COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2120 **Cir. Ct. No. 00-CV-2424**

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

STATE OF WISCONSIN EX REL. DANIEL HARR,

PETITIONER-APPELLANT,

V.

DANIEL BERTRAND, JON LITSCHER AND LAURA HALLET,

RESPONDENTS-RESPONDENTS.

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

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

¶1 PER CURIAM. Daniel Harr, an inmate at Green Bay Correctional Institution, appeals the trial court's order dismissing his petition for certiorari review of the adjustment committee's decision that he made a threat in violation of

WIS. ADMIN. CODE § DOC 303.16 (Register, June, 1994, No. 462).[1] He raises three challenges to the decision: (1) the adjustment committee violated his right to be free from double jeopardy when during his rehearing it imposed an additional penalty of thirty days exercise in his cell; (2) the committee violated his right to due process when it denied his requested witnesses and provided insufficient reasons for doing so; and (3) there was insufficient evidence to support the committee's finding of intent. We conclude that Harr's right to be free from double jeopardy and his right to due process were not violated, and that there was sufficient evidence to support the finding of intent. We therefore affirm.

¶2 The basis for the charges was a letter Harr wrote to his psychologist, Dr. Jerry Wellens. Harr wrote: "The warden is making me a very dangerous man because I'm VERY close to finding a way to hurt him. I'm doing everything I can to remain calm, but that piece of shit pushes me just a little bit further …." Harr was issued a conduct report alleging threat in violation of WIS. ADMIN. CODE § DOC 303.16, and disrespect in violation of WIS. ADMIN. CODE § DOC 303.25. Harr requested that Dr. Wellens and Warden Daniel Bertrand appear as witnesses at the hearing and that Captain Brant appear as a reporting staff member. Both Wellens and Bertrand declined to be witnesses stating that they had "no involvement beyond the receipt of the letter."

¶3 The initial hearing took place on March 23, 2000. Although Dr. Wellens did not testify, he submitted a letter stating that he believed that Harr had written the letter for therapeutic purposes, and thus it should not be a basis for a

[1] WISCONSIN ADMIN. CODE ch. DOC 303 has since been amended, all such citations are to the provisions in ch. DOC 303 (Register, June, 1994, No. 462), which was applicable at the time of this incident.

finding of disrespect. However, he also stated: "[a]lthough my personal belief was that there was no indication in this letter that there was any actual threat of physical violence to anyone, I thought it could be perceived that it was in that manner …." As a result of the first hearing, the committee found him guilty on both counts, and imposed a disposition of 180 days of program segregation and five days of adjustment segregation.

¶4 Harr appealed to the warden, who remanded the matter to the committee for a rehearing so that Captain Brant could testify. During the second hearing, Captain Brant testified that he did not know what Harr's intentions were in writing the letter. The committee found him not guilty of disrespect, but guilty of making a threat and imposed a disposition of five days adjustment segregation, 180 days program segregation, and thirty days exercise in his cell. Harr again appealed to the warden, who affirmed the committee's findings.

¶5 Harr petitioned the trial court for writ of certiorari to review the committee's decision. The trial court remanded the case to the committee so that it could further explain the reasons for denying Harr's request for witnesses, and the respondents submitted supplemental documentation on the reasons. The trial court concluded that the reasons were adequate, there was no other basis for relief, and dismissed the petition.

¶6 We review the decision of the administrative agency, not that of the trial court. ***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's decision was within its jurisdiction; (2) the agency acted according to law; (3) the agency's decision was arbitrary, oppressive, or unreasonable and represented its

will and not its judgment; and (4) the evidence of record substantiates the decision. ***Coleman v. Percy***, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980).

¶7 Harr first argues that the committee infringed on his rights under the Double Jeopardy Clause when it imposed an additional penalty on him at the rehearing.[2] He acknowledges that ***State v. Killebrew***, 115 Wis. 2d 243, 247, 254-56, 340 N.W.2d 470 (1983), holds that prison disciplinary actions are not punitive in nature, and thus an inmate may be prosecuted both in prison disciplinary and in state court proceedings without a violation of the Double Jeopardy Clause. However, he attempts to distinguish this case by claiming that ***Killebrew*** was based on a multiple-prosecution claim whereas his claim alleges a multiple-punishment violation. His reading of ***Killebrew*** is incorrect. The double jeopardy claim there was premised on multiple punishment, not multiple prosecution. ***Id.*** at 247. It is true the multiple punishments in ***Killebrew*** were a conviction and prison discipline for the same offense, whereas the multiple punishments Harr points to both result from prison discipline. However, that distinction is immaterial, since the Double Jeopardy Clause does not apply to the prison disciplinary proceedings that Harr faced.

¶8 Harr also attempts to distinguish this case from ***Killebrew*** by arguing that the disciplinary action was punitive in nature since the officer stated that he

[2] The Fifth Amendment of the United States Constitution states, in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Article I, § 8 of the Wisconsin Constitution states: "[N]o person for the same offense may be put twice in jeopardy of punishment." The Wisconsin Supreme Court has held that the federal and Wisconsin Double Jeopardy Clauses are "identical in scope and purpose." ***State v. Killebrew***, 115 Wis. 2d 243, 246 n.2, 340 N.W.2d 470 (1983). The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." ***Id.*** at 246-47.

wanted to make "sure Harr is held accountable for his conduct." However, the fact that a punitive motive may also be present, does not make the action punishment. ***State v. Fonder***, 162 Wis. 2d 591, 596-99, 469 N.W.2d 922 (Ct. App. 1991).

¶9 Harr next argues his right to due process was violated when his request to have Dr. Wellens and the warden as witnesses was denied without sufficient reasons. The committee denied Dr. Wellens as a witness because his "testimony would be cumulative of other evidence"; and denied Warden Bertrand as a witness because the "testimony is irrelevant to the question of guilt or innocence." Both of these are permissible reasons under WIS. ADMIN. CODE § DOC 303.81(3)(b) and (c).

¶10 Because this is a prison disciplinary proceeding, Harr 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.*** Accordingly, prison officials may deny witnesses "to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority." ***Id.*** at 499. If the reasons given by the prison officials are "logically related to preventing undue hazards to 'institutional safety or correctional goals,'" they meet due process grounds. ***Id.*** at 497.

¶11 Here, the reasons for denying Harr's requested witnesses are sufficient. Dr. Wellens had already submitted a letter to the committee that directly addressed his opinions on both of the correctional codes that Harr allegedly violated, and the committee took Dr. Wellens' comments into account.

The warden had no involvement in the letter writing incident; he was simply its subject matter. Thus, their testimony was not necessary. We conclude the committee acted within its discretion when it denied Harr's request for these two witnesses, and the reasons it gave were sufficient for due process purposes.

¶12 Finally, Harr argues that there was insufficient evidence on the element of intent to support the committee's finding of making a threat under WIS. ADMIN. CODE § DOC 303.16. Harr admits that upon an initial reading of his letter, one could presume that he intended to harm the warden. However, he also argues that through his testimony and Dr. Wellens' letter, he overcame that presumption.

¶13 WISCONSIN ADMIN. CODE § DOC 303.16 states in part: "**Threats**. Any inmate who intentionally does any of the following is guilty of an offense: (1) Communicates to another an intent to physically harm or harass that person or another."

¶14 The proper evidentiary test on certiorari review is the substantial evidence test. ***State v. Kenosha County Bd. of Adjustment***, 218 Wis. 2d 396, 416, 577 N.W.2d 813 (1998). Under this test, the court examines "whether reasonable minds could arrive at the same conclusion reached by the administrative tribunal." ***State ex rel Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment***, 131 Wis. 2d 101, 120, 388 N.W.2d 593 (1986). 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 (1979). It is not this court's role to weigh the evidence or judge the credibility of witnesses, *see* ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978); that belongs to the committee, *see* ***id.***

¶15 The committee found that the letter manifested intent to harm the warden. The committee relied in part on the fact that Harr admitted that he was angry when writing the letter. Based on that testimony and the contents of the letter, reasonable minds could conclude that Harr intended to communicate to the warden a plan to physically harm, harass, or intimidate him.

By the Court.—Order affirmed.

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