may be commenced.

⁹ WISCONSIN ADMIN. CODE § DOC 310.12(3) provides:

(3) If the complainant does not receive the decision within 23 working days of the ICE's receipt of the complaint, the parties shall consider the complaint dismissed and the complainant may appeal immediately.

dispute that the record filed by the State shows that the final decision of the secretary dismissing Curtis's second step inmate complaint was dated September 22, 2000, not August 22, 2000, as the petition alleged.

¶9 We turn now to the issue of whether we should consider only the petition on this appeal, and here we need to distinguish the State's contention with respect to each inmate. With respect to Winters, if we confine our analysis only to the petition, we conclude the petition does sufficiently allege an exhaustion of administrative remedies. It contains the dates Winters took each step in the administrative process and the date of the response to each step he took. If the State intends to argue on appeal, as it did in the circuit court, that Winters had to specifically refer to WIS. ADMIN. CODE § DOC 310.12(3), we disagree. WISCONSIN STAT. § 801.02(7)(b) requires that a prisoner commencing a civil action or special proceeding, including a petition for writ of certiorari, first exhaust all available administrative remedies that the DOC has promulgated by rule.¹⁰ We agree with the State that in order to show that an inmate is entitled to relief, the petition or complaint must include allegations showing that he or she has exhausted all available administrative remedies. The petition here did allege the

¹⁰ WISCONSIN STAT. § 801.02(7)(b) provides:

No prisoner may commence a civil action or special proceeding, including a petition for a common law writ of certiorari, with respect to the prison or jail conditions in the facility in which he or she is or has been incarcerated, imprisoned or detained until the person has exhausted all available administrative remedies that the department of corrections has promulgated by rule or, in the case of prisoners not in the custody of the department of corrections, that the sheriff, superintendent or other keeper of a jail or house of correction has reduced to writing and provided reasonable notice of to the prisoners.

facts necessary to show that Winters had exhausted the available administrative remedies. We are aware of no statutory or case law requirement that Winters allege the specific administrative provision governing each step he has taken, and the State has provided us with none.

¶10 With respect to the State's challenge to the timeliness of the petition as to Curtis, we conclude that the inquiry is not limited to the allegations in the petition. The purpose of this challenge is not to test the legal sufficiency of the factual allegations in the petition to determine if they would entitle the petitioner to relief if they are true, *cf. State ex rel. Luedtke v. Bertrand*, 220 Wis. 2d 574, 580-81, 583 N.W.2d 858 (Ct. App. 1998) (discussing court's review of certiorari petition to decide if it states claim for relief); rather, the purpose is to determine whether the petition was *in fact* filed within the time required by statute. Thus, when a challenge is made to the timeliness of a petition for review of an agency decision, facts not alleged in the petition are typically considered by the court. *See, e.g., Cudahy v. DOR*, 66 Wis. 2d 253, 255-59, 224 N.W.2d 570 (1974) (considering party's affidavits to determine when petition for judicial review was served). This is also true of challenges to the timeliness of prisoners' petitions for review by certiorari under WIS. STAT. § 893.735(2). *See State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶2 n.2, 235 Wis. 2d 63, 611 N.W.2d 774 (citing to the record for the date of dismissal of the institutional complaints at issue); *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶¶ 3-4, 238 Wis. 2d 393, 617 N.W.2d 201 (consulting the record to determine the date of the administrative decision and of the various steps in filing the petition); *State ex rel. Shimkus v. Sondalle*, 2000 WI App 238, ¶3 n.2, 239 Wis. 2d 327, 620 N.W.2d 409 (consulting the record to determine when the inmate deposited his disbursement authorization and petition for certiorari review in the prison mailbox).

¶11 Indeed, a moment's reflection shows that the resolution of a challenge to the timeliness of a petition for certiorari review logically cannot be based only on the allegations in the complaint regardless of their accuracy: if the petition in this case had alleged a date for the final administrative decision that was later than the actual date, the State would certainly not be precluded from proving that the petition was untimely when measured from the actual date.

¶12 We conclude that we may consider the record to determine the date on which the forty-five days began to run for Curtis, and, as we have already stated, that date is September 22, 2000, not August 22, 2000.

¶13 We next address the State's argument that Winters and Curtis did not comply with WIS. STAT. § 801.02(7)(c) because they did not file documentation with their petition showing they had exhausted their administrative remedies. That paragraph provides:

(c) At the time of filing the initial pleading to commence an action or special proceeding, including a petition for a common law writ of certiorari, related to prison or jail conditions, a prisoner shall include, as part of the initial pleading, documentation showing that he or she has exhausted all available administrative remedies. The documentation shall include copies of all of the written materials that he or she provided to the administrative agency as part of the administrative proceeding and all of the written materials the administrative agency provided to him or her related to that administrative proceeding. The documentation shall also include all written materials included as part of any administrative appeal. The court shall deny a prisoner's request to proceed without the prepayment of fees and costs under s. 814.29(1m) if the prisoner fails to comply with this paragraph or if the prisoner has failed to exhaust all available administrative remedies.

¶14 The State does not develop any argument applying this paragraph to the facts in this case. The only sanction this paragraph provides for the failure to

file the documentation is the denial of the request to proceed without prepayment of fees. The record shows that a filing fee was paid in Grant County. The statute does not suggest that a court may dismiss the petition of an inmate who pays the filing fees because of lack of documentation. Even if we consider the Grant County Circuit Court order that the inmates attach to their reply brief, which shows they paid only part of the filing fee and that the court waived prepayment of the rest,¹¹ we are still hampered by the State's failure to develop an argument. That order shows that the Grant County Circuit Court determined that the prisoner "ha[d] submitted all required documentation" and exhausted all available administrative remedies. It is not apparent to us that WIS. STAT. § 801.02(7)(c) contemplates that, after such a determination has been made, and after the petition has been filed, and after the State has filed the administrative record, which includes all the documents relevant to exhaustion, a court may at that time dismiss a petition because the prisoner did not file documentation of exhaustion with the petition. In the absence of a developed argument from the State that addresses these critical questions, we decline to consider this issue further.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

¹¹ See footnote 8.

