COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0098

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

STATE OF WISCONSIN EX REL. TONY WALKER,

PETITIONER-APPELLANT,

V.

GARY MCCAUGHTRY, LT. HAUTMAKI AND CATHY JESS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Tony Walker appeals an order affirming a prison disciplinary decision. He raises several issues concerning the administrative proceeding and claims the decision violated his First Amendment rights. We reject his arguments and affirm.

Walker is an inmate at Waupun Correctional Institution. On March 27, 1996, a staff officer issued a conduct report charging Walker with disrespect to an officer and disruptive conduct. The officer's report stated that he observed Walker discussing basketball with other inmates. Walker looked directly at the officer and said "I wish we could play the guards here. I'd dunk on those mother fuckers so hard it would make their heads spin."

The security director charged a major offense and served the conduct report on Walker on March 28, 1996. On April 2, Walker notified the institution that he did not intend to call any witnesses at his hearing. He received a notice of hearing on April 10 and a hearing was held on April 11, 1996. Walker admitted to a slightly different version of the statement, that being "if we did play the guards here, I'd dunk on them so hard their mother fucking heads would spin."

The disciplinary committee found Walker guilty of disrespect but acquitted him of disruptive conduct. As punishment, he received five days adjustment segregation and 120 days program segregation.

Walker appealed to the warden on April 12, and on April 23, the warden affirmed the guilty finding but vacated the 120 days of program segregation. The circuit court affirmed on certiorari review and this appeal followed. Walker contends that the evidence was insufficient to find him guilty; that he was punished for protected speech; that the institution prejudiced him by providing inadequate notice of the hearing; that the warden prejudicially delayed his decision on the appeal; that the disciplinary committee prejudged his guilt; and that the conditions of his five day adjustment segregation violated DOC rules and his due process rights.

The evidence was sufficient to find Walker guilty. WIS. ADM. CODE § DOC 303.25 provides that "[a]ny inmate who overtly shows disrespect for any person performing his or her duty as an employe of the state of Wisconsin is guilty of an offense .... Disrespect includes ... derogatory or profane ... remarks or ... other acts intended as public expressions of disrespect for authority and made to other inmates and staff." Here, the evidence was undisputed that Walker either referred to guards as "mother fuckers" or alluded to their "mother fucking heads." He made this comment in the presence of an officer and directed it at the officer. The disciplinary committee could reasonably conclude under these circumstances that Walker violated § DOC 303.25.

The committee's and the warden's decisions did not violate Walker's First Amendment rights. Those rights are substantially limited by Walker's prisoner status and do not extend to speech that conflicts with legitimate penological objectives of the correctional system. ***Pell v. Procunier***, 417 U.S. 817, 822 (1974). Those legitimate objectives include institutional order and security. ***O'Lone v. Estate of Shabazz***, 482 U.S. 342, 348 (1987). Disrespectful, profane speech directed at an officer falls outside the boundaries of Walker's protected speech.

Walker waived his claim that he received inadequate notice of the hearing because he never raised that issue during the administrative proceedings. ***Santiago v. Ware***, 205 Wis.2d 295, 324, 556 N.W.2d 356, 367 (Ct. App. 1996). Additionally, even if the institution violated DOC notice provisions by giving Walker only one day notice of the hearing, rather than the required two, he does not and cannot show any prejudice. *See* WIS. ADM. CODE § DOC 303.87 (any error that does not affect substantial rights is disregarded).

The warden's untimely decision on Walker's appeal was also harmless. WIS. ADM. CODE § DOC 303.76(7)(b) requires a decision on a disciplinary appeal within ten days, and here the warden took eleven days. Again, Walker does not and cannot show prejudice from the one extra day he waited for the decision.

The record does not show any evidence that the committee prejudged Walker's guilt. On review of a prison disciplinary proceeding we are 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, 819 (Ct. App. 1990). Here, we have nothing but Walker's conclusory allegations that the committee's decision was essentially written before the hearing.

We also cannot review Walker's claim that the conditions under which he served his punishment violated DOC regulations and due process. Again, the necessary facts are not a part of this record. Our review is limited to the disciplinary proceeding up to and including the warden's decision. It does not go further.

By the Court.—Order affirmed.

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