COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2005

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. 2004AP2027 **Cir. Ct. No. 2003CV3543**

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

STATE OF WISCONSIN EX REL. ARLANDIS ISSAC,

PETITIONER-APPELLANT,

V.

GERALD A. BERGE AND GARY MCCAUGHTRY,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Arlandis Issac appeals from an order affirming a prison discipline decision. We affirm.

¶2 Issac was charged with conspiracy to incite a riot and group resistance. The adjustment committee found him guilty on both charges, but the warden dismissed the group resistance charge on appeal. Issac sought judicial review by petition for certiorari. Review on certiorari is limited to whether: (1) the agency kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the order or determination in question. ***Coleman v. Percy***, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980).

¶3 The first issue relates to Issac's request for photographs. In the conduct report, the investigating officer relied on statements by confidential informants. In the report the officer opined that these informants were credible, and further noted that "all identification of inmates referenced in this report was done by photo I.D." The certiorari record does not show that the officer provided the photographs used during the investigation to the adjustment committee.

¶4 After the certiorari record was sent to the circuit court, Issac moved for the filing of an amended return. The motion asserted that during the hearing Issac had requested that he be provided with "all photographic evidence." He noted that the photographs used in the investigation were not in the return, and he asked that they be sent. The court held a hearing on the motion and ordered that the respondents investigate further whether there were photographs in existence. The respondents then filed an affidavit by the investigating officer, along with the photographs used in the investigation, but asked that they remain confidential because of the potential risk to confidential informants. After a further hearing, the court denied Issac's motion to amend the return.

¶5 Issac makes several arguments with respect to this issue. He argues that the investigating officer should not have withheld these photos from the adjustment committee. Issac offers no authority for the proposition that the reporting officer was required to include with the conduct report, or otherwise provide to the committee, all the results of or materials used in the investigation that might potentially be relevant.

¶6 Issac argues that he should have been given the photos for the hearing before the committee. We note that, contrary to Issac's assertions, it does not appear that he asked for these photos during the administrative proceedings. He claimed in his motion to amend the certiorari record that during the hearing he asked for "all photographic evidence," but that is a deceptive editing of his own request, which actually sought: "All photographic evidence, if any, from the months of Nov. and Dec. 2002 of/in the North Side Dining Halls at Waupun Correctional Institution." The request also sought photos with other specific descriptions, none of which included the ones used for inmate identification during the investigation. Issac thus waived this issue by not raising it at the initial hearing.

¶7 Issac argues that the circuit court erred by using the officer's affidavit to decide the motion to amend the return. Issac does not explain what informational basis the court should have used instead. As Issac recognized, the photos were not in the original return. Certiorari review is limited to the record brought up by the writ. ***State ex rel. Richards v. Leik***, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993). If a party believes the return is not accurate or complete, it is appropriate to move for amendment of the return. However, the court needs factual information to decide that motion. In this case, the officer's affidavit stated that the photos were not given to the adjustment committee. Issac does not appear to have disputed that factual assertion, then or now. If the photos were not before the committee, they

should not be included in the certiorari record sent to the court. The circuit court properly relied on that affidavit, and properly decided that the record should not be amended to include these photos. If Issac wanted to raise some issue for which it was necessary to have the photographs before the court, regardless of whether they were before the adjustment committee, that issue would have to be pursued using a legal theory other than certiorari review.

¶8 Issac next argues that the committee failed to make the evaluation required for the committee to accept the statements from the confidential informants. The code provides in relevant part: "If the institution finds that testifying would pose a risk of harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity or a corroborated signed statement from a staff member getting the statement from that witness." WIS. ADMIN. CODE § DOC 303.81(5) (July 2000). Issac argues that the committee did not make its own evaluation of the risk of harm to the confidential informants, but simply deferred to the opinion of the reporting officer.

¶9 We do not read the rule to require such a finding by the committee. The rule provides only that "the institution" must make such a finding, and it says nothing about the committee doing so. When the reporting officer makes such a finding in the conduct report, this requirement is satisfied. Furthermore, the conduct report itself does not have to explicitly make the finding. The fact that it relies on the informants' statements supports the implicit finding being made to that effect.

¶10 Issac argues that the evidence did not support the finding of guilt on the charge of conspiracy to incite a riot. On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the department. ***State ex rel. Richards v. Traut***, 145 Wis. 2d

677, 680, 429 N.W.2d 81 (Ct. App. 1988). The conspiracy rule covers an inmate who "plans or agrees with individuals to do acts which are forbidden." WIS. ADMIN. CODE § DOC 303.05(2) (Dec. 2000). Issac argues that the committee failed to find that Issac "conspired," but stated only that he "directed or coerced others to participate in a disturbance." We agree that one inmate's plan to coerce other inmates may not support a charge of conspiracy, but here the committee also found that Issac "directed" others, which can be read as meaning that Issac was leading or managing willing participants.

¶11 Issac also argues that the evidence did not show a "plan" or "agreement." We disagree. One confidential informant statement said that the informant was asked to join forces to assist several gang leaders in a riot, and identified Issac as one of those leaders. Another statement corroborated this information, again naming Issac by name. These statements support the finding of the existence of a plan or agreement among the alleged gang leaders to incite a riot.

¶12 Finally, Issac makes several brief arguments. He argues that the conduct report did not give adequate notice of the charge because the time was too broad and the editing of the confidential informant statements removed so much specific information that it impeded his ability to defend. The notice given by the report was adequate to describe the conduct he was charged with. Issac discusses the performance of his staff advocate, but concedes he was not prejudiced by that performance. He argues that the authority for the security director to extend the time for the hearing allows officials to avoid holding a hearing in a timely manner. However, the delay in his case was only four days. Finally, Issac argues that he was entitled to attend the "rehearing" at which the penalty was reimposed after the group resistance charge was dismissed by the warden on appeal. As far as the record shows, there was no such hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).