

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 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. 98-3654

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN EX REL. TONY G.
MERRIWEATHER,**

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 Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Tony G. Merriweather appeals an order quashing his writ of certiorari to review an administrative confinement in prison. Because we conclude that Merriweather's claims are moot, and that those capable of repetition evading review are without merit, we affirm the order.

BACKGROUND

In 1989, following a string of assorted battery convictions, Merriweather was convicted of one count of aggravated battery while armed and three counts of first-degree sexual assault based upon his participation in the gang rape of a woman and the severe beating of her husband by a group of five men. He was sentenced to prison. Over the following years, Merriweather was issued more than forty conduct reports for various violations of prison rules. A number of these conduct reports related to gang activity and group resistance. On May 23, 1992, Merriweather repeatedly struck and kicked two staff members during a large-scale disturbance in the prison cafeteria, seriously injuring one. In 1994, Merriweather and two others attempted to intimidate a fellow inmate into buying cigarettes for them at the prison canteen in exchange for protection. As a result of this violent history, Merriweather was eventually placed in administrative confinement in 1995.

In July of 1997, the WCI security director recommended that Merriweather's administrative confinement be continued on the grounds that he was still a threat to staff, inmates and security at the prison. Merriweather was given notice that his administrative confinement was to be reviewed based upon a six-page referral packet, his social services record, his prison conduct record, and additional evidence provided by security personnel. On August 20, 1997, following a continued hearing at which Merriweather successfully challenged some of the evidence presented against him, and presented witnesses and written and oral statements on his own behalf, the program review committee voted to retain him in administrative confinement. After exhausting all of his avenues for administrative relief, Merriweather filed a certiorari action in the circuit court on June 8, 1998, to challenge the August 20, 1997, administrative confinement

decision. The circuit court determined that Merriweather's action had become moot due to a subsequent PRC review of his administrative confinement on March 17, 1998.

SCOPE AND STANDARD OF REVIEW

As a threshold matter, we must consider whether the appeal is now moot. A case is moot when a decision would have no practical effect on an existing controversy. See *DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 591, 445 N.W.2d 676, 683 (Ct. App. 1989). We agree with the circuit court that a determination in Merriweather's favor would grant him no practical relief, because a subsequent administrative confinement order would still be in effect.

Generally, we will not review issues that are moot. However, we have discretion to address moot issues that are of public importance or that are likely to arise again in circumstances that may evade review. See *State v. Trent N.*, 212 Wis.2d 728, 735-36, 569 N.W.2d 719, 723 (Ct. App. 1997). The bulk of Merriweather's claims are specific to the August 20, 1997, administrative confinement proceedings, and are thus unlikely to recur. However, because Merriweather may be subject to a succession of administrative confinement reviews, the question of what evidence is sufficient to support continuing his administrative confinement is likely to occur again, and thus again become moot before he is able to obtain judicial review. We will therefore exercise our discretion to consider whether the PRC properly considered all of Merriweather's past violent conduct and whether it had sufficient evidence to continue his administrative confinement.

Our certiorari review is limited to the record created before the committee. See *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. *See 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

Under WIS. ADM. CODE § DOC 308.04(2), an inmate may be placed in administrative confinement when:

(a) The inmate presents a substantial risk to another person, self, or institution security as evidenced by a behavior or history of homicidal, assaultive or other violent behavior or by an attempt or threat to cause harm.

(b) The inmate's presence in the general population poses a threat or substantial risk to another person, self, or institution security.

... [or]

(d) The inmate has been identified as having an active affiliation with an inmate gang or street gang ... and there is reason to believe that the inmate's continued presence in the general population will result in a riot or disturbance.

Merriweather contends that the PRC erred by considering his crime of conviction, conduct reports, and other evidence that was remote in time, and he

claims the evidence was insufficient to support his continued administrative confinement in the absence of more recent violent activities. We disagree.

First, although it might be inappropriate to impose administrative confinement upon inmates solely based upon the fact that their crimes of conviction were violent, that is not what happened here. The PRC considered Merriweather's crime of conviction in the context of his long history of assaultive behavior, both in and out of prison.

Next, the PRC's consideration of Merriweather's conduct reports for the purpose of determining his dangerousness did not constitute additional penalties for his prior misconduct. Administrative confinement is not a punitive measure; its purpose is to ensure safety and security in the institution.

Finally, there is no provision in WIS. ADM. CODE § DOC 308.04(2) that limits the PRC to considering recent behavior. To the contrary, the administrative regulation explicitly authorizes the PRC to consider an inmate's history of behavior. Common sense also dictates that the recent behavior of an inmate who has had no recent opportunity to engage in violent behavior signifies little in terms of whether the inmate is still dangerous. Here, Merriweather's own witnesses provided the PRC with evidence of his continued dangerousness. Captain Michael Dittman expressed concern for staff and other inmates if Merriweather were to be returned to the general population. Inmate Harris testified that Merriweather was still viewed by other inmates as a leader, and held influence over them. Taken in conjunction with his extensive history of violent behavior, this evidence was sufficient to support the PRC's determination.

By the Court.—Order affirmed.

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

