

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 18, 2004

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. 03-1686
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000956

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. NATHANIEL ALLEN
LINDELL,**

PETITIONER-APPELLANT,

v.

MATTHEW FRANK AND GERALD BERGE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
ROBERT A. DeCHAMBEAU, Judge. *Affirmed.*

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

¶1 PER CURIAM. Nathaniel Lindell appeals from an order dismissing as untimely his certiorari action for review of a prison disciplinary action. He claims that his time to file the certiorari action should have been tolled because prison officials refused to extend his annual legal loan limit to allow him to obtain

a certified copy of his trust account statement and postage to mail his certiorari papers to the circuit court. While we agree that Lindell had no control over when prison officials would provide the certified copy of his trust account statement, we conclude that Lindell's inability to pay for postage after exhausting his annual legal loan resulted from his own litigation choices. Therefore, the time to file his certiorari action was not tolled, and the trial court properly dismissed the action as untimely. Accordingly, we affirm.

BACKGROUND

¶2 Lindell exhausted his administrative remedies from an adverse prison disciplinary decision on November 3, 2002. On December 13, 2002, he placed all of the documents necessary to initiate a certiorari action except for a trust account statement into an envelope, and submitted the envelope to prison officials along with requests for postage and a certified copy of his trust account statement. On December 17, 2002, prison officials refused both Lindell's requests for postage and for a certified copy of his trust account statement on the grounds that he had insufficient money in his account to pay for them and had already exhausted his legal loan limit for the year.

¶3 On December 27, 2002, Lindell was able to obtain an extension of his legal loan limit for another case he had pending and sent his certiorari papers to the court along with filings he was making in that case.¹ The circuit court rejected the certiorari papers because they were not accompanied by a certified

¹ WISCONSIN ADMIN. CODE § DOC 309.51(1) permits extension of the legal loan limit "with the superintendent's approval if the inmate demonstrates an extraordinary need, such as a court order requiring submission of specified documents."

copy of Lindell's trust account statement. Lindell renewed his request for a certified copy of his trust account statement once he was given a new legal loan limit for 2003, and then refiled his certiorari action. The court received the filing on January 7, 2003, but rejected it as untimely.

DISCUSSION

¶4 Generally, an inmate seeking certiorari review of an adverse prison disciplinary decision must file his petition within forty-five days after his action has accrued. WIS. STAT. § 893.735 (2001-02).² In certain circumstances, however, the time limit may be extended by the equitable doctrine of tolling. *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶¶13-16, 244 Wis. 2d 177, 629 N.W.2d 17. As we explained in *Walker*, “tolling begins when the documents over which prisoners have control have been mailed, and all of the documents over which prisoners have no control have been requested.” *Id.* at ¶18. We will independently determine whether a certiorari petition was timely filed due to tolling of the statute of limitations. *See id.*, ¶¶11, 18.

¶5 Lindell does not dispute that more than forty-five days passed between the time he exhausted his administrative remedies on his disciplinary decision and the time the trial court finally received all of the documents necessary to initiate a certiorari action for review of the disciplinary decision. He maintains, however, that he had submitted all of the required documents in his control to prison officials by December 13, 2002, within the forty-five-day time limit, and

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that the subsequent delays based on his inability to pay for postage and a certified copy of his trust account statement stemmed from indigency beyond his control.³

¶6 The State concedes that Lindell lacked control over when prison officials would fulfill his request for a certified copy of his trust account statement. It asserts, however, that Lindell did have control over his ability to pay for postage to mail the rest of his certiorari materials in a timely fashion. We agree.

¶7 WISCONSIN ADMIN. CODE § DOC 309.51(1) permits inmates without sufficient funds to borrow up to \$200 per year to pay for paper, photocopies, or postage for correspondence to the courts. Despite Lindell's current inability to earn wages, this provision would have allowed Lindell to borrow the money to pay for the postage to mail his certiorari action if he had not already exceeded his \$200 legal loan limit for the year. The fact that Lindell had exceeded his annual legal loan amount was directly attributable to his own litigation choices. *Cf. Spence v. Cooke*, 222 Wis. 2d 530, 538, 587 N.W.2d 904 (Ct. App. 1998) (noting that the reduction of the prisoner's trust account under account-freezing provisions of the PLRA "is solely a function of the prisoner's decision to litigate and seek a fee waiver"). Thus, Lindell's financial situation did not warrant equitable tolling of the time limit for filing his certiorari action.

³ Although neither party directly addresses the issue, we briefly note that WIS. STAT. § 814.29(1m)(h) states that the custodian of a prisoner's trust account "*shall* provide the prisoner with the certified copy of the trust fund account statement" when the statement is required for evaluation of a fee-waiver petition. (Emphasis added.) We see nothing in that provision that would allow prison officials to charge an inmate for a statement they are legally obligated to provide or to refuse to provide the statement based on an inmate's inability to pay for it. Indeed, such a practice would lead to the absurd result that an inmate could be too poor to prove that he is too poor to prepay his filing fee.

¶8 Lindell further suggests that his inability to afford postage deprived him of access to the courts, contrary to article I, section 9 of the Wisconsin Constitution, which guarantees every person “a certain remedy in the laws ... without being obliged to purchase it.” We have previously noted, however, that this provision requires “neither absolute nor unconditional” access to the courts, but rather a “meaningful” opportunity to pursue civil claims. *State ex rel. Lindell v. Litscher*, 2003 WI App 36, ¶2, 260 Wis. 2d 454, 659 N.W.2d 413 (citations omitted). We are satisfied that the legal loan provision provides a meaningful opportunity for inmates to pursue civil claims.

By the Court.—Order affirmed.

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

