

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2082

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. RONALD S. SCHILLING,

PETITIONER-APPELLANT,

V.

SANDRA SWENEY, AND AVE M. BIE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Ronald Schilling appeals from an order dismissing his certiorari action for failure to file a brief. He claims the dismissal was an erroneous exercise of discretion and asks this court to address the merits of his

action. However, for the reasons discussed below, we conclude that the dismissal was well within the trial court's discretion. We therefore affirm.

BACKGROUND

On July 22, 1997, authorities at the McNaughton Correctional Center issued Schilling a conduct report for threats, disobeying orders, disrespect and disruptive conduct. The conduct report was based upon an incident in which Schilling approached officers about frosting on his lunch bag. He allegedly wiped the frosting onto their table and complained to them in a loud, angry voice. The prison adjustment committee found him guilty of all but the disruptive conduct charge and imposed sixty days' adjustment segregation and ninety days' program segregation. Schilling's administrative appeal was denied as untimely.

Schilling filed a petition for a writ of certiorari seeking review of the disciplinary action on January 22, 1998. The trial court issued the writ and entered a scheduling order requiring Schilling to file his brief by April 24, 1998. Upon Schilling's motion, the trial court extended the time for him to file his brief until May 3, 1998. On June 23, 1998, after Schilling had failed to file his brief, the trial court dismissed Schilling's action with prejudice for failure to prosecute.

STANDARD OF REVIEW

Our certiorari review generally focuses on the actions of the administrative agency, rather than the decision of the circuit court. *See State ex rel. Whiting v. Kolb*, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). However, petitioners seeking judicial review under ch. 227, STATS., must also comply with the other statutes and rules applying to civil actions, so long as the rules do not conflict with that chapter. *See Lee v. LIRC*, 202 Wis.2d 558, 561,

550 N.W.2d 449, 450 (Ct. App. 1996). Accordingly, when the trial court dismisses a certiorari action without reaching the merits, we will review that decision under the same standards ordinarily applied to such procedural decisions. *See id.* at 562, 550 N.W.2d at 450.

The decision to dismiss an action based on the violation of a scheduling order lies within the sound discretion of the trial court. *See Modica v. Verhulst*, 195 Wis.2d 633, 650, 536 N.W.2d 466, 474 (Ct. App. 1995). We will sustain discretionary acts by the trial court so long as the court “examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.” *Id.*

ANALYSIS

The trial court has inherent authority to order the parties in a certiorari action to submit briefs. *See Lee*, 202 Wis.2d at 561-62, 550 N.W.2d at 450. Section 805.03, STATS., permits the trial court to dismiss an action with prejudice based on the failure of any claimant to prosecute or the failure of any party to obey an order of the court, unless the defaulting party shows a “clear and justifiable excuse” for the failure. *See id.* at 563, 550 N.W.2d at 451.

Schilling does not dispute the fact that he failed to file his brief by the deadline set by the court. Instead, he claims that the failure was excusable, because the briefing schedule was “utterly unreasonable” for an incarcerated litigant such as himself, and because a substantial portion of the delay was attributable to the time he spent awaiting a decision from this court on his petition for a supervisory writ directing the certiorari return in this matter to be supplemented. The record reveals, however, that Schilling never asked the trial court to stay the proceedings while he pursued review of the trial court’s denial of

his supplementation motion,¹ and never presented any of the arguments he raises on appeal to the trial court. Because Schilling presented the trial court with no justification for his failure to file his brief, either before or after the trial court ordered the action dismissed, we see no erroneous exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ Schilling asserts that he requested this court to stay the lower court proceedings. Requests for stays, however, must first be addressed to the trial court. See *State v. Gudenschwager*, 191 Wis.2d 431, 439, 529 N.W.2d 225, 228 (1995). The trial court had no way to know that Schilling was attempting to pursue alternate relief.

