COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3215

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

STATE OF WISCONSIN EX REL. DANIEL HARR,

PETITIONER-APPELLANT,

V.

GARY MCCAUGHTRY, AND KEN SONDALLE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Reserve Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Deininger, J., and William Eich, Reserve Judge.

¶1 PER CURIAM. Daniel Harr appeals an order dismissing his certiorari action for review of a prison discipline decision. The issues are whether

the certiorari petition was timely and whether Harr waived certain issues by not naming them in the certiorari petition. We conclude that the petition was timely and Harr did not waive most of the issues. We reverse and remand.

¶2 After Harr filed his certiorari petition, the trial court ordered the record returned and the parties filed briefs. The respondents' brief was directed solely at the merits of the disciplinary proceeding. However, the trial court's dismissal order was based on two procedural conclusions, apparently *sua sponte*, and the court did not address the merits.

¶3 One of the trial court's procedural conclusions was that Harr's certiorari petition was not filed within the forty-five day time provided in WIS. STAT. § 893.735 (1997-98).[1] The facts related to this issue follow. After the first hearing on Harr's conduct report, Harr appealed to the warden, who ordered a rehearing. On rehearing, Harr was again found guilty. Harr again appealed to the warden, who affirmed the rehearing decision. Harr also filed two complaints about these proceedings with the Inmate Complaint Review System (ICRS). One was filed shortly after the first hearing, and the other was filed shortly before the rehearing. There was apparently some overlap in the substance of the two complaints, but the second one raised at least one new issue, about compliance with time limits for the rehearing. The first ICRS complaint was ultimately dismissed by the department secretary in December 1998, while the second complaint was dismissed in April 1999. Harr filed this certiorari action in April 1999, within forty-five days after the dismissal of his second ICRS complaint.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 The trial court concluded that Harr's time to file for certiorari ran from dismissal of the first ICRS complaint. The court acknowledged that a second ICRS complaint was still pending at that time, but stated that this did not affect its conclusion because Harr's certiorari petition was not pursuing any of that complaint's new issues. In other words, for the issues actually raised in Harr's certiorari petition, the final ICRS decision had been issued December 1998. The court felt that if it held otherwise, it would be allowing Harr to toll his forty-five day filing time by filing a second ICRS complaint, thereby wasting ICRS and judicial resources. On appeal, Harr argues that the petition was timely, while the respondents argue in support of the circuit court's analysis.

¶5 We conclude the petition was timely. The key fact is that in December 1998, when the first ICRS decision was issued, another ICRS complaint remained pending, raising at least one new issue. A prisoner must exhaust administrative remedies before seeking certiorari review. *See* WIS. STAT. § 801.02(7)(b). This gives the agency the opportunity to correct its own errors, and thereby avoid further review by the courts. As long as ICRS review was still pending on a timely filed complaint raising an issue not previously decided, Harr's administrative remedies were not exhausted, and therefore he was barred from filing for certiorari review. Therefore, the time to petition for certiorari did not begin to run until the second ICRS complaint was finally disposed of. *See* WIS. STAT. § 893.735(2) (time to file for certiorari is forty-five days "after the cause of action accrues").

¶6 It is irrelevant that Harr's certiorari petition did not pursue any issue that was new in the second complaint. We see no reason why Harr's right to certiorari review of the issues in his first complaint should depend on whether he also pursues issues raised in the second complaint. Although the trial court

believed this conclusion would allow Harr to toll his time to file for certiorari, the timing of the ICRS complaints does not support this concern. Harr did not file the second ICRS complaint after a decision was made on the first one, and both ICRS complaints were filed before the rehearing on the conduct report.

¶7 The trial court's other procedural conclusion was that Harr waived certain issues by not continuing to present them through the administrative process. On appeal, Harr argues that most of those issues were properly preserved. The respondents' brief does not respond to this argument, and therefore we conclude that the trial court erred in this conclusion. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondent cannot complain if appellant's unrefuted propositions are taken as confessed).

¶8 However, the respondents do advance a different waiver argument. They argue that many of Harr's issues were waived because they were not named in the certiorari petition itself. In other words, a certiorari petitioner is limited to making those arguments that are specified in the petition, and cannot go beyond those arguments in briefing to the trial court after the record has been returned.

¶9 In support of this argument, the respondents cite two cases, with the later case relying on the first one. The later case is ***Merkel v. Village of Germantown***, 218 Wis. 2d 572, 581 N.W.2d 552 (Ct. App. 1998). Although there is some language in that opinion which superficially supports the respondents' argument, the ***Merkel*** opinion did not apply the language as the respondents argue. In ***Merkel***, we held that the trial court erred by going beyond the certiorari petition to consider other errors that the *respondent* argued had occurred. *See* ***id.*** at 579-80. Apparently if those other errors were fixed, the petitioners' claims would have

been mooted or eviscerated. We said that the trial court's review should have been confined to the errors alleged by the petitioners, rather than looking at the respondent's defense based on other alleged errors. ***Merkel*** does not stand for the proposition that a certiorari petitioner is limited to arguing only those issues set forth in the petition itself.

¶10 ***Merkel*** relied on a much older case, ***Tourville v. S.D. Seavey Co.,*** 124 Wis. 56, 102 N.W. 352 (1905). On its face, that opinion provides some support for the respondents' argument, because it states that jurisdictional errors not specifically stated in the certiorari petition are waived. *See* ***id.*** at 58. However, that case obviously pre-dates notice pleading. In a more modern context, we have applied notice pleading standards to determine whether a certiorari petition states a claim. *See* ***State ex rel. Luedtke v. Bertrand***, 220 Wis. 2d 574, 580-86, 583 N.W.2d 858 (Ct. App. 1998), *aff'd by an equally divided court*, 226 Wis. 2d 271, 594 N.W.2d 370 (1999).

¶11 In the notice pleading era, the respondents' argument appears to make little sense from a policy perspective. It would simply cause petitioners to file brief-like certiorari petitions, merely out of fear of waiver. This rule would not serve any notice function to aid a respondent's briefing, because the customary practice is for briefing to occur after the certiorari record is filed, with the petitioner going first. If the petitioner *never* raises an issue in the trial court, then the issue might reasonably be held waived. But the respondents have not convinced us that Harr waived any of his issues by stating them only in his trial court brief, and not also in the petition itself.

¶12 The only issues potentially remaining in this appeal are those related to the merits of Harr's certiorari petition. In his appellate brief, Harr asks us to

reverse the trial court's procedural conclusions and remand for further consideration on the merits. However, the respondents' brief addresses the merits of Harr's claims, and appears to assume that we will do the same, but it does not argue any reason for us to do that. Therefore, we reverse and remand for a trial court decision on the merits.

By the Court.—Order reversed and cause remanded with directions.

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