

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.*

Appeal No. 2004AP2199

Cir. Ct. No. 2003CV3864

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. JOEDDIE SMITH,

PETITIONER-APPELLANT,

v.

GARY R. McCUAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Joeddie Smith appeals an order dismissing his petition for certiorari review of a prison disciplinary decision. We affirm for the reasons discussed below.

BACKGROUND

¶2 Prison officials at Waupun Correctional Institution (WCI) issued Smith a conduct report on December 20, 2003, charging him with group resistance and petitions, contrary to WIS. ADMIN. CODE § DOC 303.20, and inciting a riot, contrary to WIS. ADMIN. CODE § 303.18(c). The conduct report cited information from three separate confidential informants who said Smith was a leader in the gang known as the Vice Lord Nation and was actively involved in planning and recruiting for a large scale prison disturbance intended to gain more respect for the Vice Lords at WCI.

¶3 Smith requested the investigating officer and inmate Tony Eppenger attend his hearing as witnesses. The request to have Eppenger testify was denied because he had been transferred to another prison. Smith asked to postpone his disciplinary hearing on the grounds that he had not gotten notice of his witnesses; he found evidence in his file that he needed; and he didn't receive a file review until late. The adjustment committee denied the postponement request, noting that Smith had prepared questions for his approved witness and had gathered statements from five other inmates.

¶4 The adjustment committee found Smith guilty of both charges based on the conduct report and the investigating officer's credentials and credibility. During the administrative review process, an inmate complaint examiner (ICE) noted that finding of guilt of both a greater and lesser included offense violated department rules, and also noted the file was missing a required DOC-77 Confidential Informant form. The ICE recommended affirming the conduct report, but also remanding the record to the adjustment committee to correct the noted errors. On remand, the adjustment committee added the missing form to the

record and set aside the group resistance and petitions adjudication; but the penalty, 8 days' adjustment segregation and 360 days' program segregation, remained in place.

DISCUSSION

¶5 Smith raises six issues on appeal. He claims: (1) the certiorari return should have been amended to include several additional documents; (2) the adjustment committee improperly relied upon the confidential informant statements; (3) the conduct report gave insufficient notice of the charges against him by failing to list the subsection he was accused of violating under WIS. ADMIN. CODE § DOC 303.20; (4) the evidence was insufficient to support the finding of guilt on the charge of inciting a riot; (5) the adjustment committee denied him due process by not allowing him to appear at a rehearing; and (6) his sanction should have been reduced because one of the charges was reversed and expunged following the remand from the ICE. We address each contention in turn.

Amendment of the Certiorari Return

¶6 Smith claims the return should have been amended to include (1) an affidavit from Walter Brown which contradicted a fact asserted by one of the confidential informants; (2) Smith's written request for review by the corrections complaint examiner following the adjustment committee's decision on remand; and (3) separate DOC-77 forms showing each confidential informant had signed a statement taken under oath but refused to testify and that the committee had found that testifying would pose a significant risk of bodily harm to the informant.

¶7 The affidavit does not belong in the certiorari record because it was not before the adjustment committee when it made its initial decision. Smith belatedly attempted to introduce it into the record during the administrative appeals process rather than at his hearing. In any event, the point on which the affidavit contradicts the statement of CI-1 — namely, whether Walter Brown, who was another alleged Vice Lord leader, was “on the streets in Chicago now” as CI-1 thought, or still in prison at Columbia Correctional Institution — bore little relevance to the information CI-1 gave about Smith’s activities.

¶8 It does appear Smith’s written request for CCE review on remand could properly have been included in the certiorari return. The only relevance of the CCE review request form, however, would be to document that Smith preserved certain arguments. Since we are not applying waiver to any of those arguments based on a failure to raise them in the administrative proceedings on remand, Smith is not harmed by the absence of his CCE review request form from the certiorari return.

¶9 Smith’s contention that the certiorari return should include a separate DOC-77 form for each confidential informant is flawed in two respects. First, it appears that the committee filled out only one form for all three informants. Obviously, the return cannot include a document that never existed in the first instance. Secondly, a DOC-77 form is not required for appellate review. *In camera* review of the confidential informant statements themselves is sufficient to determine whether the administrative rules regarding the use of such statements have been satisfied. *See State ex rel. Staples v. DHSS*, 115 Wis. 2d 363, 367-68, 340 N.W.2d 194 (1983). Here, all three confidential informant statements were properly included in the record under seal as item 10. In sum, we are satisfied the certiorari return adequately complied with the writ.

Use of the Confidential Informant Statements

¶10 Smith contends the adjustment committee failed to comply with WIS. ADMIN. CODE § DOC 303.86(4) because it did not make findings that testifying would place the confidential informants at significant risk of bodily harm and did not take their statements under oath. The basis for Smith's claim appears to be that the DOC-77 form contained in the record is insufficient to document procedural compliance. Contrary to Smith's apparent understanding, the DOC-77 form is not the sole basis for evaluating compliance with all procedural requirements for using confidential statements. Item 10 in the appellate record contains notarized statements from each of the three confidential informants on DOC-78 forms, accompanied by the investigator's explanation of the risk each informant would face by testifying. While we understand Smith is not privy to the DOC-78 forms because they are under seal, we have examined them *in camera* and are satisfied that all procedural requirements for use of the confidential informant statements were satisfied in this case.

Notice of Charges

¶11 Smith claims he received inadequate notice of the charges against him because the conduct report failed to specify which subsection of WIS. ADMIN. CODE § DOC 303.20 (the group resistance and petitions rule) he was alleged to have violated. That issue is moot, however, because the adjustment committee set aside the group resistance and petition charge at the ICE's direction.

Sufficiency of the Evidence

¶12 Smith contends the evidence was insufficient to find him guilty of inciting a riot because the confidential informants did not specify when or where

they observed Smith participating in the planning of the disturbance and did not attribute any specific actions or statements to him. As the State points out, however, disclosing such information could be tantamount to disclosing the identity of the confidential informants. In short, we are satisfied the information provided by the confidential informants — that Smith was recruiting inmates to take part in a disturbance — was adequately corroborated by the fact that all three gave very similar accounts and was sufficient to support the guilty verdict. We are further satisfied the adjustment committee's written decision adequately explains why it relied on the statements of the investigating officer and the confidential informants.

Right to Appear at Rehearing

¶13 Smith complains he was not allowed to appear at a rehearing after the ICE directed the adjustment committee to set aside one of the charges and correct the record. Smith had no right to appear, however, because there was no rehearing. The ICE properly directed the adjustment committee to take certain actions based on the record already established.

Punishment Imposed

¶14 Finally, Smith asserts his punishment should have been reduced when one of the charges was set aside. The two charges were intertwined, however, and it was not unreasonable for the adjustment committee to conclude Smith's conduct warranted the same level of punishment even after the lesser included offense was set aside.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

