COURT OF APPEALS DECISION DATED AND FILED

January 8, 2015

Diane M. Fremgen
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. 2012AP1964

Cir. Ct. No. 2011CV1609

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. JOSE SOTO,

PETITIONER-APPELLANT,

V.

GREGGORY GRAMS, TIM DOUMA AND DANIEL WESTFIELD,

RESPONDENTS-RESPONDENTS.

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

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Jose Soto, pro se, appeals an order denying his petition for a writ of certiorari challenging his administrative confinement in

prison.[1] Soto raises several challenges to his confinement. For the reasons discussed below, we reject Soto's arguments and affirm the order.

BACKGROUND

¶2 Soto, who has been incarcerated since August 2001, is currently serving a life sentence for first-degree intentional homicide with use of a dangerous weapon; possession of a firearm by a felon; false imprisonment; and second-degree reckless endangerment, the latter two convictions as party to a crime. At all times relevant to this appeal, Soto was incarcerated at Columbia Correctional Institution (CCI). On November 5, 2010, CCI's security director recommended Soto be reviewed for administrative confinement, citing the nature of Soto's crimes; his numerous conduct reports; and his identification as a gang member.

¶3 A hearing before the Administrative Confinement Review Committee (ACRC) was scheduled for November 15, 2010. Soto's request for staff witnesses was rejected pursuant to WIS. ADMIN. CODE § DOC 303.81(3)(b), which permits denial of a prisoner's witness request where "[t]he testimony is irrelevant to the question of guilt or innocence." At the hearing, Soto offered the following statement:

> [Soto]: What is 81 b? Quamme seen me handling tools. There never was an incident-is relevant to if I'm a risk to security. I was in class over a year without a problem. McDonnell saw me over 2 years. There was an incident one time. I got 90 for threats to another inmate.

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[1] WISCONSIN ADMIN. CODE § DOC 308.04(1) (Sept. 2014) states in part: "Administrative confinement is an involuntary nonpunitive status for the segregated confinement of an inmate whose continued presence in general population poses a serious threat to life, property, self, staff, or other inmates, or to the security or orderly running of the institution."

> The officer that wrote the IR has history and I got ½ time off that 90 seg placement. I haven't been in seg except for that. If you read the reports no weapon was involved. It was not a gang fight-was no gang fight. It was a one punch incident. I did my 180. I did my time. I don't have no gang behavior and no conduct report for gang action. Monfort had contact with me. How was I?
>
> Monfort: You were a real good student for me up there.
>
> [Soto]: I done some immature stuff. There's no stuff in the packet to support the county allegation. If there was a shank, I would have had it on the unit with me, not away. The shank was planted. The Warden denied the appeal on the shank conduct report.

Soto also provided a written statement and a packet of information for the committee's consideration.

¶4 In a decision issued the same day as the hearing, ACRC concluded Soto needed to be placed in administrative confinement, stating the following:

> The Committee has reviewed all the evidence and believes that inmate Jose Soto's presence in general population poses a substantial risk of serious physical harm to both staff and inmates as well as the overall security of the Institution.
>
> The Committee notes that inmate Jose Soto #307830 has accumulated 52 conduct reports since being received into the Wisconsin Department of Corrections on 8/22/01. Approximately 30 of these were for major violations. While in the Milwaukee County Jail, Soto escaped from a locked cell, threatened a victim/witness, assaulted another inmate by kicking him in the head and assaulted other inmates in what was considered gang related actions. In addition, he escaped from handcuffs twice as well as RIPP restraints. He attempted to gain insight to jail operations and offered jail staff $50,000 to assist in his escape and threatened the lives of law enforcement officers. Milwaukee County had to transfer Soto to WDOC for temporary custody because of these actions.
>
> Inmate Soto assaulted another inmate on 1/20/03 by striking him in the chest with his right fist and then ran

> back to his cell. His victim needed medical care requiring 6 stitches to close the one inch cut in his chest. Soto received 4 days Adjustment and 180 Days Program Segregation for Fighting. Soto threatened another inmate in front of a full dayroom on 4/8/08 over a fellow La Familia gang member being sent to WSPF. The Committee notes that inmate Soto has been identified as a member of the violent street gang "La Familia.["] Soto received 90 days Disciplinary Separation for Threats. Most recently, on 4/26/10 an investigation revealed that Soto had hidden an eleven inch shank in the gym and had been using it to threaten other inmates. He received 300 Days Disciplinary Separation and 10 Loss of Recreation for Threats, Lying, and Possession, Manufacture and Alteration of Weapons.
>
> Due to inmate Soto's propensity for violence, the Committee believes that he presents a substantial risk of serious physical harm to both staff and inmates as well as a threat to the overall security of the Institution. Therefore, we are placing inmate Jose Soto in Administrative Confinement.

The ACRC decision was affirmed by the warden on November 30, 2010. Soto appealed to the security chief on December 8, 2010, and the ACRC decision was again affirmed in a January 31, 2011 decision.

¶5 On January 17, 2011, Soto submitted a complaint through the Inmate Complaint Review System (ICRS), alleging procedural due process errors at the November 15, 2010 hearing. That complaint was rejected as untimely. Soto sought review of the rejected complaint and the reviewing authority determined Soto's ICRS complaint was appropriately rejected.

¶6 Soto petitioned the circuit court for certiorari review of the administrative confinement decision and the dismissal of his ICRS complaint. Soto filed several motions challenging the contents of the certified return. After a hearing, a supplemental return was submitted and, over further protest from Soto, the court ultimately concluded that Soto failed to show the return lacked relevant

materials. The court ultimately affirmed the administrative confinement and dismissed the procedural claims Soto had attempted to raise via his ICRS complaint. This appeal follows.

DISCUSSION

¶7 On certiorari review, we determine de novo whether the agency acted within its jurisdiction, acted according to law, issued an arbitrary or oppressive decision, and had sufficient evidence to make the decision in question. *See* ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). In making its decision "an agency is bound by the procedural regulations which it itself has promulgated." ***Id.***

¶8 Soto attempted to challenge his administrative confinement utilizing two available grievance procedures—a substantive challenge pursuant to WIS. ADMIN. CODE § DOC 308.04(9), and a procedural challenge by an ICRS complaint pursuant to WIS. ADMIN. CODE § DOC 310.08. With respect to his ICRS complaint, Soto argues it was erroneously rejected as untimely. We are not persuaded. WISCONSIN ADMIN. CODE § DOC 310.11(5)(d) provides that a complaint may be rejected if "[t]he inmate submitted the complaint beyond 14 calendar days from the date of the occurrence giving rise to the complaint and provides no good cause for the ICE to extend the time limits."

¶9 The complaint examiner recounted that Soto's complaint alleged due process errors at the November 15, 2010 ACRC hearing, but his ICRS complaint was not received until January 20, 2011, beyond the fourteen-day time limit. The examiner further determined Soto had not provided good cause for extending the deadline. Soto claims the "date of occurrence" was not the November 15, 2010 hearing date but, rather, January 31, 2011—the date the security chief affirmed the

ACRC decision. Soto thus asserts that a complaint filed before the "date of occurrence" is timely. On its face, however, Soto's ICRS complaint challenges "due process errors at ACRC hearing on 11/15/10." Therefore, "the date of the occurrence giving rise to the complaint" was November 15, 2010, and Soto's ICRS complaint was properly rejected as untimely.

¶10 Soto's failure to properly complete each step in the ICRS grievance process constituted failure to exhaust available administrative remedies. *See* ***Pozo v. McCaughtry***, 286 F.3d 1022, 1025 (7th Cir. 2002); *see also* ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶10, 245 Wis. 2d 607, 629 N.W.2d 686 (following reasoning of federal cases interpreting federal Prison Litigation Reform Act (PLRA) to interpret Wisconsin PLRA). The circuit court, therefore, properly dismissed the procedural claims Soto had attempted to raise in his ICRS complaint.[2]

¶11 With respect to his remaining challenge to the administrative confinement, Soto alleges that a number of due process violations occurred throughout the administrative confinement decision process. Specifically, Soto contends he was arbitrarily denied all witnesses; he never received a written decision explaining his placement into administrative confinement; the statement of reasons for Soto's confinement was insufficient; he never received notice of

[2] To the extent Soto contends the circuit court erred by *sua sponte* determining Soto had failed to exhaust administrative remedies under the ICRS grievance process and by dismissing those claims before allowing Soto an opportunity to be heard on the exhaustion issue, exhaustion is a statutory precondition to suit. *See* WIS. STAT. § 801.02(7)(b) (under PLRA, prisoners are required to exhaust administrative remedies before bringing circuit court action). To that end, WIS. STAT. § 802.05(3) "expressly puts prisoners on notice that a circuit court will examine the initial pleading and may, without further briefing or hearing on the matter, dismiss the complaint if the court determines that the initial pleading fails to state a claim." ***State ex rel. Schatz v. McCaughtry***, 2003 WI 80, ¶31, 263 Wis. 2d 83, 664 N.W.2d 596.

certain charges contained in the administrative confinement recommendation; and the ACRC members were biased against him. Soto's due process claims fail, however, because he does not have a liberty interest in the specific nature of his incarceration.

¶12 The Due Process Clause protects against state action that deprives a person of "life, liberty, or property without due process of law." *See* ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 579, 500 N.W.2d 277 (1993) (citation omitted). The discipline of incarcerated prisoners triggers due process protections only if it affects a liberty interest. *See* ***Sandin v. Conner***, 515 U.S. 472, 485-87 (1995). The discipline might affect a liberty interest if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." ***Id.*** at 484. In ***Sandin***, the Supreme Court held that a prisoner had no liberty interest in remaining free from segregated confinement. ***Id.*** at 485-86. Further, Wisconsin courts have held that placement in a "Management Continuum" program designed for violent inmates already in adjustment segregation did not cause such a major change in the physical conditions of confinement that it gave rise to a liberty interest. *See* ***Kirsch v. Endicott***, 201 Wis. 2d 705, 711-14, 549 N.W.2d 761 (Ct. App. 1996). Although the respondents concede administrative confinement is more strict than the general prison population, Soto has not established that his administrative confinement imposes "atypical and significant hardship" as that phrase is used in ***Sandin***. Therefore, his due process claims are unavailing.

¶13 Next, Soto contends the circuit court erroneously exercised its discretion by denying his motions challenging the accuracy and sufficiency of the certified return and supplemental return. As noted above, Soto filed several motions challenging the accuracy of the certified return. After a hearing, the circuit court ordered prison officials to review their records and, where

appropriate, supplement the certified return with materials Soto claimed were missing or illegible. The court also gave Soto the opportunity to provide any documents he believed should have been included in the return.

¶14 After the certified return was supplemented, the court heard another round of Soto's challenges to the accuracy of the record. Soto also moved to strike the supplemental return as nonresponsive. The circuit court denied the motion to strike, noting that the creation of a record in this case was complicated by the overlapping administrative decisions. The court then addressed the specific documents and exhibits that Soto claimed were missing and ultimately determined that Soto had "not shown that the return lacks materials considered by the Respondents in making the decision to place [Soto] in administrative confinement." Based on our review of the record, we conclude that the court properly exercised its discretion when deciding Soto's various challenges to the returns.

¶15 Soto also attempts to relitigate issues related to one of the fifty-two conduct reports supporting his administrative confinement. Soto asserts that the conduct report was found to contain various due process violations and was subsequently remanded for re-hearing by the circuit court on certiorari review. After the re-hearing, however, Soto again initiated certiorari proceedings. The circuit court then affirmed the referenced disciplinary decision and concluded that Soto's due process rights were satisfied throughout that administrative process. Any attempt to relitigate the matter now is barred by claim preclusion. *See* ***Isaacs Holding Corp. v. Premiere Prop. Group, LLC***, 2004 WI App 172, ¶38, 276 Wis. 2d 473, 687 N.W.2d 774 ("Under claim preclusion, a final judgment in an earlier matter is conclusive upon the parties in that earlier matter *and those in privity* with those parties, and the final judgment governs all issues that were either

litigated or might have been litigated."). To the extent that Soto attempts to claim innocence with respect to any other underlying conduct report, the time for challenging the substantive decisions and any procedural deficiencies associated with past conduct reports has passed.

¶16 Soto additionally asserts a double jeopardy argument, claiming that the ACRC was precluded from punishing him again for behavior cited in past conduct reports. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects defendants against multiple punishments for the same offense. ***State v. Kurzawa***, 180 Wis. 2d 502, 515, 509 N.W.2d 712 (1994). Governmental action constitutes punishment, however, only when "its principal purpose is punishment, retribution or deterrence." ***State v. McMaster***, 206 Wis. 2d 30, 42, 556 N.W.2d 673 (1996) (citation omitted). The purpose of administrative confinement, however, is not punishment—rather, it is "an involuntary *nonpunitive* status for the segregated confinement of an inmate whose continued presence in general population poses a serious threat to life, property, self, staff, or other inmates, or to the security or orderly running of the institution." *See* WIS. ADMIN. CODE § DOC 308.04(1) (emphasis added).

¶17 Finally, Soto challenges the sufficiency of the evidence to support his administrative confinement. "The evidentiary test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion" reached by the agency. ***George v. Schwarz***, 2001 WI App 72, ¶10, 242 Wis. 2d 450, 626 N.W.2d 57. Thus, we look for evidence that supports the agency's decision, not for evidence that might support a contrary finding. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶12, 246 Wis. 2d 814, 632 N.W.2d 878. Given Soto's numerous conduct reports, including a history of assaultive and violent behavior, the record shows that there

was sufficient evidence to support the ACRC's conclusion that Soto's presence in general population posed a substantial risk of serious harm to both staff and inmates as well as to the overall security of the institution. *See* WIS. ADMIN. CODE § DOC 308.04(2).

By the Court.—Order affirmed.

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