COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0087

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

STATE OF WISCONSIN EX REL.
DANNY PRINCE HALL,

PETITIONER-APPELLANT,

V.

GERALD BERGE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Affirmed.*

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

PER CURIAM. Danny Prince Hall appeals from an order affirming the decision of the prison adjustment committee which found him guilty of violating WIS. ADM. CODE §§ DOC 303.43 (possession of intoxicants) and DOC 303.39 (creating a hazard). He argues that: (1) there was insufficient evidence to support the committee's findings of guilt; (2) he was denied his right to call

witnesses at the disciplinary hearing; and (3) the record is defective. We reject his arguments and affirm the order.

Hall is an inmate at the Jackson Correctional Institution. At all relevant times, he was confined at the Fox Lake Correctional Institution.[1] On March 6, 1996, a correctional officer detected the smell of marijuana coming from Hall's prison cell—which, apparently, Hall had moved into two days earlier. Upon searching the cell, the officer found some seeds and flakes of a green substance which later tested positive for marijuana. The officer also found a torn piece of a bed sheet that was burnt on the edge. The next day, Hall was issued a conduct report charging him with violating WIS. ADM. CODE §§ DOC 303.43 (possession of intoxicants) and DOC 303.39 (creating a hazard).

A disciplinary hearing was held on March 27, 1996. Hall made the following statement:

> I did have knowledge of the burnt bed sheet. It was that way when I got it. I tore off the burnt part to throw away. I didn't have any marijuana. I don't know where they found it.

The adjustment committee found Hall guilty of both offenses. It reasoned:

> Hearing officer relies on the physical evidence. Although the inmate denies charges. The evidence tested positive for THC. All cells are cleaned when they are vacated. This includes mopping the floors. It appears the sheet is soiled, indicating it may have been used.

Hall was given 8 days' adjustment segregation and 360 days' program segregation and was referred to the Program Review Committee.

[1] Hall was formerly confined at the Columbia County and Fox Lake correctional institutions. Although Hall initiated this action while he was at Columbia, it pertains to a conduct report received at Fox Lake.

Responding to Hall's appeal, Gerald Barge, the superintendent of FLCI, affirmed the committee's decision. Hall then sought certiorari relief from the circuit court, which was denied. This appeal followed.

On certiorari, we review the prison disciplinary committee's decision *de novo* and our review 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). Our review is limited to whether (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) the 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.*** Whether the adjustment committee acted according to law includes the questions of whether due process was afforded and whether the committee followed its own rules. ***State ex rel. Meeks v. Gagnon***, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980).

The test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the committee reached. *See* ***State ex rel. Richards v. Traut***, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988). "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." ***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 Palmyra,*** 92 Wis.2d 289, 301, 284 N.W.2d 649, 655 (1979)).

Hall first argues that the evidence presented at the disciplinary hearing was insufficient for the committee to find him guilty of possession of intoxicants and creating a hazard. We disagree.

WIS. ADM. CODE § DOC 303.43(1), possession of intoxicants, states in part, "[e]xcept as specifically authorized, any inmate who knowingly has in his or her possession any intoxicating substance ... is guilty of an offense." Marijuana is an "intoxicating substance," § DOC 303.02(11); "possession" means "in one's quarters," § DOC 303.02(14); and "knowingly" means that "the inmate believes that the specified fact exists," § DOC 303.04(2). According to the conduct report, the officer "detected a strong smell of marijuana from cell 8 occupied by [Hall]" and, upon searching the cell, "[found] some seeds and flakes of a green substance" which "tested positive for THC." In addition, the committee noted that "[a]ll cells are cleaned when they are vacated. This includes mopping the floors."

Hall claims that he did not "knowingly" possess the marijuana—that the marijuana seeds were not his and that he didn't know where they came from. But the committee is not obligated to believe him, and credibility is an issue for the committee, not for this court. ***Robertson Transp. Co. v. Public Serv. Comm'n***, 39 Wis.2d 653, 658, 159 N.W.2d 636, 639 (1968).[2] Because the

[2] In ***Robertson Transport Co. v. Public Serv. Comm'n***, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968), the court explained:

> Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept. Likewise, there are cases where only one view can be supported by substantial evidence and the determination depends upon the credibility of witnesses.
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> ... What is substantial or what a reasonable man might consider to be adequate support of a conclusion lies within the domain of

(continued)

committee could reasonably conclude from the evidence that Hall knowingly possessed the seeds, the evidence is sufficient to sustain its finding of guilt.

Hall disagrees. He claims the evidence was insufficient because no "confirmatory test" was performed to confirm that the substance found in his cell was in fact marijuana. A confirmatory test, however, is required only when an inmate is charged with use of intoxicants under § DOC 303.59. None is required where, as here, the charge is simple possession under § DOC 303.43. Additionally, because the record does not indicate that Hall objected to the alleged procedural defect before the adjustment committee, he has waived this issue on appeal. *See* ***Saenz v. Murphy***, 162 Wis.2d 54, 63, 469 N.W.2d 611, 615 (1991) (an issue not raised before the trier of fact—here, the adjustment committee—is waived).

Hall's next argument—that he was denied access to the official test results of the marijuana seeds—must also be rejected. The record contains a document entitled "Contraband Drugs and Other Substances" which shows that on March 6, 1996, Lt. L. Dietz tested the "material" found in Hall's cell for the presence of "THC" and that the result was "positive."[3] There is nothing in the record to indicate that Hall requested to see, or was denied access to, these results. And, as before, because there is no showing that Hall raised this objection before the committee, it, too, is waived. ***Saenz***, 162 Wis.2d at 63, 469 N.W.2d at 615.

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the reviewing court and this court may well differ on this point with an administrative agency.

[3] Hall claims this document is not the "official" scientific test result. Any such argument must be deemed waived, however, for his failure to raise it before the adjustment committee. *See* ***Saenz v. Murphy***, 162 Wis.2d 54, 63, 469 N.W.2d 611, 615 (1980).

With respect to creating a hazard, WIS. ADM. CODE § DOC 303.39 reads: "Any inmate who intentionally, recklessly or negligently creates a hazard by fire or explosion is guilty of an offense." The officer found "a torn piece of bed sheet burned on the edge" in Hall's cell, and the committee noted that "[i]t appears the sheet is soiled, indicating it may have been used." Based on this evidence, the committee could reasonably believe that Hall was the one who burnt the sheet, despite his denial.

Hall next argues that he was denied his right to call witnesses at his disciplinary hearing. WIS. ADM. CODE § DOC 303.81(1) provides:

> **DOC 303.81 Due process hearing: witnesses.** (1) A request by the inmate for witnesses to appear at the major violation hearing, including requests for the appearance of the staff member who signed the conduct report, may be made by the accused to the advocate who shall deliver the request to the security office. Except for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members. If an inmate does not have an advocate, the request shall be sent directly to the security office. This request shall be made within 2 days of the service of notice.

Hall claims that he requested two witnesses through his advocate: the officer who searched his cell and the officer who wrote the conduct report and completed the "Contraband Drugs and Other Substances" form. However, the record does not bear out Hall's assertion. It contains a "Notice of Major Disciplinary Rights" with Hall's signature, indicating that he was notified that he "may request, in writing, within 2 days of this notice ... that any one or more of those [staff] witnesses be present at said hearing." But there is no "Witness Request Form" or any other indication in the record that he requested that the witnesses appear at his hearing.

Hall next argues that he was denied his constitutional right to cross-examine certain witnesses at his hearing. While a defendant in a criminal prosecution has a constitutional right to confront and cross-examine witnesses, no similar right exists in prison disciplinary proceedings. ***Wolff v. McDonnell***, 418 U.S. 539, 567 (1974); s*ee also* ***Heimermann v. McCaughtry***, 855 F. Supp. 1027, 1029 (E.D. Wis. 1994) ("there is no absolute right for prisoners to cross-examine witnesses at a prison due process hearing which does not involve parole revocation").

Finally, Hall argues that the record is defective because it does not contain the test results from urine specimens which were taken from him on March 4, March 7, March 8, and March 9, 1996, which, he says, tested negative for THC. The argument is unavailing. The question is not whether Hall *used* marijuana, but whether he *possessed* it. Even so, the record does not show that the committee relied upon—or even was aware of—these results when it found Hall guilty possession of intoxicants. The test results from urine samples were therefore not relevant to proceedings and, as such, were properly excluded from the record.[4]

By the Court.—Order affirmed.

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

[4] Hall also argues that the prison officials placed him in temporary lockup without following the proper notice requirements, in violation of WIS. ADM. CODE § 303.11. This argument, too, is dispelled by the record, which contains a "Notice of Inmate Placed in Temporary Lockup" which specifically indicates that Hall was provided an opportunity to respond to the reason(s) for his placement in lockup, and that he had no comment and refused to sign the statement. We see no procedural violation with respect to his placement in temporary lockup.