

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 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. 98-0218

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL.
BARON L. WALKER, SR.,**

PETITIONER-APPELLANT,

V.

DANIEL BERTRAND,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

PER CURIAM. Richard Walker appeals from an order quashing his writ for certiorari review of a prison disciplinary decision on jurisdictional grounds. The State concedes that the trial court's jurisdictional ruling was

erroneous,¹ but contends that we may affirm the order on the merits because we review the committee's decision rather than that of the circuit court. Walker agrees that we may address the merits, but argues that such review would result in reversal of the disciplinary decision on several grounds. We conclude that Walker waived his procedural claims of error, and that the record supports his adjudication of guilt for attempting to incite a riot. But, for the reasons discussed within, we determine that there was insufficient evidence to support his adjudication of guilt for disobeying orders. We therefore remand the case to allow the prison committee to adjust Walker's punishment and record accordingly.

BACKGROUND

On April 21, 1997, upon observing a Green Bay Correctional Institution prison guard watching inmates in the dining room serving line through binoculars, Walker shouted something to the effect of, "what the fuck is this, binoculars, well then, if they want to make this a real joint, lets hook this mother fucker up and make it ours." Walker then left his place in line and went to grab a second helping of carrots. As a result of the incident, Walker was issued a conduct report for disobeying orders and attempting to incite a riot. The adjustment committee found him guilty on both charges and imposed eight days of adjustment segregation and 360 days of program segregation.

¹ We need not review issues which have been conceded. See *State ex rel. Sahagian v. Young*, 141 Wis.2d 495, 500, 415 N.W.2d 568, 570 (Ct. App. 1987) "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." *Id.* (quoting *Charolais Breeding Ranches v. EPC Sec.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979)).

STANDARD OF REVIEW

Our certiorari 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). We will consider only 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).

ANALYSIS

Allegations of procedural error

Walker complains that he was not afforded his right to call witnesses and that his staff advocate did little to help him. The record shows that Walker requested that a number of witnesses attend the hearing. Staff determined that three of the requested witnesses were not required to be present because the conduct report did not pertain to the cook, the guard was not on duty at the time of the hearing, and one of the inmates was not mentioned in the report and could perhaps give a written statement. The record does not indicate, however, that Walker raised either of his procedural complaints before the committee.

Because our certiorari review is limited to the record created before the committee, we cannot consider issues that were not raised before the committee and are thus 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 the court. *Santiago v. Ware*, 205 Wis.2d 295, 327, 556 N.W.2d 356, 368 (Ct. App. 1996) *cert. denied*, 117 S. Ct. 2435 (1997). We conclude that Walker waived the right to raise any witness or advocacy issues on appeal.

Sufficiency of the Evidence

WIS. ADM. CODE § DOC 303.18 says that “[a]ny inmate who intentionally encourages, directs, commands, coerces or signals one or more other persons to participate in a riot is guilty of” attempting to incite a riot. The statement of the reporting officer in the conduct report that Walker had yelled obscenities and twice indicated to fellow inmates that they could “make it ours” in apparent reference to the dining area was sufficient to support the adjustment committee’s determination that Walker had attempted to incite a riot.

WIS. ADM. Code § DOC 303.06(1) says that an inmate is guilty of disobeying orders when “[t]he inmate intended to do something which would have been a rule violation; and [t]he inmate did acts which showed that he or she intended to violate the rule at that time.” The committee indicated that it found Walker guilty of disobeying orders based, in part, upon “institution rules, policies or procedures” contained in a handbook given to all inmates. Neither the conduct report nor the committee decision, however, specifically identified what rule Walker disobeyed by returning for extra carrots, and the handbook was not made part of the certiorari record. Consequently, there is not sufficient evidence to support Walker’s adjudication of guilt for disobeying orders.

Because we cannot determine what portion of the penalty imposed on Walker related to the disobeying orders charge, we must remand to the adjustment committee to reconsider the penalty in light of our determination.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

