COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP787 **Cir. Ct. No. 2008CV830**

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

STATE OF WISCONSIN EX REL. STANLEY FELTON AND
STATE OF WISCONSIN EX REL. TONY G. GRAY,

PETITIONERS-APPELLANTS,

V.

RICK RAEMISCH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Stanley Felton and Tony Gray appeal an order affirming prison disciplinary decisions. They raise procedural issues regarding the disciplinary proceeding and challenge the sufficiency of the evidence used to find

them guilty. The only named respondent is the secretary of the Department of Corrections. Their challenge to the sufficiency of the evidence is therefore waived. *See* ***State ex rel. Grzelak v. Bertrand***, 2003 WI 102, ¶30, 263 Wis. 2d 678, 665 N.W.2d 244 (for review of substantive claims on review of prison disciplinary decision, warden must be named as respondent). We affirm on the basis of the substantive waiver, and on the merits of the procedural issues.

¶2 In January 2007, Felton and Gray were inmates at Green Bay Correctional Institution (GBCI). Conduct reports were issued charging each inmate with conspiracy to commit battery, conspiracy to incite a riot, and group resistance and petitions. A disciplinary committee found each of them guilty of the conspiracy violations, based on evidence of their principal role in planning a prison riot, and found them not guilty of group resistance. The circuit court denied their petition for judicial review of the disciplinary decisions, and they have appealed. The issues we address on appeal are whether: (1) the appellants were denied their due process right to present evidence; (2) the appellants were punished twice for their violations; (3) the disciplinary committees altered evidence; (4) the committees were not impartial; and (5) the committees used uncorroborated and improperly signed statements from confidential informants to find Felton and Gray guilty.

¶3 Appellate review of a circuit court's certiorari decision is *de novo*. ***State ex rel. Macemon v. Christie***, 216 Wis. 2d 337, 339-40, 576 N.W.2d 84 (Ct. App. 1998). Our review of a prison disciplinary decision is limited to the record created before the disciplinary committee. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). Generally, we consider whether the committee: (1) stayed within its jurisdiction; (2) acted according to law; (3) did not act in an arbitrary, oppressive, or unreasonable manner; and (4) the

evidence was such that the committee might reasonably make the order or determination in question. ***Id.*** The inquiry into whether the committee acted according to law includes consideration of whether due process was afforded and whether the committee followed its own rules. ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43 (citing ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980)).

¶4 ***The right to present evidence***. Felton asked for "CO Vince" to appear as a witness at his hearing, but the request was denied because there was no correctional officer by that name at GBCI. Felton concedes as much, but contends that he meant to ask for "CO Vincent," and that "CO Vince" was close enough that institution officials should have known which officer he wanted to call. As noted, our review is limited to the record. The appellants fail to cite any evidence in the record that there was a "CO Vincent" at GBCI, that officials should have recognized this person from Felton's request, or if the person existed that he had relevant exculpatory information about the charges against Felton. In short, the record provides an insufficient basis to provide relief on this issue.

¶5 Gray contends that his due process rights were violated when his request for inmate Jackson to appear as a witness was denied. The record indicates that Jackson in fact did appear at Gray's hearing, but submitted a written statement rather than oral testimony. The appellants contend that the record of the hearing is false and that Jackson did not appear. However, they cite no supporting evidence in the record for that contention, and we therefore cannot accept their assertion. In any event, the appellants have not shown that Jackson's oral testimony, had he given any, would have provided any more benefit to Gray than Jackson's written statement, in which Jackson plainly and unequivocally denied any knowledge of Gray's participation in the charged conduct.

¶6 Gray and Felton both contend that they were subjects of videotaped interviews about the allegations against them, and both argue that failure to produce the videotapes as evidence during the disciplinary proceeding was error. However, there is no reference to the tapes in the record of the disciplinary proceeding, or to statements made by either Gray or Felton on the day investigating officers allegedly made the tapes. Gray and Felton contend that statements they made on the tape are exculpatory, and the tapes prove the identity of one of the investigating officers. They fail to demonstrate, however, that they were denied the opportunity to present their exculpatory statements in testimony at their hearings, that they lacked other means of proving the identity of the officer, or that the officer's identity was a contested matter. In short, they have failed to demonstrate that the videotapes existed, or that they were prejudiced by their absence if the tapes did exist.

¶7 ***Double punishments***. Gray and Felton contend that they were punished twice, first by their confinement in temporary lockup pending their disciplinary hearings, and then through the punishments imposed after the disciplinary committee found them guilty. However, under DOC rules, temporary lockup is not meant to be punishment and does not count as punishment. WIS. ADMIN. CODE §§ DOC 303.11(7) and 303.84(2)(h). Also, Gray and Felton have not shown that lockup was imposed as punishment.

¶8 ***Altered evidence***. Gray and Felton were charged in numbered conduct reports. They both later received summaries of confidential informants' statements that were used as evidence against them. In both cases, the summaries cite to an incorrect conduct report number. The mistakes were subsequently corrected. In both cases, the error in the conduct report number had no bearing on the evidentiary value of the summarized statements, nor on Gray and Felton's

opportunity to contest the evidence those statements contained. There is no evidence that the typographical errors in the summaries misled them, and they do not contend that they were misled. Consequently, their contention that these nonprejudicial, inadvertent errors entitle them to relief is without merit.

¶9 ***Impartiality***. One of the two members of the disciplinary committee that found Gray and Felton guilty was the security director at GBCI. Gray and Felton contend that the security director was not an impartial decision maker because he participated in the investigation of their activities. The evidence they cite is the director's signature on an incident report containing information on overheard comments by an inmate threatening a riot. The security director was not the author of the report, which does not mention either Gray or Felton, and apparently signed it because he was in the author's chain of command. The report indicates that it was provided to the security director for informational purposes, and indicates no further action by the director.

¶10 WISCONSIN ADMIN. CODE § DOC 303.82(2) provides that "[n]o person who has substantial involvement in an incident, which is the subject of a hearing, may serve on the committee for that hearing." Gray and Felton cannot reasonably contend that the security director should have been disqualified for partiality under this rule merely for receiving an investigative report which does not mention nor by itself implicate either one of them, and signing it only because of his supervisory role.

¶11 ***Uncorroborated and improperly signed confidential informant statements***. Under WIS. ADMIN. CODE §§ DOC 303.81(5) and 303.86(4), DOC may use a statement from a confidential informant in a disciplinary proceeding if it is corroborated and signed under oath. Two confidential statements by different

persons may corroborate each other. ***Id.*** A statement may also be corroborated by other evidence, such as a staff member's eyewitness account or evidence of a very similar violation by the same person. WIS. ADMIN. CODE §§ DOC 303.81(5)(a) & (b) and 303.86(4)(a) & (b).

¶12 Here, Gray and Felton contend that the nine confidential informant statements used as evidence in their hearings were insufficiently corroborated. Gray and Felton's argument is conclusory and undeveloped. The disciplinary committee made express findings that the statements it used were corroborated by other evidence, and a review of the statements and other evidence confirms that finding.

¶13 Gray and Felton also contend that four of the statements were signed by staff members rather than by the informants. However, WIS. ADMIN. CODE §§ DOC 303.81(5) and 303.86(4) permit the use of a corroborated "signed statement from a staff member getting the statement from [the confidential informant]." The four statements Gray and Felton object to were admissible under those provisions.

¶14 Gray and Felton also contend that the disciplinary committee used fabricated evidence to find them guilty. The argument they present pertains to the sufficiency, credibility, and weight of the evidence before the committee, and is therefore a substantive claim that they waived when they failed to name the warden as a respondent. *See* ***Grzelak***, 263 Wis. 2d 678, ¶30.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).