COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3689

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

STATE OF WISCONSIN EX REL. JERRY SAENZ,

PETITIONER-APPELLANT,

v.

GARY MCCAUGHTRY, WARDEN, WAUPUN CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

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

Before Dykman, P.J., Vergeront and Deininger, JJ.

DYKMAN, P.J. Jerry Saenz, an inmate at the Waupun Correctional Institution, appeals *pro se* from an order affirming Warden McCaughtry's decision that Saenz used intoxicants, contrary to WIS. ADMIN. CODE § DOC 303.59. He argues that the trial court erred when it applied the "some evidence" standard

rather than the "substantial evidence" standard during its certiorari review of the adjustment committee's decision. We agree but conclude that there was substantial evidence in the record to support the committee's decision. Saenz also argues that he was denied his right to effective assistance from his prison advocate. Saenz never informed his advocate, during or after their initial meeting, that he needed assistance in preparing a defense; we therefore conclude that he was not denied effective assistance. Accordingly, we affirm.

BACKGROUND

Jerry Saenz, a prisoner at Waupun Correctional Institution (WCI), submitted to a urine test in February 1997. His test results came back positive for cannabinoids. A major conduct report was issued, charging him with violating WIS. ADMIN. CODE § DOC 303.59.[1] A full disciplinary hearing was scheduled for February 18, 1997. Prior to the hearing, Saenz requested that a confirmatory test be conducted on his sample.

A few days after the conduct report was filed, a staff advocate asked Saenz whether he needed assistance. Saenz informed his advocate that he was just awaiting the results of the confirmatory drug test, which eventually came back positive. Saenz never indicated that he wanted his advocate's assistance in gathering evidence or in preparing a defense.

[1] DOC 303.59 "Use of intoxicants" reads, in pertinent part, as follows:

> (1) Any inmate who intentionally takes into his or her body any intoxicating substance, except prescription medication in accordance with the prescription, is guilty of an offense.

Saenz later requested a postponement of the disciplinary hearing, because his assigned advocate failed to assist him in the preparation and presentation of a defense. Saenz stated that he had not been contacted by his advocate since their initial meeting, in which he informed the advocate that he was awaiting the confirmatory test results. Saenz also argued that the hearing should be postponed because he had not received any evidence that he was tested at random, apparently the basis of his defense at the hearing. He believed that he was entitled to a copy of the "computer print out sheet" indicating that he was selected at random.

At the disciplinary hearing on February 18, 1997, the two-member adjustment committee denied Saenz's request for a postponement because it concluded that: (1) he was randomly chosen; (2) his advocate did talk to him; and (3) the only relevant defense he could possibly offer was medication and, on the chain of evidence form, he stated that he was not on any medication. The committee found him guilty.[2]

[2] The committee stated the following on the disciplinary hearing form:

> We find the reporting officer credible. The inmate did not present any evidence to contradict the report. We do not find the inmate's plea of "not guilty" credible[.] Two separate tests were done on the sample of his urine and both tests were positive for use ….
>
> After a review of the conduct report, the inmate's statement, the evidence and the advocate's statement, we find that he intentionally took into his body an intoxicating substance. A test done on a sample of his urine indicated the presence of cannabinoids. This was a random test. The test results were 35.7>=T(T=25) with the confirmatory test result also coming back positive for use.

In his appeal to the WCI warden, Gary R. McCaughtry, Saenz argued that he never received evidence that he was randomly selected for testing, and that he received ineffective assistance from his staff advocate. McCaughtry disagreed and affirmed the committee's decision. Saenz then sought review by filing a writ of certiorari in the Dodge County Circuit Court.

On certiorari review, Saenz argued that he received inadequate notice of his disciplinary hearing and ineffective assistance from his advocate. He also alleged that there was insufficient evidence to support the adjustment committee's conclusion that his urinalysis test was randomly conducted. The court stated that the appropriate standard on certiorari review should be whether there was "some evidence" to support the adjustment committee's factual findings and conclusions. The court concluded that Saenz received adequate notice and effective assistance from his advocate, and that his drug test was conducted at random. Therefore, it affirmed the warden's decision. Saenz appeals.

STANDARD OF REVIEW

On certiorari review, we determine the following: (1) whether the department acted within its jurisdiction; (2) whether it acted according to law; (3) whether the action was arbitrary, oppressive or unreasonable; and (4) whether the evidence supported the determination in question. ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980). The scope of our review is identical to that of the trial court on certiorari, but we decide the merits of the case independently of the trial court's decision. ***Gordie Boucher Lincoln-Mercury Madison, Inc. v. City of Madison Plan Comm'n***, 178 Wis.2d 74, 84, 503 N.W.2d 265, 267 (Ct. App. 1993). The standard on certiorari review is the substantial evidence test, under which we determine whether reasonable

minds could arrive at the same conclusion the committee reached. ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). "The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence, and we may not substitute our view of the evidence for that of the committee." *See* ***State ex rel. Jones v. Franklin***, 151 Wis.2d 419, 425, 444 N.W.2d 738, 741 (Ct. App. 1989) (quoting ***Nufer v. Village Bd. of Village of Palmayra***, 92 Wis.2d 289, 301, 284 N.W.2d 649, 655 (1979)).

DISCUSSION

I. Sufficiency of the Evidence

Saenz argues that the trial court used an incorrect standard of review to examine the adjustment committee's decision. We agree. In ***Ortega v. McCaughtry***, No. 97-2972, slip op. at 8 (Wis. Ct. App. Aug. 6, 1998), we stated that the appropriate standard on certiorari review is whether there is "substantial evidence" to support the adjustment committee's decision. However, we conclude that this error was harmless. We will review *de novo* the adjustment committee's decision to determine whether substantial evidence exists to support the decision.

The adjustment committee's decision to discipline Saenz for using intoxicants was based on the results of his initial and confirmatory drug tests. Saenz does not challenge the results of these tests. Rather, he contends there was insufficient evidence that the initial test was conducted at random.[3] Saenz,

[3] A drug test constitutes a "body contents" search. WIS. ADMIN. CODE § DOC 306.16(5) addresses the guidelines for body contents searches:

> A body contents search may only be conducted under one of the following conditions and only after approval by the superintendent or that person's designee:

(continued)

however, failed to introduce any evidence to support this contention.[4] The only evidence in the record regarding the randomness of the initial drug test is a statement in Saenz's conduct report by a correctional officer that the test was conducted at random.[5] And while Saenz contends that the officer did not have first-hand knowledge that the test was conducted at random, he did not examine the officer at the disciplinary hearing. Because our review is limited to matters included in the record, ***State ex rel. Meeks***, 95 Wis.2d at 120, 289 N.W.2d at 361,

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> (a) If a staff member, from direct observation or reliable sources, has reasonable grounds to believe that the inmate has used, possesses or is under the influence of intoxicating substances, as defined in § DOC 303.02 (10), or other contraband;
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> (b) Upon intake in the assessment and evaluation process;
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> (c) After an inmate returns from:
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> 1. A furlough;
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> 2. Work or study release;
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> 3. Temporary release offgrounds;
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> 4. Any outside work details, or
>
> 5. A visit; or
>
> (d) As part of a random testing program conducted on the entire population of the correctional institution. Selection of inmates for random testing may not be made with knowledge of inmate identities.

[4] Saenz requested that his disciplinary hearing be postponed so that WCI could provide him with a copy of the computerized printout sheet that proved that his institution number or cell number was selected at random. Saenz was never given the computerized printout, and his request for a postponement was denied. Saenz raised this issue in his appeal to the warden and to the circuit court. On appeal to this court, Saenz alleges that there is insufficient evidence to establish that he was tested at random, but he does not raise the issue that the WCI failed to provide him with a computerized printout.

[5] Because the evidence indicates that the test was conducted at random, we will not consider whether there is a requirement that searches in prison cases may be other than at random.

which, in this case, only includes the statement that the test was conducted at random, we conclude that substantial evidence exists to support the adjustment committee's decision.

II. Assistance of Staff Advocate

Saenz also argues that he was denied his right to effective assistance by his staff advocate, because his advocate failed: (1) to investigate and gather evidence that the testing procedures were not random; (2) to provide him with copies or notice of the confirmation test results prior to the hearing; and (3) to request a continuance to allow for additional time to investigate and gather any evidence that WCI did not follow its random testing procedures.

On February 11, 1997, Saenz was contacted by his appointed staff advocate, and he told his advocate that he was awaiting the results of the confirmatory test. Saenz never indicated that he wanted the advocate to return after the confirmatory test. According to WIS. ADMIN. CODE § DOC 303.78(2), an advocate's duties are as follows:

> The advocate's purpose is to help the accused to understand the charges against him or her and to help in the preparation and presentation of any defense he or she has, including gathering evidence and testimony, and preparing the accused's own statement. The advocate may speak on behalf of the accused at a disciplinary hearing or may help the accused prepare to speak for himself or herself.

Saenz argues that his advocate failed to adhere to this standard, because the advocate did not help gather evidence or prepare a defense. In particular, he asserts that the advocate did not gather evidence to help establish that WCI failed to adhere to its random testing procedures. But, the record does

not show that Saenz requested assistance from his advocate in preparing this or any other defense.

A staff advocate is appointed or selected to *assist* the inmate in understanding the charges and preparing for the disciplinary hearing. The advocate does not assume the role of the inmate's attorney. *See generally* ***Ortega***, No. 97-2972, slip op. at 18. A staff advocate is usually a correctional officer appointed by the superintendent or selected by the prisoner. Staff advocates do not have the same training as attorneys and are not bound by the same ethical considerations as attorneys; therefore, they should not be held to the same standard of care. Their duties should be limited to those set forth in the administrative rule.

We therefore conclude that based on the duties set out in WIS. ADMIN. CODE § DOC 303.78(2), Saenz's advocate provided adequate assistance. Accordingly, we affirm.

By the Court.—Order Affirmed.

Not recommended for publication in the official reports.