

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2002

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. 01-2113
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-1955

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. JESSE HARDY SWINSON,

PETITIONER-APPELLANT,

v.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jesse Swinson appeals the circuit court's order dismissing his petition for certiorari review of the decision of the disciplinary

committee at Waupun Correctional Institution.¹ We conclude that there was sufficient evidence to support the committee's finding of guilt on all of the charges, and also that his other claims are without merit. Accordingly, we affirm.

¶2 This case arises out of a search of Swinson's work area. As a result of the search, prison officials found a copy of the prison's blueprints and a central security improvement book in Swinson's desk. After checking with Swinson's work supervisor, officials discovered that these items had been thrown away two weeks earlier and that Swinson was not authorized to have them in his possession. Officials also found a floppy disk on which Swinson had saved legal work he had done for himself and other prison inmates. The legal work was not a part of Swinson's job duties.

¶3 Swinson was issued two conduct reports: one focused on the blueprints and security book and alleged violations of WIS. ADMIN. CODE §§ DOC 303.34 (theft) and 303.47 (possession of contraband).² The other focused on the disk and alleged violations of WIS. ADMIN. CODE §§ DOC 303.32 (enterprises and fraud), 303.36 (misuse of state or federal property), and 303.62 (inadequate work or study performance).

¶4 A hearing was held on each conduct report. Swinson requested the presence of three witnesses for the hearing with respect to the second conduct report that focused on the disk and the alleged violations of WIS. ADMIN. CODE §§ DOC 303.32, 303.36, and 303.62. The committee approved two of Swinson's

¹ Swinson is now confined at North Fork Correctional Facility in Sayre, Oklahoma.

² All references to the provisions of WIS. ADMIN. CODE ch. DOC 303 are to version ch. DOC 303 (Register, June 1994, No. 462).

witnesses, but denied the third one because his testimony would be cumulative of other testimony. With respect to the second conduct report, Swinson also presented several written statements from other inmates that asserted that he had not asked for any compensation for the legal work he had done. One of the inmates admitted that he gave Swinson ten stamps for the work, but he asserted he had done it on his own initiative.

¶5 At the first hearing, the committee found Swinson guilty of possession of contraband, but found him not guilty of theft. At the second hearing, the committee found him guilty of enterprise and fraud, misuse of state property, and inadequate work or study performance. Swinson appealed these decisions to the warden, who affirmed. He then filed a petition for review by certiorari in the circuit court, and the court dismissed his petition.

¶6 We review the decision of the administrative agency, not that of the circuit court, and our review is de novo. See *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). Our review on certiorari is limited to whether: (1) the agency kept within its jurisdiction; (2) the agency acted according to law; (3) the action was arbitrary, oppressive, or unreasonable; and (4) the evidence presented was such that the agency might reasonably make the decision it did. *Burk v. McCaughtry*, 223 Wis. 2d 196, 199, 588 N.W.2d 371 (Ct. App. 1998).

¶7 Swinson's primary argument is that there was insufficient evidence to support the committee's finding of guilt on the following four charges: possession of contraband, enterprises and fraud, misuse of state property, and inadequate work or study performance. The proper evidentiary test on certiorari review is the substantial evidence test. *State ex rel. Richards v. Traut*, 145 Wis.

2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988). Under this test, we examine “whether reasonable minds could arrive at the same conclusion reached by the [tribunal].” *Id.* It is not our role to weigh the evidence or judge the credibility of the witnesses, that belongs to the committee. *Robertson Transp. Co. v. PSC*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). Thus, if any reasonable view of the evidence would sustain the lower tribunal’s findings, the findings are conclusive. *Nufer v. Village Bd. of Palmyra*, 92 Wis. 2d 289, 301, 284 N.W.2d 649 (Ct. App. 1979).

¶8 We conclude there was substantial evidence to support a finding of guilt on each of the charges. With respect to the contraband charge, WIS. ADMIN. CODE § DOC 303.47(2) provides: “Any inmate who knowingly possesses any of the following is guilty of an offence: (a) Items of a type which are not allowed according to a posted list.” Swinson argues that his supervisor gave him the prison’s blueprints and central security improvement book. Although Swinson presented evidence that he was authorized to have these items, the committee believed Swinson’s supervisor, who testified that Swinson was not allowed to have them because he had been told to throw them away. Swinson also argues he was not in possession of the blueprints and book because they were not in his cell. However, WIS. ADMIN. CODE § DOC 303.02(14) defines possession as “on one’s person, in one’s quarters, in one’s locker, or under one’s immediate physical control.” The committee could have reasonably found that these items were under Swinson’s control based on the evidence that they were located in a desk used only by him.

¶9 With respect to the other three charges, the committee relied on evidence that Swinson had performed a substantial amount of unauthorized legal work during his work time. WISCONSIN ADMIN. CODE § DOC 303.32(1) provides,

in part: “Any inmate who engages in a business or enterprise, whether or not for profit, or who sells anything except as specifically allowed under other sections is guilty of an offence” Swinson argues that he was allowed to do legal work as authorized by WIS. ADMIN. CODE § DOC 309.155(5). However, that provision prohibits an inmate from receiving “[c]ompensation of any kind” for providing legal services. Here, the committee found that an inmate had given Swinson ten stamps for his legal work. Therefore, the committee could have reasonably determined that Swinson received compensation and thus did not come within the scope of § DOC 309.155(5).

¶10 WISCONSIN ADMIN. CODE § DOC 303.36(1) provides: “Any inmate who intentionally uses any property of the state in any way that is not authorized is guilty of an offense.” The committee reasonably relied on Swinson’s testimony that he did not receive permission to use the computer for personal use, and on his supervisor’s testimony that the computer belonged to the state.

¶11 WISCONSIN ADMIN. CODE § DOC 303.62(1) provides: “Any inmate whose work fails to meet the standards set for performance on a job or school program and who has the ability to meet those standards, is guilty of an offense.” The committee determined that Swinson had done legal work during his work hours when he should have been doing his assigned activities, and that Swinson had already been reprimanded for falling behind on his project. There was substantial evidence to support this determination.

¶12 Swinson next argues that his rights were violated when the committee refused to produce the third witness he requested. Because Swinson is a prisoner in a disciplinary proceeding, he is not entitled to the “full panoply of rights due a defendant” in a criminal case. *Ponte v. Real*, 471 U.S. 491, 495

(1985). Instead, this right is limited by the prison's need to provide "swift discipline" and by the "very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff." *Id.* The Wisconsin Administrative Code codifies the boundaries of this limited right. WISCONSIN ADMIN. CODE § DOC 303.81(1) provides the boundaries of this limited right by stating, "[e]xcept for good cause, an inmate may present no more than 2 witnesses in addition to the reporting staff member or members." Two of Swinson's requested witnesses did appear to testify. Therefore, the disciplinary committee violated neither the regulation nor Swinson's right to due process when it denied Swinson a third witness.

¶13 Swinson next argues that he is entitled to a remedy because the security director charged him with a major offense without following the procedures in WIS. ADMIN. CODE § DOC 303.68(4). The relevant portions of § DOC 303.68(4) are below:

In deciding whether an alleged violation should be treated as a major or minor offense, the security director shall consider the following criteria and shall indicate in the record of disciplinary action the reason for the decision based on these criteria:

- (a) Whether the inmate has previously been found guilty of the same or a similar offense, how often, and how recently;
- (b) Whether the inmate has recently been warned about the same or similar conduct.

Although § DOC 303.68(4) is written in mandatory terms, it is simply a procedural guideline, informing the security director "how he should make his decision whether to charge an inmate with a major or a minor offense." *State ex rel. Staples v. Young*, 142 Wis. 2d 348, 359, 418 N.W.2d 333 (Ct. App. 1987) (addressing a prior version of § DOC 303.68(4)). Section DOC 303.68(4) was not

enacted for the benefit of the prisoner, and did not deprive Swinson of a protected right. *Id.* at 359-60.

¶14 Finally, Swinson argues that prison officials did not sentence him within the guidelines prescribed by WIS. ADMIN. CODE § DOC 303.84(2)(a), which states in part: “At one hearing, the maximum penalty is the most severe penalty the inmate could receive for any single offense of which he or she is found guilty. The duration of a penalty may not exceed the duration shown in Table 303.84.” Swinson points out that he received the maximum penalties allowed both for violations of WIS. ADMIN. CODE §§ DOC 303.47 (possession of contraband) and 303.32 (enterprises and fraud). He relies on the fact that because the hearings on both conduct reports were scheduled for the same date and time, he had one hearing on both conduct reports. However, each conduct report addressed separate conduct. We are satisfied from the record that the proceedings on each conduct report were separate, including a separate “Record of Witness Testimony,” separate requests for witnesses, separate “Reasons for Decision and Evidence Relied On,” and separate appeals to the warden. The fact that the two hearings were scheduled for the same date and time does not convert them into one hearing for purposes of § DOC 303.84(2)(a).³

³ Swinson argues that he did not receive proper notice of the hearings because the second notices he was given for the hearings were not given to him two working days before the hearings, and the hearing officer did not prepare these notices and give them to him. The notice Swinson refers to indicates that he was notified on March 3, 2000, of the hearing date on March 6, 2000. We are unable to tell from these notices who prepared them or gave them to Swinson. Swinson does not cite to a regulation that supports his argument, nor does he develop an argument as to how the deficiencies he alleges prejudiced him. Because of the undeveloped nature of this argument, we decline to address it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

(continued)

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

Swinson also argues that the prison officials violated his rights when he was placed in temporary lockup (TLU) pending the hearings. However, any deficiency in that procedure is not before us on appeal of the disciplinary committee's decision. *State ex rel. Riley v. DHSS*, 151 Wis. 2d 618, 621 n.1, 445 N.W.2d 693 (Ct. App. 1989).

