COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1831 **Cir. Ct. No. 2010CV5047**

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

STATE OF WISCONSIN EX REL. CARLOS ROBLES,

PETITIONER-APPELLANT,

V.

LARRY JENKINS AND RICK RAEMISCH,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman, J., and Charles P. Dykman, Reserve Judge.

¶1 PER CURIAM. Carlos Robles appeals from a circuit court order denying his petition for writ of certiorari, by which Robles sought review of a prison disciplinary action. Because the record shows that the Department of

Corrections (the "department") followed the applicable regulations and because substantial evidence supports its decision, we affirm.

BACKGROUND

¶2 During all time periods relevant to this case, Robles was an inmate at Fox Lake Correctional Institution (FLCI) and the Wisconsin Secure Prison Facility (WSPF). On February 16, 2010, Robles received an adult conduct report alleging that he had engaged in gang activity and had possessed contraband, in violation of WIS. ADMIN. CODE §§ DOC 303.20 and 303.47 (Dec. 2006).[1] The conduct report was filled out by FLCI's Security Threat Group Coordinator and stated that Robles was in possession of pictures that showed him wearing a black and gold crucifix necklace and showed him associating with other inmates affiliated with the Latin Kings gang. The Security Threat Group Coordinator explained in the report that black and gold are the colors of the Latin Kings. Statements from three confidential informants (CIs) were used to establish Robles' participation in gang activity, and Robles was provided with a written summary of those statements.

¶3 On the same date he received his conduct report, Robles also received a form entitled "Notice of Major Disciplinary Hearing Rights and Waiver of Major Hearing and Waiver of Time." Robles signed the form next to a statement that said, "I certify that I have read, or had read to me, and fully understand this Notice of Major Disciplinary Hearing Rights." Robles also checked a box on the form indicating that he was waiving his rights to a formal due process hearing.

[1] All references to the Wisconsin Administrative Code are to the Dec. 2006 register date unless otherwise noted.

¶4 On February 18, 2010, Robles received a disciplinary hearing pursuant to WIS. ADMIN. CODE § DOC 303.67(2). Robles gave a statement that he was "not a Latin King" and was not guilty of the alleged violations. The hearing officer found the conduct report and the statements from the CIs to be credible and found Robles' denial of the accusations not to be credible. Robles was found guilty of violating WIS. ADMIN. CODE §§ DOC 303.20(1) and 303.47(2)(a). He was ordered to 360 days of disciplinary separation and his photos were confiscated. The original decision issued by the hearing officer had another inmate's name, "Pena," typed into the portion of the form used to explain the decision.

¶5 Robles appealed the decision to the warden of FLCI. Robles challenged the hearing officer's findings of guilt under WIS. ADMIN. CODE §§ DOC 303.20(1) and 303.47(2)(a). He also argued that 360 days of disciplinary separation was a severe measure to impose, given that he had never before been found guilty of similar offenses. The warden returned the case to the hearing officer to remove inmate Pena's name from the decision form, but concluded that the evidence supported a finding of guilt and the penalty imposed.

¶6 Robles then filed an offender complaint, arguing that the disciplinary hearing officer did not follow the correct procedure for using CI statements. He further argued that inmate Pena, and not Robles, was the person found guilty of the violations. The Inmate Complaint Examiner's Office (ICE) recommended dismissal of Robles' offender complaint. ICE's recommendation stated that the issues of whether Robles was a gang member and whether he possessed contraband were outside the scope of its review, citing WIS. ADMIN. CODE § DOC 303.76(7)(d), which 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)." ICE also noted that Robles had not raised any procedural issues on appeal and, thus, had not exhausted his administrative remedies prior to filing his offender complaint, as required by § DOC 310.08(2)(a). Finally, ICE concluded that the issue of Pena's name appearing on Robles' hearing decision form had been corrected as ordered by the warden of FLCI.

¶7 On June 21, 2010, the warden accepted ICE's recommendation and dismissed Robles' offender complaint. Robles then appealed the dismissal of his offender complaint to the Corrections Complaint Examiner (CCE). CCE recommended dismissal of Robles' appeal, with modification. In its recommendation report, CCE noted that the hearing record did not indicate how the photos confiscated from Robles were "contraband" under WIS. ADMIN. CODE § DOC 303.47. Therefore, the CCE ordered that the case file be returned to the hearing officer with instructions to include an evaluation of the photos referenced in the conduct report.

¶8 The hearing officer followed the recommendation of CCE by adding to his disciplinary hearing decision an explanation that the pictures showed Robles in possession of materials that FLCI's Security Threat Group Coordinator identified as being gang-related. The hearing officer stated that he relied on the Security Threat Group Coordinator's experience and knowledge, and found his statements to be credible.

¶9 Robles then filed another offender complaint, challenging the WSPF's decision to place him in a full-time segregation program, as opposed to half-time. ICE again dismissed Robles' complaint, stating that there is no

administrative code section requiring that an inmate be allowed to serve only half his segregation time.

¶10 Robles again appealed ICE's decision to CCE, and CCE again recommended dismissal of the appeal, concluding that WSPF's decision "reasonably and appropriately addressed the issue raised by this inmate" and that Robles had not presented any information warranting reversal of that decision. The department's Office of the Secretary followed CCE's recommendation and dismissed Robles' appeal. Robles then filed a petition for certiorari review in circuit court. In an order, the circuit court affirmed the department's decision. Robles now appeals.

DISCUSSION

¶11 Robles makes a number of arguments on appeal. He contends that: (1) the circuit court erred in concluding that Robles was required to exhaust his administrative remedies and did not do so; (2) the department failed to follow its own rules and policies; (3) the department improperly destroyed the photographs that were confiscated from him as contraband; (4) the circuit court improperly considered items that were not part of the administrative record; and (5) the evidence was insufficient to support the department's findings of guilt on the conduct report. We disagree, and affirm.

¶12 On certiorari review, we review the administrative agency's decision, not the decision of the circuit court. ***Sprewell v. McCaughtry***, 226 Wis. 2d 389, 393, 595 N.W.2d 39 (Ct. App. 1999). We determine de novo whether the department acted within its jurisdiction, whether it acted according to applicable law, whether the action was arbitrary and unreasonable, and whether the evidence supported the department's determination. ***Id.*** Our scope of review

is identical to that of the circuit court on certiorari. *See* ***Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987).

¶13 Robles argues on appeal that he was not required to exhaust his administrative remedies prior to filing a writ petition because the Prison Litigation Reform Act is ambiguous and confusing on that issue. We disagree. The Wisconsin Supreme Court has held that the Prison Litigation Reform Act's exhaustion of administrative remedies requirement, codified at WIS. STAT. § 801.02(7)(b) (2009-10), is clear on its face in requiring prisoners to exhaust their administrative remedies prior to bringing an action in circuit court. ***Hensley v. Endicott***, 2001 WI 105, ¶1, 245 Wis. 2d 607, 629 N.W.2d 686. We therefore reject Robles' argument that he was not required to exhaust his remedies at the administrative level.

¶14 Robles also argues that the department did not follow its own rules and policies in his disciplinary proceedings. This is a broad procedural issue that encompasses several sub-issues, none of which were raised in Robles' appeal to the warden of FLCI. Specifically, Robles did not raise the following procedural arguments in his appeal to the warden of FLCI: that he never received a due process hearing, that his hearing occurred before the two-day waiting period required by WIS. ADMIN. CODE § DOC 303.75(2), that the CI statements did not meet the requirements of § DOC 303.86(4), that he did not receive notice of the charges against him, that he waived his hearing rights unknowingly and involuntarily, that the hearing officer was not impartial, and that evidence was withheld from him. With the exception of the challenge to the use of the CI statements, these issues also were not raised in the offender complaint Robles filed to appeal the warden's decision. Since Robles did not exhaust the administrative remedies available to him in addressing these procedural issues, he cannot now

raise them in this certiorari action, and we need not address their merits. *See* ***Hensley***, 245 Wis. 2d 607, ¶¶10, 22.

¶15 We next examine Robles' assertion that the contraband photos taken from his cell were intentionally destroyed to avoid judicial review of the department's decision on the conduct report. We begin by noting that the photos are not in the record. The department's certified return to the writ of certiorari includes a contraband tag that lists "7 pictures," but the pictures themselves are not included. At the bottom of the contraband tag, a box is checked to indicate that the "[o]ffender may send out on visit/mail" the seven photos. Other options on the contraband tag that remain unchecked include destroying the contraband, holding it in a file, or returning it to the offender. The department's certified return does not include any documentation suggesting whether Robles sent the photos out of the institution or whether they were ultimately disposed of and, if so, by whom. Because there is no support in the record for Robles' assertion that the photos were intentionally destroyed, we reject that argument.

¶16 We next consider Robles' argument that the record contains items that should not have been reviewed by the circuit court. First, we note that two of the items of which Robles complains—the affidavits of Welcome Rose and Robert Bresette—are not part of any original, amended, or supplemental return to the writ of certiorari, nor were they referenced in the circuit court's decision. Bresette's affidavit was filed with the circuit court for the purpose of supporting the department's motion to submit the CI statements to the circuit court under seal. Rose's affidavit was submitted for the purpose of refuting Robles' claim that a disputed statement from another inmate was part of the administrative record. Robles has not persuaded us that these items were in any way relevant to the court's decision in this case, nor are they relevant to our decision on appeal.

¶17 We likewise are not persuaded by Robles' argument that the amended and supplemental returns of the writ of certiorari should be stricken from the record. The department is permitted to file amended and supplemental returns. *See* ***Gray v. Common Council of City of Oconomowoc***, 104 Wis. 622, 627, 80 N.W. 942 (1899); *see also* ***Hoover v. Gagnon***, 124 Wis. 2d 135, 145-46, 368 N.W.2d 657 (1985). We also note that the first amended return was filed after Robles filed a motion to amend the record with documents related to the department's decision not to grant him half-time release from his disciplinary sentence. The department filed a response stating that it did not realize Robles was challenging anything other than his conduct report, and amended the return of certiorari to include the administrative record pertaining to the denial of Robles' request for half-time release. The department later supplemented the record on two subsequent occasions with copies of FLCI's institutional rules and procedures relevant to the case. Robles has not persuaded us that any of these materials were not properly included in the amended and supplemental returns.

¶18 Finally, we address Robles' argument that the evidence at his disciplinary hearing was insufficient for the department to find him guilty of engagement in gang activity and possession of contraband, in violation of WIS. ADMIN. CODE §§ DOC 303.20 and 303.47. In a prison disciplinary proceeding, the relevant inquiry is whether it is "more likely than not" that the accused committed the violation. WIS. ADMIN. CODE § DOC 303.76(6)(b). Any relevant evidence may be considered, whether or not it would be admissible in a court of law. WIS. ADMIN. CODE § DOC 303.86(2)(a). When this court reviews a finding from a prison disciplinary proceeding, we may not substitute our own judgment for that of the hearing officer, but may only inquire whether substantial evidence supports the decision. ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d

540 (Ct. App. 1994). After reviewing the record, we conclude that substantial evidence supports the hearing officer's determination that Robles violated §§ DOC 303.20 and 303.47.

¶19 WISCONSIN ADMIN. CODE § DOC 303.20(1) states that an "inmate who participates in any group activity which is not approved under s. DOC 309.365 or is contrary to provisions of this chapter is guilty of an offense." The Latin Kings gang is not an approved inmate group activity. *See* WIS. ADMIN. CODE § DOC 309.365(5)(c).

¶20 The hearing officer considered three statements from CIs as evidence of Robles' participation in the Latin Kings. The CIs' statements indicated that Robles "holds the box" for the Latin Kings, that he "is the Kings Treasurer" and that he is in a "leadership position with the Kings." Under WIS. ADMIN. CODE § DOC 303.86(4), the department may use anonymous statements by different persons to corroborate each other. Here, the three CI statements all suggest that Robles was affiliated with the Latin Kings. In addition, the adult conduct report indicated that staff observed Robles "associating with and meeting with other inmates identified as being associated with the [Latin Kings] as offender Robles was [an] institution barber and regularly at recreation." In light of these facts in the record, we conclude that there was substantial evidence to support the hearing officer's finding that Robles participated in gang activity in violation of WIS. ADMIN. CODE § DOC 303.20(1).

¶21 The other offense of which Robles was found guilty was possession of contraband. WIS. ADMIN. CODE § DOC 303.47(2) states that "any inmate who possesses any of the following is guilty of an offense: (a) Items of a type which

are not allowed." The FLCI inmate handbook, section 34 subsection E., states that "[p]hotos of gang signs ... are not permitted."

¶22 The adult conduct report states that seven photos were confiscated from Robles' cell, and depicted him wearing a black and gold necklace and associating with other inmates affiliated with the Latin Kings. Robles admitted in his letter to the FLCI warden on appeal that the photos existed and depicted what the adult conduct report said they depicted. The Security Threat Groups Coordinator stated in the adult conduct report that "black and gold are the colors used by the Latin Kings to show affiliation." The hearing officer relied upon the coordinator's experience and knowledge in the area of gang participation, and found him to credible.

¶23 On certiorari review, we do not weigh the evidence or decide questions of credibility; rather, our review is limited to whether there is substantial evidence to support the department's decision. *See* ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978). Under this test, we examine "whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal." ***Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment***, 131 Wis. 2d 101, 120, 388 N.W.2d 593 (1986). We conclude that, based upon the photos and the contents of the adult conduct report, reasonable minds could conclude that Robles possessed contraband. Because there is substantial evidence to support the department's decision, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).