

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 1998

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. 97-1766

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DONALD C. BROWN,

PETITIONER-APPELLANT,

V.

GARY R. McCAUGHTRY,

RESPONDENT-RESPONDENT.

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

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Donald Brown appeals from a decision of the circuit court denying his petition for a writ of certiorari and affirming the decision of the superintendent of the institution. The issues on appeal are whether there was sufficient evidence to support the Program Review Committee's (PRC's) determination, and whether the PRC improperly considered Brown's past

behavior. Because we conclude that there was sufficient evidence, both recent and past, to support the PRC's determination, we affirm.

Brown has a long history of assaultive behavior both inside and outside of the prison system. Brown has received over one hundred conduct reports in the years he has been incarcerated. He received one report for being involved in a prison riot, and has received others for being involved in gang activities, threatening guards, and attacking other inmates. In November 1994, approximately one year before the decision on which this appeal is based, Brown received a conduct report for attacking another inmate. This was the second report Brown received for battery during that year. In this incident, Brown used a padlock wrapped in a sock to beat the other inmate, causing him numerous head injuries. As a result of this incident, Brown was placed in program segregation for 360 days.

In October 1995, shortly before Brown was scheduled to be released to the general prison population, the adjustment program supervisor recommended that Brown be placed in administrative segregation. The basis for this recommendation was Brown's long history of assaultive behavior. The recommendation concluded:

Inmate Brown has demonstrated a continued unabated pattern of violent and aggressive behavior that has escalated since he was first incarcerated. His conduct history of approximately 119 conduct reports since he was first incarcerated demonstrates this fact. He has been involved in a riot, and due to his affiliation with the Gangster Disciples, has received numerous conduct reports for Group Resistance and Petitions. It is the belief of security that the fights and assaults that Brown has been involved in were a direct result of his group affiliation. It should be clear to any inmate that participating in any dangerous assaultive activity, whether it's against staff or

inmate, will inevitably result in long periods of Administrative Confinement.

Pursuant to WIS. ADM. CODE § DOC 308.04(3) (June 1994), the PRC held a review to consider the recommendation. The record indicates that Brown told the PRC that he was not a threat to anyone and asked the PRC to review his monthly reports for the year he had been in program segregation. Based on the evidence presented, the PRC decided to place Brown in administrative segregation. The PRC concluded: “It appears to this committee that if Mr. Brown is placed in the population of this facility, his activities will present a substantial risk of serious physical harm to staff and inmates and threaten the security of the institution.”

Brown appealed this decision pursuant to WIS. ADM. CODE § DOC 308.04(8) (June 1994). He argued to the warden that the PRC improperly considered his juvenile record, and that the appropriate procedures had not been followed when he was placed in temporary lockup. The warden affirmed the decision. Brown appealed to the Administrator of the Division of Adult Institutions, who also affirmed. Brown then brought a petition for certiorari in the circuit court. The circuit court also affirmed concluding that Brown had waived all the arguments he raised in his petition except for the sufficiency of the evidence. Brown now appeals.

On certiorari, the reviewing court 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, 819 (Ct. App. 1990). The court’s review is limited to whether: (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented the committee’s will and not its judgment, and (4) the evidence was such that the committee might

reasonably make the order or determination in question. *Id.* “The facts found by the committee are conclusive if supported by ‘any reasonable view’ of the evidence, and [the court] may not substitute [its] view of the evidence for that of the committee.” *Id.* (citations omitted).

Since on certiorari review we are limited to the record created before the committee, it follows that we cannot consider issues which were not raised before the committee and hence are not in the record. Consequently, if an inmate does not raise an issue before the committee, the inmate has not preserved that issue for review by this court. *Cf. Saenz v. Murphy*, 162 Wis.2d 54, 66, 469 N.W.2d 611, 616 (1991) *overruled on other grounds*, 167 Wis.2d 1, 481 N.W.2d 476 (1992); *Santiago v. Ware*, 205 Wis.2d 295, 327, 556 N.W.2d 356, 368 (Ct. App. 1996).

In this case, Brown asked the PRC to consider his monthly reports from the time he had been in segregation and stated that he did not pose a threat to anyone. On appeal to the warden, he argued that the PRC improperly considered his juvenile record in making its determination. On this appeal, Brown apparently is challenging the sufficiency of the evidence and arguing that, under the regulations then in effect, the PRC could only consider his recent behavior in determining whether administrative segregation was warranted.¹ He argues that the committee erred by considering his past acts, including his juvenile record. We conclude that Brown preserved only these arguments for appeal. Brown has waived any other arguments he may be making in this appeal.

¹ In his brief to this court, Brown argues that the circuit court applied an erroneous standard of review. He does not directly address his issues on appeal. The issues we have identified are the ones he appears to be arguing and which he raised in his petition to the circuit court.

On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the department. *State ex rel. Richards v. Traut*, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988). Brown's claims that there was insufficient evidence and that the PRC improperly considered his juvenile record, in essence both challenge whether there was sufficient evidence in the record to support the PRC's determination. We will consider them as one issue.

Brown challenges the language in the Recommendation for Administrative Confinement Report which explains that "[b]ecause of Brown's *past* assaultive behavior" he is being recommended for administrative confinement. (Emphasis added.) WISCONSIN ADM. CODE § DOC 308.04(2) (June 1994) states that an inmate may be placed in administrative confinement "for any of the following reasons." Subsection (a) states: "The inmate presents a substantial risk of serious physical harm to another person as evidenced by recent homicidal, assaultive or other violent behavior or by an attempt or threat to cause that harm." Brown argues that the PRC should not consider his past behavior because the regulation says "recent" behavior.

Brown appears to be arguing that the PRC may only consider his behavior during the year immediately prior to their determination. Brown offers no relevant legal authority in support of this argument. As the State points out in its brief, Brown was in program segregation during that year and his contact with staff and other inmates was severely restricted. His behavior during that year, therefore, would not be indicative of his behavior in the general prison population.

The purpose of administrative confinement is "to provide for an involuntary nonpunitive status for the segregated confinement of an inmate *solely*

because the inmate is dangerous, to ensure personal safety and security within an institution.” WISCONSIN ADM. CODE § DOC 308.01 (June 1994) (emphasis added). The record shows that the PRC considered Brown’s entire record of assaultive behavior, including his most recent attacks on inmates, which led to his placement in program segregation. We conclude that this constitutes sufficient recent evidence of dangerous behavior to support the PRC’s determination that Brown be placed in administrative confinement.

By the Court.—Order affirmed.

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

