

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 13, 2001

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.

No. 00-2237

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. TONY EPPENGER,

PETITIONER-APPELLANT,

V.

JON E. LITSCHER, AND GARY R. MCCAUGHTRY,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. Tony Eppenger appeals an order affirming a prison disciplinary decision given him while an inmate at Waupun Correctional Institution. The dispositive issue is whether substantial evidence supports that

decision. We conclude that there was insufficient evidence to find Eppenger guilty of a disciplinary offense, and therefore we reverse.

¶2 A major offense conduct report issued against Eppenger charged him with attempted inciting a riot. The report alleged that another inmate, Patterson, tried to recruit other inmates to participate in a demonstration or a riot in the prison. Eppenger was allegedly implicated in the effort by two confidential inmate informant statements. One provided, in relevant part,

I observed a physical altercation between Inmate Jhon Veloz ... and Johnson ... and as a result of that physical altercation both inmates were placed in T.L.U. and Inmate Jhon Veloz was released the following day.

Approximately three weeks after the physical altercation between Inmate Veloz and Johnson. I was told Inmate Thoy Nail Patterson ... and Inmate Tony Eppenger ... [h]ad believed there was an informant who help[ed] get Inmate Veloz released. And that they were looking to retaliate against the informant. And inmate Veloz.... I overheard Veloz, talking about being involved in a confrontation with Inmate Patterson and Inmate Eppenger. But he was not worried about Eppenger because Eppenger did not receive[] permission. From whoever was running the building.... I believe if inmates Patterson, Eppenger and Veloz was released there would be a disturbance....

The other statement reported:

I overheard Inmate Patterson talking about a demonstration within the institution. He was discussing the tactics used in the Fox Lake riot with another inmate who was there. I then heard Patterson tell Tony Eppenger ... [and two others] what he learned from the guy from the Fox Lake riot.... I heard Patterson trying to recruit others for this demonstrations and wanted them to have a shank (knife).

The conduct report also noted that a search revealed two shanks. No evidence was presented linking Eppenger to the shanks.

¶3 The Waupun disciplinary committee found Eppenger guilty of attempted incitement and later amended the finding to guilty of aiding and abetting the attempt. The committee's decision, upheld in subsequent administrative reviews, stated:

We find the reporting officer credible [sic] inmate provides no evidence to contradict this report. Inmate witness has no direct knowledge of the incident except to say that he doesn't believe that the inmate would engage in this activity. Confidential informants were found to be credible [sic] their statements support each other. Other inmates [sic] statements deemed to be irrelevant as they would be cumulative.

After a review of the report, confidential witness statements and inmates [sic] statements we find the following. We find that the inmate intentionally attempted to incite a riot by attempting to plan and organize a disturbance at Waupun Correctional. These inmates attempted to gather information on a disturbance which occurred at Fox Lake in an effort to use this information to plan a disturbance at WCI. Confidential informants also state that Inmates believed that inmate Veloz was a snitch and had ordered retaliation against him which resulted in a physical altercation between inmates Veloz and Johnson. Committee also notes informants reference to the disruptive groups which these inmates belong the gangster disciples [sic].

¶4 We apply the substantial evidence test on review of disciplinary decisions, under which we determine whether reasonable minds could have arrived at the same conclusion the committee reached. *State ex rel. Richards v. Traut*, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988). "The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence, and we may not substitute our review of the evidence for that of the committee." *State ex rel. Jones v. Franklin*, 151 Wis. 2d 419, 425, 444 N.W.2d 738 (Ct. App. 1989). We review the evidence independently of the trial court's

decision. *State ex rel. Hippler v. City of Baraboo*, 47 Wis. 2d 603, 616, 178 N.W.2d 1 (1970).

¶5 Under any reasonable view, the evidence fails to support the finding that Eppenger was guilty of the disciplinary charge. Confidential signed statements are admissible if corroborated by other evidence, and two such statements may corroborate each other. WIS. ADMIN. CODE § DOC 303.86(4)(b). In this case, however, no reasonable basis exists to conclude that the two statements corroborated each other. One provides a confused account, based not on personal knowledge but on overheard statements,¹ of Eppenger's peripheral role in a feud between inmates Patterson and Veloz. It describes events that occurred in the last week of April 1999. The second describes Patterson's efforts sometime in the middle of May 1999 to recruit inmates to participate in a riot similar to one that occurred in another prison. Nothing in the statements allows the inference that the planned disturbance had anything to do with Patterson's feud with Veloz. Because no other evidence corroborates either statement as it pertains to Eppenger, neither was admissible under § DOC 303.86(4)(b).

¶6 Additionally, even if the statements were admissible, they do not prove that Eppenger acted to aid and abet Patterson in his plans to incite a riot. A riot is a "disturbance to institutional order caused by a group of two or more inmates which creates a risk of injury to persons or property." WIS. ADMIN. CODE § DOC 303.18. The charge of inciting a riot under § DOC 303.18 is the most serious of three charges covering organized disturbances and "should be used

¹ Hearsay is admissible in disciplinary hearings but disciplinary committees are instructed to carefully scrutinize such evidence because it is often unreliable. Appendix to WIS. ADMIN. CODE ch. 303, Note: DOC 303.86.

against ‘ringleaders’ of a serious disturbance which involves violence.” Appendix to WIS. ADMIN. CODE ch. 303, Note: DOC 303.18. Here, one statement reports hearsay that vaguely implicates Eppenger in some sort of confrontation with inmate Veloz, or in some unspecified retaliation plan against an unidentified inmate. It contains no evidence, hearsay or otherwise, that Eppenger was involved in causing or planning violence. The other statement identifies Eppenger as one of a group of inmates Patterson communicated his plans to. With regard to Eppenger, it contains no evidence of anything beyond his passive role as part of Patterson’s audience. That is not enough to prove aiding and abetting. *See Edwardson v. American Family Mut. Ins. Co.*, 223 Wis. 2d 754, 764, 589 N.W.2d 436 (Ct. App. 1998) (noting that mere presence does not constitute aiding and abetting unless an intent to assist is communicated).

¶7 Our decision reversing the order affirming Eppenger’s disciplinary conviction makes it unnecessary to address his other issues. On remand, the trial court shall order the respondents to expunge this offense from Eppenger’s disciplinary records.

By the Court.—Order reversed and cause remanded with directions.

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

