COURT OF APPEALS
DECISION
DATED AND FILED

January 7, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1807-FT **Cir. Ct. No. 02-CV-671**

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

STATE OF WISCONSIN EX REL. MARK B. EVANS,

PETITIONER-APPELLANT,

V.

DAN BERTRAND, WARDEN, GREEN BAY CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark B. Evans appeals an order denying his petition for a writ of certiorari.[1] Evans argues the circuit court erred by denying

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000).

the petition for Evans' failure to exhaust all administrative remedies. Because Evans failed to follow the specific procedures necessary to exhaust his administrative remedies, we conclude the circuit court properly denied his petition for writ of certiorari.

BACKGROUND

¶2 Evans, an inmate at the Green Bay Correctional Institution, was charged with aiding and abetting a battery and participating in a riot, contrary to WIS. ADMIN. CODE § DOC 303.12B and 303.19. Evans was found guilty following a February 20, 2002 disciplinary hearing. Evans appealed the hearing officer's decision to the warden on February 23, 2002, and the warden affirmed the hearing officer's decision on April 8, 2002.

¶3 The day before his appeal to the warden, however, Evans filed a complaint with the institution complaint examiner seeking review of alleged procedural errors. The institution complaint examiner found no procedural errors and dismissed Evans' complaint on April 11, 2002. Evans' subsequent appeal to the corrections complaint examiner was dismissed on April 16, 2002. The basis for the corrections complaint examiner's dismissal was Evans' failure to exhaust his remedies under WIS. ADMIN. CODE § DOC Ch. 303 before appealing to the Inmate Complaint Review System (ICRS). The Office of the Secretary accepted the corrections complaint examiner's recommendation and dismissed Evans' complaint on April 21, 2002.

¶4 On April 18, 2002, Evans filed a petition for writ of certiorari with the circuit court, challenging the conduct report and punishment imposed. The circuit court denied Evans' petition for writ of certiorari, noting that Evans had failed to provide sufficient documentation that he exhausted his administrative

remedies. Evans filed a motion for reconsideration along with supporting documentation. The circuit court denied the motion for reconsideration. This appeal follows.

ANALYSIS

¶5 Our scope of review is identical to the circuit court's on certiorari. *See* ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Because we independently determine this appeal's merits, it is unnecessary to review the circuit court's analysis. *See* ***id.***

¶6 Pursuant to the Prisoner Litigation Reform Act (PLRA), codified at WIS. STAT. § 801.02(7)(b), a prisoner commencing a civil action or special proceeding, including a petition for writ of certiorari, must first exhaust all available administrative remedies that the DOC has promulgated by rule.[2] After

[2] 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.

WISCONSIN ADMIN. CODE § DOC 310.04, as it existed at that time, governs the exhaustion of administrative remedies and provides:

(continued)

an inmate is found guilty of a major violation, WIS. ADMIN. CODE § DOC 303.76(7) governs the inmate's appeal of that decision. The code provides: "Any time within 10 days after either a due process hearing or after the inmate receives a copy of the decision, whichever is later … [a]n inmate who is found guilty may appeal the decision or the sentence, or both, to the warden." WIS. ADMIN. CODE § DOC 303.76(7)(a). The code further states: "The warden's decision is final regarding the sufficiency of the evidence. An inmate may appeal procedural errors as provided under s. DOC 310.08(3)." In turn, WIS. ADMIN. CODE § 310.08(3) states: "**After** exhausting the appeal in s. DOC 302.19, 303.75 or 303.76, an inmate may use the [inmate complaint review system ("ICRS")] to challenge the procedure used by the adjustment committee or hearing officer, by a program review committee, or by any decision maker acting on a request for authorized leave." (Emphasis added.)

¶7 In order to use the ICRS, an inmate must first file a complaint with the institution complaint examiner under WIS. ADMIN. CODE § DOC 310.09 or 310.10. The inmate will then receive a decision on the complaint under § DOC 310.12 and may have an adverse decision reviewed by a corrections complaint examiner pursuant to § DOC 310.13. Under § DOC 310.14, the secretary shall

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> 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 ch. DOC 303, an inmate shall appeal to the warden under s. DOC 303.76 and file an inmate complaint under s. DOC 310.08(3) in order to exhaust administrative remedies.

either accept, adopt, reject or return the corrections complaint examiner's recommendation.

¶8 Here, contrary to WIS. ADMIN. CODE § DOC 310.08(3), Evans initiated proceedings with the ICRS before exhausting his appeal under § DOC 303.76. In fact, he filed his complaint with the ICRS before filing his appeal with the warden. Significantly, Evans filed his petition for writ of certiorari before the secretary accepted the corrections complaint examiner's recommendation and dismissed Evans' complaint.

¶9 Evans concedes that he did not follow the specific order set forth by the administrative code for exhausting his remedies. He nevertheless argues that because he ultimately completed each step necessary for an exhaustion of administrative remedies, he has "exhausted all available administrative remedies" as required by the PLRA. Citing ***State ex rel. Mentek v. Schwarz***, 2001 WI 32, 242 Wis. 2d 94, 624 N.W.2d 150, Evans claims that this court "need not apply the exhaustion doctrine in a rigid, unbending way." ***Mentek***, however, was a common law exhaustion case involving a probation revocation and, thus, was not covered by the PLRA exhaustion requirements.[3] ***Id.*** at ¶6.

¶10 In ***State ex rel. Hensley v. Endicott***, 2001 WI 105, 245 Wis. 2d 607, 629 N.W.2d 686, our supreme court addressed, in relevant part, whether there is a common law futility exception to the PLRA's exhaustion requirement. The court noted that "the plain language of the PLRA … indicates the intent of the

[3] Even if common law exhaustion principles were applied to the facts of this case, Evans asks us to be so flexible as to vitiate a significant portion of the clear procedure set forth in the code.

legislature." ***Id.*** at ¶9. The court held that "the plain language of the PLRA requires prisoners to exhaust all their administrative remedies prior to challenging a condition in their respective facilities through any civil actions or special proceedings, including common law writs of certiorari." ***Id.*** The court further concluded that "[b]ecause Wisconsin's PLRA does not contain any contingent language regarding exhaustion, it follows that the PLRA eliminated any common law futility exception in the context of prisoner litigation." ***Id.*** at ¶12.

¶11 Although the present case does not involve a futility exception, our supreme court's analysis in ***Hensley*** is nevertheless applicable. Evans urges this court to look beyond the plain language of the PLRA. The statute is clear, however, and thus the common law exceptions do not apply. Because Evans failed to follow the specific procedures necessary to exhaust his administrative remedies pursuant to the PLRA, we conclude the circuit properly denied his petition for writ of certiorari.

By the Court.—Order affirmed.

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