COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1412 **Cir. Ct. No. 2005CV2921**

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

STATE OF WISCONSIN EX REL. DWAYNE G. THOMAS,

PETITIONER-APPELLANT,

V.

DANIEL BUCHLER AND MATTHEW FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Dwayne Thomas appeals an order denying his request for certiorari relief from a prison disciplinary decision issued after a prior remand from the circuit court. We affirm for the reasons discussed below.

BACKGROUND

¶2 Thomas initially sought certiorari review of a prison disciplinary decision finding him guilty of aiding and abetting battery and conspiracy to participate in a riot. The conduct report was based on allegations that a group of inmates had assaulted a group of guards at an officers' station at New Lisbon Correctional Institution. Photographs from video surveillance showed Thomas moving toward the officers' station six seconds before the attack. The conduct report also quoted statements from seven separate confidential informants (CIs) who identified Thomas as having participated in the planning and execution of the assaults.

¶3 Thomas moved to compel the respondents to file an amended return to include a number of documents, including signed copies and/or edited summaries of the underlying CI statements. In response, the prison officials noted that edited summaries were already contained in the conduct report and that there were no separate signed CI statements in existence. In a separate motion to remand, the prison officials acknowledged that the certiorari return did not contain documentation showing compliance with WIS. ADMIN. CODE §§ DOC 303.81(5) and 303.86(4), relating to when and how CI statements can be used in a disciplinary hearing. They asked for a remand to "cure one of the principal alleged errors" by allowing the adjustment committee to reconsider Thomas's guilt and penalty without the CI statements. The circuit court granted the requested remand over Thomas's objection.

¶4 On remand, the adjustment committee disregarded the CI statements, and also permitted Thomas an opportunity to present additional evidence. The committee then found Thomas not guilty of aiding and abetting battery and

conspiracy to incite a riot, but guilty of the lesser-included charge of participating in a riot. The committee based its decision on the photographs showing Thomas walking toward the officers' station at the time of the assaults, as well as one officer's statement that she had seen Thomas present during the incident. Thomas again exhausted his administrative remedies.

¶5 After returning to the circuit court, Thomas argued: (1) the adjustment committee lost competency to proceed due to the length of time prison officials held Thomas in temporary lockup awaiting his hearing on the conduct report; (2) the adjustment committee violated Thomas's due process rights because its presiding officer had also served as an investigator of the conduct report; (3) the evidence was insufficient to support the adjustment committee's finding of guilt; and (4) the circuit court should have dismissed the conduct report outright, rather than remanding for reconsideration, based on the adjustment committee's improper reliance on the CI summaries during the original proceeding. The circuit court denied the writ petition, and Thomas appeals all but the temporary lockup issue.

STANDARD OF REVIEW

¶6 Our certiorari review is limited to the record created before the adjustment 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 whether 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

¶7 We first address whether the remand for reconsideration was proper. Thomas contends that the adjustment committee's failure to follow its own rules regarding the use of CI statements invalidated the entire disciplinary proceeding and cannot be corrected by a remand. He relies on cases such as ***State ex rel. Jones v. Franklin***, 151 Wis. 2d 419, 423, 444 N.W.2d 738 (Ct. App. 1989) (where disciplinary committee lost competency to proceed after it failed to hold a timely hearing); ***Bergmann v. McCaughtry***, 211 Wis. 2d 1, 9, 11, 564 N.W.2d 712 (1997) (where failure to provide inmate a second required written notice of a disciplinary hearing invalidated the proceeding and resulted in vacation of the disciplinary findings); and ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶¶1-2, 12, 15-26, 33, 234 Wis. 2d 626, 610 N.W.2d 821 (where failure to provide inmate a second required notice of a disciplinary hearing invalidated the proceeding and resulted in vacation of the disciplinary findings, even though inmate actually attended hearing).

¶8 Here, the prison officials first respond that they never actually conceded that they had not followed their own procedural rules in regard to the CI statements, but conceded only that the record did not demonstrate their compliance. However, the prison officials did not ask to supplement the record to demonstrate their compliance; they asked for a remand to "cure" the alleged errors

regarding the use of the CI statements by reconsidering Thomas's guilt and penalty without the statements. We see no reasonable interpretation of this request other than an implicit concession of error. We therefore start from the premise that the prison officials did, in fact, violate their own procedural rules by considering summaries of CI statements that were not signed under oath and without making prerequisite findings regarding the need to maintain the confidentiality of the witnesses.

¶9 Not every violation of an administrative rule, however, results in an uncurable invalidation of a disciplinary proceeding. The ruling in ***Jones*** was specific to the type of time-limit violation that occurred there, and left open the possibility that other procedural errors could still be subject to a harmless error analysis. *See* ***Jones***, 151 Wis. 2d at 423. In ***Bergmann***, the court premised its ruling on the fact that the notice provision at issue was a "basic procedural right." ***Bergmann***, 211 Wis. 2d at 9. The court did not suggest in that case that all procedural errors would require vacation of the disciplinary findings. While the court did use some broad language in ***Anderson-El*** which might be read to require the invalidation of all proceedings where prison officials have violated their own administrative rules, we squarely rejected that interpretation in ***State ex rel. Anderson v. Gamble***, 2002 WI App 131, 254 Wis. 2d 862, 647 N.W.2d 402. In ***Anderson***, we explained that we were not persuaded that ***Anderson-El*** created a blanket rule, and instead held that "a violation of such a nonfundamental right [as having the notice provided by the wrong official] does not mandate that the disciplinary proceedings be invalidated." ***Anderson***, 254 Wis. 2d 862, ¶¶7-9.

¶10 The question then becomes whether the type of evidentiary violation at issue here falls within the same category of "basic procedural rights" as hearing time limits and notice provisions, whose violation requires invalidation of an

entire disciplinary proceeding, or is instead the type of nonfundamental error that may be deemed harmless or remedied by a remand. The prison officials direct our attention to several analogous situations in which remands to an administrative agency were ordered following evidentiary problems.

¶11 In ***Snajder v. State***, 74 Wis. 2d 303, 246 N.W.2d 665 (1976), the Wisconsin Supreme Court held that it was proper to remand to allow the department to reconsider whether a defendant's parole would have been revoked even in the absence of erroneously considered information. *See* ***id.*** at 313-14. The court acknowledged that "due process and fairness … ought to require that the facts necessary to establish the validity of revocation be established at a single proceeding." ***Id.*** at 313. It concluded, however, that due process would be offended only by "[a] remand which directs or permits supplementing the record by additional evidence," allowing the department to "shore up" the record in support of the ruling at issue. ***Id.***

¶12 In ***Meeks***, 95 Wis. 2d 115, we concluded that a remand was proper after prison officials had refused to allow the inmate to call witnesses on his behalf without an adequate explanation for the refusal. ***Id.*** at 128-29. We reasoned that reopening the hearing to allow the inmate to present additional evidence was a proper remedy because it would not involve a "shoring-up of deficient findings by the committee," as barred by ***Snajder***. ***Meeks***, 95 Wis. 2d at 129. We noted, however, that if the requested witnesses were no longer available, the disciplinary findings would need to be vacated based on prejudice resulting from the violation. *See* ***id.*** Similarly, in ***State ex rel. Irby v. Israel***, 95 Wis. 2d 697, 291 N.W.2d 643 (Ct. App. 1980), we concluded that a remand was appropriate to take the testimony of a witness who had been requested by the inmate, with directions that

the disciplinary findings should be vacated if the witness was not available. ***Id.*** at 708.

¶13 Thomas points to ***State ex rel. Riley v. DHSS***, 151 Wis. 2d 618, 445 N.W.2d 693 (Ct. App. 1989), as a case in which we invalidated an administrative confinement without allowing a remand because prison officials relied upon unsworn witness statements without any findings that the witnesses were unavailable to testify. Even there, however, we noted that "conceivably we could remand the matter to allow the department to comply with the rule," but declined to do so because the circuit court had already allowed the department one such opportunity. ***Id.*** at 627.

¶14 Although the opinions in ***Snajder***, ***Meeks***, ***Irby***, and ***Riley*** do not use the same "basic procedural right" and "nonfundamental right" language used in ***Jones***, ***Bergmann***, and ***Anderson-El***, the underlying rationales of the cases are consistent. Taken together, and applied in the evidentiary context, we conclude that these cases teach that an inmate has a basic procedural right to have all of the evidence against him presented at one disciplinary hearing. However, that right is not violated by a corrective remand that allows the inmate himself an opportunity to present additional evidence or directs the adjustment committee to reconsider its decision based only on evidence that was properly before it in the first instance. The circuit court here tailored its order to bar the adjustment committee from bolstering its case with additional evidence. Therefore, the remand was proper and did not violate Thomas's fundamental due process rights.

¶15 Thomas next contends that his conduct report should be expunged because Lieutenant Pamela Zank, who sat on the adjustment committee, was also involved in the investigation of the incident. The due process principle of

impartiality "mandates the disqualification of an official who is directly involved in the incident or is otherwise substantially involved in the incident but does not require the disqualification of someone tangentially involved." ***Merritt v. De Los Santos***, 721 F.2d 598, 601 (7th Cir. 1983). However, the certiorari record here does not show that Zank had any direct involvement in the riot or other substantial involvement in the incident or its investigation. To the contrary, the adjustment committee made an explicit finding upon remand that: "It should be noted that Lt. Zank did not have any prior involvement and was not a member of an investigative team sent to NLCI." Thomas has not pointed to any evidence that was before the adjustment committee that contradicts this finding. Furthermore, since Thomas has not even specified what involvement he believes Zank had in the incident or its investigation, we have no basis to evaluate whether that involvement would have been substantial or tangential.

¶16 Finally, we reject Thomas's challenge to the sufficiency of the evidence on remand. Participating in a riot is defined to include remaining in a group where some members of the group are participating in a riot. WIS. ADMIN. CODE § DOC 303.19. Here, the adjustment committee had photographs showing that Thomas walked toward the officers' station just before the riot began and that he remained there despite general orders for inmates to return to their cells. The committee also had the testimony of one of the injured officers that Thomas was "acting strange" prior to the assault, and that she saw him during the incident. The adjustment committee could reasonably reach a conclusion of guilt based on the information before it.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).