

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 1999

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. 97-2199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. KARL JULIUS JAMES,

PETITIONER-APPELLANT,

V.

GARY R. McCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MICHAEL B. TORPHY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Karl Julius James, an inmate at Waupun Correctional Institution, appeals a circuit court order quashing his writ of certiorari. For the reasons below, we affirm.

BACKGROUND

According to major conduct report #804199, on November 21, 1996, James approached a corrections sergeant and stated “I guess I have to go to the hole” because he was unwilling to share a cell (double bunk). The sergeant asked whether James was refusing an order to double bunk, and James replied “yes.” James was placed in temporary lock up (TLU).

On November 22, 1996, James received report #804199 charging him with violating WIS. ADM. CODE § DOC 303.24, disobeying orders.¹ On that same date, he waived his right to have the matter processed as a “formal due process hearing,” thus waiving the time limits set for hearings, his right to a staff advocate, and his right to request witnesses.

On December 2, 1996, James was informed that his hearing would take place the next day. At the December 3, 1996 hearing, which was conducted according to WIS. ADM. CODE § DOC 303.75, James denied that he refused orders, but admitted that he made the “go to the hole” statement. Based on James’s admission and the conduct report detailing the verbal order to double

¹ **DOC 303.24 Disobeying orders.** (1) Any inmate who disobeys any of the following is guilty of an offense:

(a) A verbal or written order from any staff member, directed to the inmate or to a group of which the inmate is or was a member;

(b) A bulletin which applies to the inmate and which was posted or distributed in compliance with s. DOC 303.08; or

(c) Any other order which applies to the inmate and of which he or she has actual knowledge.

(2) An inmate is guilty of an offense if he or she intentionally commits an act which violates an order, whenever the inmate knew or should have known that the order existed.

bunk, a hearing officer, in an oral decision, found James guilty of disobeying orders.

On December 5, 1996, James appealed the oral ruling to the warden. On December 6, 1996, James was furnished a written copy of the hearing officer's decision. On December 13, 1996, the warden affirmed the decision on the grounds that there were no procedural errors, the evidence supported the decision, and the records were correct.

On December 19, 1996, James filed a circuit court certiorari appeal. The circuit court dismissed the petition,² and we affirm.

STANDARD OF REVIEW

A reviewing court on certiorari does not weigh the evidence presented to the hearing officer. *See Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). Rather, judicial review of certiorari actions is limited to determining whether the hearing officer kept within his jurisdiction, whether he proceeded on a correct theory of law, whether his action was arbitrary, oppressive or unreasonable and represented his will and not his judgment, and whether the evidence was such that the hearing officer might reasonably have made the

² Although he is the petitioner in the underlying action, James argued to the circuit court that service of process was insufficient. The court noted that granting James's motion would have the perverse effect of dismissing James's own action, but agreed that service was insufficient because the time of day was not noted on the certificate of service. The court dismissed for lack of personal jurisdiction over the defendant.

Because the defendant never raised defective service and had filed a response to James's petition, we affirm on other grounds. *See Kafka v. Pope*, 186 Wis.2d 472, 476, 521 N.W.2d 174, 176 (Ct. App. 1994), *aff'd* 194 Wis.2d 234, 533 N.W.2d 491 (1995). (We may affirm a circuit court's determination for reasons not stated by the circuit court if we agree with the circuit court's conclusion.) *See also Hasley v. Black, Sivals & Bryson, Inc.*, 70 Wis.2d 562, 570, 235 N.W.2d 446, 450 (1975) (defects in personal jurisdiction waived if not timely presented).

determination in question. *See id.* As to this last factor, the test is whether reasonable minds could arrive at the same conclusion as the officer did. *See State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 131 Wis.2d 101, 120, 388 N.W.2d 593, 600 (1986); *State ex rel. Jones v. Franklin*, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989); *see also Van Ermen*, 84 Wis.2d at 64, 267 N.W.2d at 20 (same standard is applied on appellate review). On certiorari review we are bound by the contents of the record. *Kuehnel v. Registration Bd. of Architects*, 243 Wis. 188, 195-96, 9 N.W.2d 630, 634 (1943).

DISCUSSION

Before the circuit court,³ James argued that he was denied the right to appeal because he never received the hearing officer's decision. We disagree. James was not denied the right to appeal: he appealed to the warden, then to the circuit court, and most recently to this court. Also, James received a written copy of the hearing officer's decision on December 6, 1996.

James argues that the warden failed to discharge his administrative duties. However, despite James's premature⁴ appeal to the warden, the record

³ Before this court, James questions whether the circuit court acted correctly in dismissing the case on James's own jurisdiction motion. However, because we affirm on different grounds, we do not consider that argument.

Respondent addressed the underlying merits in his brief, but we do not have James's response because, despite several orders, James did not timely file his reply brief. We therefore consider James's circuit court arguments. *See also State ex rel. Riley v. DHSS*, 151 Wis.2d 618, 623, 445 N.W.2d 693, 694 (Ct. App. 1989) (appellate court conducts *de novo* review of record) and *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978) (on appellate review, we apply same standard as circuit court).

⁴ James chose to appeal to the warden on December 5, 1996 based on the hearing officer's December 3, 1996 oral decision. However, on December 6, 1996, James received a written hearing officer's report.

demonstrates that the warden promptly considered James's appeal, and gave reasons for his decision to affirm.

James argues that various time-related procedural irregularities occurred. However, the record shows James received a written copy of the hearing officer's decision on December 6, 1996; that the warden issued a written decision on James's appeal on December 13, 1996; and that James filed a circuit court action on December 19, 1996. Additionally, James affirmatively waived all time limits in the processing of his charge. Thus, any possible time-related procedural irregularities (and we have found none) cannot be grounds for an appeal. *Soo Line R. Co. v. Office of Comm'r of Transp.*, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992) (having invited the error (if error it is), the appellant is estopped from coming to us now and complaining that the error occurred).

James argues that he was not allowed an extension of time to prepare for his hearing, and that he had no duty to obey an illegal order. Because there is no evidence that he made these arguments before the hearing officer, we cannot consider them further. *Compare Kuehnelt*, 243 Wis. at 195-96, 9 N.W.2d at 634 (on certiorari review, we are bound by the contents of the record) *with Zeller v. Northrup King Co.*, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985) (matters not raised before trier of fact will not be considered for the first time on appeal) *and Saenz v. Murphy*, 162 Wis.2d 54, 66-67, 469 N.W.2d 611, 617 (1991) (applying rule to prison administrative proceedings).

James argues that he was refused his "legal properties" while in TLU and that during the hearing, he was refused medical treatment. We do not consider these arguments. As matters relating to conditions of confinement, James had to

pursue administrative remedies for relief under the Inmate Complaint Review System, and there is no evidence in the record that he did so. *See* WIS. ADM. CODE § DOC 310.04.⁵

James argues that there is insufficient evidence to support a finding of guilt. However, the record contains an admission by James that he would “have to go to the hole,” and this admission was corroborated by the conduct report containing a correction officer’s statement that James refused an oral order to double bunk. This is evidence a reasonable mind could use to arrive at the same

⁵ **DOC 310.04 Exhaustion of administrative remedies.** Before an inmate may commence a civil action or special proceedings against any officer, employee or agent of the department in the officer’s, employee’s or agent’s official or individual capacity for acts or omissions committed while carrying out that person’s duties as an officer, employee or agent or while acting within the scope of the person’s office, the inmate shall file a complaint under s. DOC 310.09 or 310.10, receive a decision on the complaint under s. DOC 310.12, have an adverse decision reviewed under s. DOC 310.13, and be advised of the secretary’s decision under s. DOC 310.14. With respect to procedures used by the adjustment committee or hearing officer in a prison disciplinary action under ch. DOC 303, an inmate shall appeal to the warden under s. DOC 303.76 and file an inmate complaint under s. DOC 310.08 (3) in order to exhaust administrative remedies.

conclusion reached by the hearing officer. *See Brookside Poultry Farms*, 131 Wis.2d at 120, 388 N.W.2d at 600.

By the Court.—Order affirmed.

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

