

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2002

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. 01-2967
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-2647

**IN COURT OF APPEALS
DISTRICT IV**

BARNEY A. GUARNERO,

PLAINTIFF-APPELLANT,

v.

**GERALD A. BERGE, GARY BOUGHTON, OFFICER ECK AND
GARY BLACKBURN,**

DEFENDANTS-RESPONDENTS.

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

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

¶1 PER CURIAM. Barney Guarnero, a prison inmate, appeals an order dismissing his 42 U.S.C. § 1983 complaint against four administrators and officers at Supermax Correctional Institution, now known as the Wisconsin Secure

Program Facility (WSPF). He alleged that the four violated his constitutional rights by seizing certain written material and disciplining him for possessing it. On its initial review of the complaint, the trial court concluded, under WIS. STAT. § 802.05(3) (1999-2000),¹ that the complaint did not state a claim for relief under 42 U.S.C. § 1983 because Guarnero had an adequate post-deprivation remedy by certiorari review of the disciplinary proceeding. We conclude otherwise with regard to three of the four respondents, and therefore reverse in part and remand for further proceedings on the complaint.

¶2 In relevant part, Guarnero's complaint alleged the following. Guarnero is a practicing Christian and had some handwritten prayers among his papers. Respondent Eck seized the papers during a cell search and issued a conduct report alleging that the writings were gang-related, and that possessing them was forbidden under prison disciplinary regulations. The assistant security warden, respondent Boughton, approved the report and authorized a disciplinary proceeding. Respondent Blackburn conducted the disciplinary hearing, found Guarnero guilty, and imposed punishment. Guarnero appealed to respondent Berge, WSPF warden, who denied Guarnero's administrative appeal on procedural grounds.

¶3 Guarnero alleged that these actions violated his First Amendment right to practice his religion, as well as his right to due process. He sought remedies including expungement of his record, the return of his written material, judgment declaring that his rights were violated, and monetary damages.

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

¶4 A civil action by a prison inmate is subject to the trial court's initial review of the pleading to determine, among other things, if the pleading states a claim upon which relief may be granted. WIS. STAT. § 802.05(3). If not, the court must dismiss the action without requiring the defendants to answer the complaint. *Id.*

¶5 In its WIS. STAT. § 802.05(3) review, the trial court found that 42 U.S.C. § 1983 relief was not available because certiorari review was adequate. The court construed the complaint as a petition for certiorari, and then dismissed it as untimely. However, the availability of certiorari review precludes 42 U.S.C. § 1983 redress for procedural due process violations only. *See Thorp v. Town of Lebanon*, 2000 WI 60, ¶43, 235 Wis. 2d 610, 612 N.W.2d 59. One may therefore pursue a 42 U.S.C. § 1983 action for violations of other constitutional rights. *See id.* (plaintiff may pursue a 42 U.S.C. § 1983 claim for an equal protection violation despite the availability of an adequate post-deprivation remedy by certiorari).

¶6 Guarnero may therefore proceed on his complaint against those he alleges violated his First Amendment right to practice his religion. This does not include Warden Berge, who is not alleged to have participated in the First Amendment violations. Guarnero alleges only that Berge violated due process in the manner in which he handled Guarnero's administrative appeal. The dismissal of the complaint against Berge is therefore affirmed. On remand, Guarnero may pursue his claim against the remaining three respondents in further proceedings.

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

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

