COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2984

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

STATE OF WISCONSIN EX REL. NORMAN O. BROWN,

PETITIONER-APPELLANT,

V.

STEPHEN PUCKETT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Norman O. Brown appeals pro se from an order dismissing his certiorari petition. Brown asserts that the circuit court should not have denied his motion to compel discovery or, in the alternative, to supplement the agency record and should not have issued a protective order barring discovery.

He further argues that the dismissal was an erroneous exercise of discretion and that the circuit court erred in declaring such dismissal a "strike."[1] We hold that the denial of the discovery motion, the issuance of a protective order and the dismissal of the certiorari petition with prejudice were well within the circuit court's discretion. The circuit court also properly determined that such dismissal constituted a strike. We therefore affirm.

¶2 On June 22, 1998, Brown filed a petition for a writ of certiorari against Stephen Puckett, Director of the Office of Offender Classification of the Department of Corrections. Brown alleged that he was wrongfully denied entrance into certain prison programs and that he was improperly subjected to an out-of-state transfer to a correctional facility in Oklahoma. While the certiorari petition was pending, the circuit court denied Brown's motion to compel discovery from Puckett or, in the alternative, for an order requiring Puckett to supplement the certified agency record, and issued an order barring any discovery in the action. Brown's action was dismissed for his failure to timely file a brief as required by the scheduling order.

¶3 We review the circuit court's discovery rulings under a "misuse" of discretion standard. *See* ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996). Discovery or supplementation of a certified agency record is rarely appropriate in a certiorari action. On review by certiorari, the court reviews only the record of the challenged administrative proceeding. *See* ***State ex rel.***

[1] Pursuant to WIS. STAT. § 801.02(7)(d) of the Wisconsin Prisoner Litigation Reform Act (PLRA), a court must dismiss a matter if a prisoner has had three previous cases dismissed for any of the reasons discussed in WIS. STAT. § 802.05(3)(b). This is known as the "three strikes" rule. Brown's petition for a writ of certiorari was pending on September 1, 1998, the effective date of the PLRA. Thus, the PLRA applies. *See* 1997 Wis. Act 133, §§ 43-44. All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Conn v. Board of Trustees, 44 Wis. 2d 479, 482, 171 N.W.2d 418 (1969); ***Consolidated Apparel Co. v. Common Council***, 14 Wis. 2d 31, 36-37, 109 N.W.2d 486 (1961); ***State ex rel. Irby v. Israel***, 95 Wis. 2d 697, 703, 291 N.W.2d 643 (Ct. App. 1980). This is because the purpose of a certiorari petition is to test the validity of a judicial determination; it has no other legitimate use. *See* ***State ex rel. Gaster v. Whitcher***, 117 Wis. 668, 671-72, 94 N.W. 787 (1903). The circuit court found that Brown failed to show any legitimate reason why the certified record required supplementation and that Brown's discovery requests pertained to matters well beyond the scope of the administrative proceedings he sought to challenge. For example, Brown requested lists of all current and former participants in and applicants for the Intensive Sanctions program. The discovery requests were nothing more than a "fishing expedition" and the circuit court properly exercised its discretion when it denied Brown's motion to compel discovery or, in the alternative, to supplement the agency record.

¶4 The circuit court's issuance of a protective order prohibiting all discovery in the certiorari action was also within the court's discretion. WISCONSIN STAT. § 804.01(3)(a)1 permits a court to issue a protective order precluding discovery so as "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." The circuit court concluded that discovery was not proper and that there were no grounds warranting supplementation of the administrative record. Accordingly, the court properly exercised its discretion by issuing a protective order barring discovery in this matter.

¶5 We turn to the merits of Brown's petition. The circuit court has inherent authority to order the parties in a certiorari petition to submit briefs. *See* ***Lee v. LIRC***, 202 Wis. 2d 558, 561-62, 550 N.W.2d 449 (Ct. App. 1996). Circuit

courts also have both statutory and inherent authority to dismiss an action if the party seeking judicial relief fails to follow court orders or fails to prosecute his or her action. *See* WIS. STAT. § 805.03; ***Lee***, 202 Wis. 2d at 562-63. The decision to dismiss an action based on the violation of a scheduling order lies within the sound discretion of the circuit court. *See* ***Modica v. Verhulst***, 195 Wis. 2d 633, 650, 536 N.W.2d 466 (Ct. App. 1995). Thus, we will sustain the circuit court's discretionary decision so long as the court "examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id***. Specifically, a circuit court's dismissal sanction will be sustained "if there is a reasonable basis for the circuit court's determination that the noncomplying party's conduct was egregious and there was no 'clear and justifiable excuse' for the party's noncompliance." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991).

¶6 The circuit court entered a scheduling order requiring Brown to file a brief in support of his certiorari petition. At a telephonic hearing before the court regarding the discovery motion, the circuit court reminded Brown that the terms of the scheduling order required him to file a brief on the merits of his petition. Rather than heeding that directive, Brown opted to pursue an unsuccessful interlocutory appeal of the circuit court's discovery orders. He did not file a brief on the merits of his petition and he did not seek a stay of the scheduling order until after Puckett had filed the motion to dismiss. We hold that the circuit court properly exercised its discretion, and we affirm the dismissal of Brown's certiorari action.

¶7 We next address whether the circuit court properly determined that Brown's certiorari petition was frivolous, such that it constituted a strike pursuant

to WIS. STAT. § 802.05(3)(b). Our standard of review is a deferential one. *See* ***State ex rel. Campbell v. Township of Delavan***, 210 Wis. 2d 239, 247-49, 565 N.W.2d 209 (Ct. App. 1997). We are bound by the circuit court's findings of fact unless they are clearly erroneous and the court's legal conclusions are reviewable only for an erroneous exercise of discretion. *See* ***id***.

¶8 WISCONSIN STAT. § 814.025(3) sets forth the applicable standard for determining whether this action is frivolous. The court must find that "the action ... was commenced, used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another" and/or "[t]he party ... knew, or should have known, that the action ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for extension, modification or reversal of existing law." ***Id***.

¶9 The circuit court found, based on the nature of the discovery requests submitted by Brown as well as his failure to respond to the court's directive requiring him to submit a brief addressing the merits of his certiorari petition, that his petition was for an improper purpose. The court further found that there was no good-faith basis for Brown to claim that either the facts or the law would support his discovery requests or efforts to supplement the agency record. The record supports these findings.

¶10 Our second inquiry is whether the circuit court properly exercised its discretion in concluding that Brown's petition was frivolous. *See* ***Riley v. Isaacson***, 156 Wis. 2d 249, 257-58, 456 N.W.2d 619 (Ct. App. 1990). After considering the relevant facts before it and applying the proper law, the circuit court reasonably concluded that Brown filed his petition and sought discovery from Puckett for an improper purpose. It was not a misuse of discretion for the

circuit court to determine that Brown's petition was frivolous. Having determined that Brown's petition was frivolous, the circuit court properly declared the dismissal a strike in accordance with WIS. STAT. § 801.02(7)(d).

¶11 Finally, we hold that there is no evidence that would support Brown's claim that the circuit court violated his due process or equal protection rights under the United States Constitution or the Wisconsin Constitution.

By the Court.—Order affirmed.

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