

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 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. **99-0403**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. TRACY GEORGE,

PETITIONER-APPELLANT,

V.

JON LITSCHER, SECRETARY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

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

PER CURIAM. Tracy George appeals from a trial court order that denied him \$188.98 in costs after he prevailed in his certiorari review of prison disciplinary proceedings. The trial court ruled that George, like almost all other litigants, could not recover the costs of litigation against the State. The trial court

held that George could not recover costs against the State without statutory authority and that no statute authorized such an award. On appeal, George raises multiple arguments that encompass two basic claims: (1) costs were recoverable as a matter of fairness and public policy; and (2) costs were recoverable as a matter of due process. We reject these arguments and affirm the trial court's order.

First, George has no general right to recover costs against the State. Costs are recoverable against the State only when expressly allowed by statute. See *DILHR v. Coatings, Inc.*, 126 Wis.2d 338, 346, 376 N.W.2d 834, 838 (1985). We know of no statute that allows inmates to recover costs in a certiorari action. George's fairness and public policy arguments do not change this state of affairs. The absence of a cost-recovery statute itself represents the public policy of this State on inmate-litigation costs, and we have no power to examine such matters further. If the legislature wanted to grant inmates such an important right as the right to costs in certiorari cases, it would have expressly granted them that right. It has granted litigants the right to costs in other settings.¹

Second, George did not raise his due process argument in the trial court and thereby has waived the issue on appeal. See *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). In any event, if we consider the issue *arguendo*, we doubt that he could prove such claim. Due process requires legislative action to have only a rational basis, see *Messner v. Briggs & Stratton*

¹ George also claims costs under § 814.25(2)(b), STATS. This statute allows prisoners to recover costs in lawsuits that obtain (1) injunctions against defendants in their official capacities or (2) judgments against defendants in their personal capacities. See *id.* The statute does not apply to actions or special proceedings related to prison conditions that seek a remedy available by certiorari. See *id.* We see nothing in this statute that gives George the right to costs against the State or State officials for certiorari review of prison disciplinary proceedings.

Corp., 120 Wis.2d 127, 135, 353 N.W.2d 363, 367 (Ct. App. 1984), and we are satisfied that the legislature may rationally require inmates, like almost all other litigants, to assume their own costs in litigation against the State. George has given no constitutional basis for why inmates must have, as a matter of due process, more favorable rules on costs against the State than other litigants.

By the Court.—Order affirmed.

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

