COURT OF APPEALS DECISION DATED AND FILED

February 23, 2006

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. 2005AP1546

Cir. Ct. No. 2004CV3201

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. BARRY L. BALL,

PETITIONER-APPELLANT,

V.

MATTHEW FRANK AND JUDY P. SMITH,

RESPONDENTS-RESPONDENTS.

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

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

¶1 PER CURIAM. Barry Ball appeals from an order dismissing his action for statutory certiorari review of a prison disciplinary decision. We affirm for the reasons discussed below.

BACKGROUND

¶2 Prison officials issued a conduct report charging Ball with sexual conduct and battery. The charges were based on information, provided by five confidential informants, that Ball had paid his cellmate with canteen items to perform oral sex on him on multiple occasions, had hit that cellmate in the face hard enough to leave a red mark, and had made sexual overtures to two other inmates. The conduct report did not specify a date or dates on which the offenses had occurred and did not identify the other two inmates to whom sexual overtures had allegedly been made.

¶3 Each of the five confidential informant statements was typed onto a DOC-78 form and stated that the informer feared retaliation if his identity was revealed. All five statements were signed under oath in front of a witness. Two of the five statements were also notarized; however, the other three statements were dated but not signed by the notary. Ball was given a summary of the statements made by the confidential informants.

¶4 The adjustment committee deemed the statements by the confidential informants to be credible because they were "so close in their context and consistency and the accused could offer no defense other than to deny the allegations." The committee found Ball guilty of both offenses, and he sought administrative relief and then certiorari review.

STANDARD OF REVIEW

¶5 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 (Ct. App. 1990). With regard to the substance of the prison disciplinary decision,

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 inquiry into whether the committee acted according to law includes consideration of whether due process was afforded and the committee followed its own rules. ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43 (citing ***State ex rel. Meeks v. Gagnon***, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980)).

DISCUSSION

¶6 Ball first complains that he was denied a meaningful due process opportunity to defend against the charges because he was given no specificity as to the time and location of his alleged misconduct. Under WIS. ADMIN. CODE § DOC 303.66(2), a conduct report must list all sections of the administrative code which the inmate is alleged to have violated and must "describe the facts in detail." *See also* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 399, 585 N.W.2d 640 (Ct. App. 1998). However, prison officials must also balance the right of the accused to have adequate notice against the safety of the informants and the need for institutional security. ***State ex rel. Clarke v. Carballo***, 83 Wis. 2d 349, 356 n.4, 265 N.W.2d 285 (1978). Thus, it is permissible in certain circumstances to omit information about the time and place of charged offenses if necessary to protect confidential informants. ***McCollum v. Miller***, 695 F.2d 1044, 1048 (7th Cir. 1982).

¶7 Here, the conduct report "described the facts in detail" by summarizing all of the allegations made by the confidential informants. While the

time period was not specified, it was nonetheless limited by the undisputed fact that the primary victim had only been Ball's cellmate for a period of about sixty days. Moreover, because the primary allegation was of an ongoing sexual relationship between cellmates, the times and places of individual incidents was not essential. This is not a situation where Ball could realistically have defended against either the sexual conduct or battery charge by showing that he was housed in a different section of the prison and had no opportunity to engage in the alleged conduct. Rather, the case turned on whether the committee found Ball's denials credible. The failure to identify the other two inmates to whom Ball had allegedly made sexual overtures would be more troubling if Ball were charged with additional counts relating to them. However, because Ball was charged with only one sexual conduct count relating to his cellmate, and the other alleged incidents were only used as corroborating statements, we conclude the conduct report gave Ball sufficiently specific notice to satisfy due process.

¶8 Ball next claims the adjustment committee failed to determine the identity or credibility of the confidential informants. His argument appears to be based in part upon the erroneous assumption that the committee had only the summary of the confidential statements before it. However, the record shows that the committee had the actual statements signed by the confidential informants before it, and that it expressly deemed those confidential statements to be credible because they were largely corroborated by one another. Thus, contrary to Ball's assertions, this is not a situation where the only evidence before the committee was a hearsay assertion related by the reporting prison official in the conduct report without identifying the source for his information.

¶9 Finally, Ball complains that some of the confidential statements were not notarized. The administrative rule does not require that confidential

statements be notarized. It merely requires that they be given under oath. WIS. ADMIN. CODE § DOC 303.81(5). The record shows that all five of the statements at issue here were properly given under oath. It is irrelevant whether they were also notarized.

By the Court.—Order affirmed.

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