

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 5, 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. 2014AP852

Cir. Ct. No. 2013CV2390

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. FREDRICK JONES,

PETITIONER,

STATE OF WISCONSIN EX REL. TINGIA WHEELER,

PETITIONER-APPELLANT,

V.

WILLIAM POLLARD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
FRANK D. REMINGTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Tingia Wheeler appeals a circuit court order that affirmed a prison disciplinary decision on certiorari review.¹ He raises seven issues on appeal. We reject each of Wheeler’s arguments and affirm for the reasons explained below.

BACKGROUND

¶2 Following an investigation into reports that the Gangster Disciples were actively recruiting and organizing at the Waupun Correctional Institution, prison staff issued a conduct report charging Wheeler with Group Resistance and Petitions and Violations of Institution Policies and Procedures. The report alleged that Wheeler “occupied a position of leadership and rank” in the gang, based primarily upon the signed, dated, witnessed, and notarized statements provided by three confidential informants—designated CI#3, CI#4, and CI#6—who each claimed personal knowledge of Gangster Disciples activities in the prison.

¶3 CI#3 identified Wheeler as the one who was “calling it for the Gangster [Disciples] in WCI” and who “made all the calls when it came to [their] business,” with another inmate, Fredrick Jones, serving as Wheeler’s “point man for the south side.”

¶4 CI#4 identified Wheeler as the gang’s “Institution Coordinator” and stated that “there are no violations, threats, extortions being done without his word giving” and that Wheeler was “the only person to give word to any other GD about harming anyone or staff” in the prison.

¹ Wheeler filed his certiorari petition jointly with another inmate, Fredrick Jones, but Jones is not a party to this appeal.

¶5 CI#6 stated: “Tingia Wheeler has the joint! I’ve heard Fred Jones say it over 20 times. Fred told other members they had to holler at Ten first if they wanted to be on count.” CI#6 explained that meant that “if anything was to happen with the ‘GD’s in the joint it was to go through Tingia first.”

¶6 Wheeler’s defense was that Gangster Disciples members were falsely identifying him as a gang leader in retaliation for his becoming a practicing Muslim and thereafter “refusing rank.” In addition to his own written statement, Wheeler presented written statements from Jones, who asserted that he was housed in a different section of the prison from Wheeler and had never even met him, as well as from two other inmates who supported Wheeler’s claim that Wheeler had become a practicing Muslim and denied that Wheeler was an active gang member, much less in a leadership role.

¶7 Wheeler also provided the hearing officer with a copy of the conduct report of another inmate, Terrance Prude, who had recently been found guilty of Group Resistance and Petitions based upon allegations that Prude had been appointed the Institution Coordinator for the Gangster Disciples in the prison. In that conduct report, staff analyzed a coded document in which Prude mentioned that he had appointed Wheeler, under the alias of “Mr. Ten,” as a “lawyer” (ranking member) on the “Southern District Federal Court” (South Hall at Waupun) to protect the “lawsuit” (organizational structure) of the gang. In another document, Prude stated that the “Attorney, Mr. Tenn,” had “come to terms” with the appointment of someone else to be a lawyer for lawsuit, and that Ten would just be a “plaintiff on the lawsuit” (meaning a nonranking Gangster Disciples member). Prude further noted that “Me and the Attorney Mr. Tenn had a discussion and he’s in fully compliance with the decision from the 7th Circuit [i.e., the Gangster Disciples leadership in Chicago] and sent me the paperwork.”

¶8 Wheeler requested the presence of the three confidential informants at his hearing, but the requests were denied to protect the informants' safety. However, Wheeler's request to have the reporting staff member, Capt. Radtke, attend the hearing was granted. Wheeler presented a written list of questions for Radtke, some of which were answered at the hearing, and others of which were deemed irrelevant by the hearing officer. Radtke acknowledged having been aware that Prude had been serving as the Institution Coordinator for Waupun, but also testified that Prude had lost that position. Radtke further acknowledged that an appointment as the Institution Coordinator for Waupun could only be made by Gangster Disciples leadership in Chicago and that no documentation of such an appointment had been mentioned in the conduct report, but also testified that the information given by the three confidential informants had led to other, unspecified evidence substantiating their claims, and that if staff had found a letter from Chicago appointing Wheeler, Wheeler would not know about it.

¶9 The hearing officer found the reporting staff member credible because she had no vested interest in the matter, and found the CI statements to be corroborated because they had been independently given, and each identified Wheeler as holding a Gangster Disciples leadership position. The hearing officer further noted that Wheeler's own statement did not deny his membership in the gang—only his position as the Institution Coordinator—and that Wheeler's materials demonstrated a knowledge of the gang and its activities that was consistent with him having a leadership role. The hearing officer concluded it was more likely than not that Wheeler was a Gangster Disciples member (which in and of itself violated an institutional rule against membership in a security threat group) and that he had participated in gang-related activities, in violation of the Group Resistance and Petitions rule.

¶10 The hearing officer's ruling was affirmed on both substantive and procedural administrative review and on certiorari review in the circuit court. This appeal followed.

STANDARD OF REVIEW

¶11 Our certiorari review is limited to the record created before the committee. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). With regard to the substance of a prison disciplinary decision, we will consider only whether: (1) the committee stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable, representing its will and not its judgment; and (4) the evidence was such that the committee might reasonably make the order or determination in question. *Id.* We may, however, independently determine whether an inmate was afforded due process during administrative proceedings. *Jackson v. Buchler*, 2010 WI 135, ¶39, 330 Wis. 2d 279, 793 N.W.2d 826.

DISCUSSION

¶12 Wheeler divides his argument section into seven parts, which he labels as: (1) Newly discovered evidence; (2) Notice; (3) Denial of evidence; (4) Procedural due process; (5) Was ICRS arbitrary; (6) Advocate; and (7) Impartial fact-finder. We address each argument in turn.

¶13 First, Wheeler seeks a new hearing based upon newly discovered evidence that his finding of guilt was based upon perjured testimony. He points to face cards that show that he and Jones were never housed in the same area, and claims that it “came to light” after his finding of guilt that an order had been passed to Gangster Disciples members to target Wheeler and Jones for

“eradication”—that is, to have them removed from general population by means of providing false information against them.

¶14 We note that the newly discovered evidence rule applies to *judicial* proceedings seeking a new trial, not to *administrative* proceedings. As set forth above, our certiorari review of administrative proceedings is limited to considering whether prison officials acted properly based upon the information that was before them at the time they made their decisions. Therefore, any newly discovered evidence is outside the scope of our review of the warden’s decision on the substance of Wheeler’s disciplinary decision, although such evidence could be relevant to Wheeler’s companion appeal through the inmate complaint review system (ICRS), which alleges various due process violations. Accordingly, we will address Wheeler’s arguments relating to the face cards and an alleged eradication order in the context of Wheeler’s exculpatory evidence argument below, rather than analyzing them in the framework of the test for newly discovered evidence.

¶15 Second, Wheeler contends that the information contained in the conduct report and CI statements was too vague to provide him with adequate notice of the charges against him. In particular, he complains that there were no dates or places given for specific incidents or activities that would give him a meaningful opportunity to refute the accusations against him.

¶16 It is true that the allegations in the conduct report lack specificity as to the time and place of any individual incident. Instead, the conduct report makes broad accusations that during an investigation conducted at the prison, Wheeler was identified as the Gangster Disciples gang member making the calls as to what actions or activities by other Gangster Disciples members in the prison would be

approved or disapproved. The generality of the allegations is due in large measure to the nature of the charges—which involve ongoing leadership in a gang rather than a one-time violation of a rule—as well as the obvious danger that including more specific information about individual incidents could lead to the identification of one or more of the confidential informants.

¶17 Nonetheless, the conduct report still identified *who* (Wheeler, with the assistance of Jones) did *what* in violation of prison rules (directed the activities of Gangster Disciples gang members), *where* (at Waupun Correctional Institution), *when* (during the month preceding the issuance of the conduct report), and *why* (because Wheeler held a leadership position in the gang). In response to the allegations, Wheeler was able to present evidence in support of defense theories that: (1) he and Jones were housed in different sections of the prison, and so could not have met in person to discuss or direct gang activities; (2) prison officials had charged a different inmate with holding the same leadership position they alleged Wheeler held, in the same general timeframe; (3) holding a gang leadership position would be inconsistent with Wheeler’s religious beliefs and practices; and (4) Wheeler’s refusal to accept a position of rank in the gang provided motive for other Gangster Disciples members to get him in trouble by inflating his role. Therefore, the allegations in the conduct report were sufficiently specific to allow Wheeler a meaningful opportunity to defend himself.

¶18 Third, Wheeler complains that prison officials failed to turn over potentially exculpatory evidence to him—including: (1) the conduct reports of other inmates who had been found guilty of Group Resistance based on allegations during the earlier investigation involving Prude; (2) the investigating officer’s curriculum vitae to show that she lacked the experience or qualifications to evaluate the claims of the confidential informants; and (3) assorted prison logs that

would have shown it to have been physically impossible for Wheeler and Jones to have actually met, even if they were housed on different floors of the same hall for a short period of time. For the sake of argument, we will add the subsequently-discovered face cards and statements from other inmates about eradicating Wheeler to the list of items that prison officials could have provided him. As we explain, these items either were not exculpatory, or the failure to disclose them was harmless. *Piggie v. Cotton*, 344 F.3d 674, 678-80 (7th Cir. 2003) (prison officials have no duty to disclose evidence if it is not exculpatory and, moreover, any failure to disclose is subject to harmless error analysis).

¶19 Any failure to turn over the conduct reports of other inmates involved in a prior gang investigation was harmless because Wheeler presented a copy of Prude's conduct report himself, and the hearing examiner explicitly considered it. Additional conduct reports were not necessary to establish that Prude had previously been identified as the Gangster Disciples Institution Coordinator for Waupun, and that Prude had at one point referred to Wheeler as a general gang member rather than a leader. Moreover, aside from the question of Wheeler's status as the Institution Coordinator, Prude's conduct report actually supported rather than undermined the proposition that Wheeler was actively involved in the gang. Similarly, any statements from other inmates that would have supported Wheeler's claim that Gangster Disciples members wanted to retaliate against him for reducing his role in the gang based upon his religious conversion also rested upon the premise that Wheeler was, in fact, a member of the gang. Because it was not necessary for Wheeler to have held a leadership role in order to be found guilty of Group Resistance, neither the additional conduct reports nor the subsequently discovered statements from other inmates would have altered the outcome of the disciplinary proceeding.

¶20 Captain Radtke's curriculum vitae was not relevant, much less exculpatory, because she was providing evidence based upon her position as a staff member, not an expert witness who needed to be deemed qualified. As to the movement logs and face cards, they were not exculpatory because neither prison staff nor the confidential informants alleged that Wheeler and Jones had any meetings in person. Instead, Radtke testified at the hearing that Wheeler and Jones had written to each other. Additionally, we note that being housed in different sections of the prison would not have precluded communication through intermediaries.

¶21 Fourth, Wheeler contends that his due process rights were violated because the information provided by the three CI statements was not corroborated by any physical evidence, and was inherently unreliable because Wheeler and Jones had not met and prison officials had already determined in another disciplinary proceeding that someone else was the Institution Coordinator. However, there is no requirement that either conduct reports or CI statements be based upon or corroborated by physical evidence rather than statements. We have already explained why it was not necessary for Wheeler and Jones to have met in person in order for them to have communicated. As to Prude and Wheeler both being named as the Institution Coordinator, there is no inherent inconsistency because they could have been Institution Coordinator at different times.

¶22 Fifth, Wheeler complains that the Inmate Complaint Examiner rejected his ICRS complaint regarding the absence from the record of correspondence between Wheeler and his advocate without conducting an

investigation. *See generally* WIS. ADMIN. CODE § DOC 303.87(3) (2015)² (requiring the institution to place in the inmate’s file the original conduct report and “all due process documents”). Wheeler believes that the complaint examiner’s decision violated Executive Directive 43, which directs ICRS staff to evaluate allegations of misconduct by correctional personnel in accordance with civil service statutes and collective bargaining agreements. The directive is completely inapplicable to this situation, however. It deals with the procedure for handling allegations that correctional personnel have violated established work rules governing their employment, not whether correctional personnel have properly followed the administrative procedures for an inmate’s disciplinary hearing.

¶23 Sixth, Wheeler contends that his advocate failed to fulfill his duties under the administrative rules because he did not assist him in obtaining the conduct reports of other inmates who had been involved in investigations of the gang, did not testify at the hearing about all of his interactions with Wheeler, and ignored Wheeler’s request for a memorandum outlining his assistance for judicial review. While the administrative code gives a staff advocate discretion to assist an inmate in gathering evidence, it does not require that he or she do so. Rather, the relevant code provides:

The role of the staff representative is to help the accused inmate understand the charges against the inmate and to provide direction and guidance regarding the disciplinary process. The staff representative *may* use discretion in the

² The administrative code provisions relating to DOC disciplinary procedures were renumbered and slightly revised by 2014 WIS. ADM. REG. No. 705 (eff. Jan. 1, 2015), but neither party contends that any revision affects the substance of the issues before us on this appeal. We will therefore use the current numbering of all of the relevant DOC administrative code provisions throughout this opinion.

performance of this role, including gathering relevant evidence and testimony and preparing the inmate's own statement. The staff representative may speak on behalf of the accused inmate at a disciplinary hearing or may help the inmate prepare to speak.

WIS. ADMIN. CODE § DOC 303.83(3) (emphasis added). This role is limited in nature, and not on par with the obligations of a defense attorney in a criminal matter, where far more process is due. *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 398, 585 N.W.2d 640 (Ct. App. 1998).

¶24 Here, the staff advocate provided a memo to the hearing officer stating that he had met with Wheeler in his cell, that Wheeler requested witnesses and the advocate provided the proper forms, and that Wheeler did not express any other concerns or requests at the time of the initial interview. The advocate supplemented his memo at the hearing, noting that he had subsequently received several requests from Wheeler about getting Prude's conduct report. The advocate's memo and statement at the hearing, along with all the documents that Wheeler submitted in his defense, amply demonstrate that Wheeler understood both the charges against him and that the disciplinary hearing would be his opportunity to refute those charges by presenting such witnesses, witness statements, or other evidence as he would be able to gather. We are therefore satisfied that the advocate's primary purpose of providing Wheeler with general guidance about the charges and disciplinary process was fulfilled.

¶25 Seventh, Wheeler challenges the impartiality of the hearing examiner on the grounds that the same examiner had presided over the disciplinary hearings of Prude and at least one other alleged gang member. He seems to argue that, based upon those prior disciplinary hearings, the examiner should have known that Prude had already been classified as the leader of the Gangster

Disciples gang, and therefore, should have questioned the reliability of the CI statements. As we have already explained, however, we see nothing inherently inconsistent about Prude and Wheeler each having been Institution Coordinator at different times. Wheeler does not point to any conflict of interest or personal bias that would have undermined the hearing examiner's impartiality, and the decision itself represents a rational application of the applicable rule to the facts of record.

By the Court.—Order affirmed.

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

