

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 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. 01-2386

Cir. Ct. No. 01-CV-2168

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. ROGER L. KAUFMAN,

PETITIONER-APPELLANT,

V.

JON E. LITSCHER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Roger L. Kaufman appeals an order of the circuit court dismissing his request for relief. Kaufman filed a “Motion for Declaratory Judgment Upon Writ of Certiorari” requesting various forms of relief related to his record from Corrections Corporation of America, Whiteville, Tennessee (“CCAW”), and his placement in administrative confinement. We agree with the

circuit court that Kaufman's motion failed to state a claim upon which relief could be granted because it did not comply with the notice of claim statute, WIS. STAT. § 893.82 (1999-2000),¹ and because Kaufman had failed to exhaust his administrative remedies. We therefore affirm.

¶2 While housed at CCAW, Kaufman made two escape attempts. As a consequence, Kaufman was placed in administrative confinement. When Kaufman was subsequently moved to the Supermax Correctional Institution, he was again placed in administrative confinement, based on his CCAW conduct report relating to the escape attempts. According to Kaufman, each time he comes up for an administrative confinement hearing, his administrative confinement status is continued due to his CCAW record, despite subsequent good behavior. After various complaints to the corrections complaint examiner, Kaufman petitioned the circuit court, seeking the following relief:

- 1) That the Court Declare that my CCAW conduct record cannot be used in regards to my Wisconsin AC reviews, hearings or appeals to justify continued AC.
- 2) That the Court Order that my CCAW conduct record [be] removed as part of my Wisconsin Institutional Adjustment record and Declare that my CCAW conduct record is not part of my Wisconsin prison adjustment.
- 3) That the Court Declare that any use of my CCAW conduct record be for statistical purposes only.
- 4) That the Court Order a new ... AC hearing based solely on my Wisconsin Institutional Adjustment record and to Declare that based on that record I be released from AC status and;

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

- 5) That the Court Order the [Department of Corrections] to create some type of objective criteria for all [Department of Corrections] prisoners who are placed on DOC 308 Administrative Confinement in order to give some hope to and for release from AC status.

The circuit court dismissed Kaufman's petition because it failed to state a claim upon which relief could be granted because Kaufman did not timely pursue his administrative remedies or timely seek judicial review. Kaufman sought to amend and supplement his action but the circuit court did not allow it. Kaufman's proposed amended action sought only declaratory judgment, which would have required Kaufman to comply with the notice of claim statute, something he had not done.

¶3 On appeal, Kaufman argues that the circuit court erred and deprived him of his constitutional right to due process of law by dismissing his action and failing (1) to recognize that Kaufman had given notice to the attorney general; (2) to rule on Kaufman's claim; and (3) to allow Kaufman to amend or supplement his complaint.²

¶4 Our review of the circuit court's decision to dismiss a petition because it was not timely filed is *de novo*. See ***State ex rel. Walker v. McCaughtry***, 2001 WI App 110, ¶11, 244 Wis. 2d 177, 629 N.W.2d 17. Similarly, we determine independently whether a claim for relief exists. ***State ex rel. Adell v. Smith***, 2001 WI App 168, ¶5, 247 Wis. 2d 260, 633 N.W.2d 231. Finally, whether a claimant has complied with the notice of claim statute is also a

² Because Kaufman's complaint was untimely, any amendment would not have saved the complaint from dismissal. Therefore, we need not address Kaufman's argument regarding amendment of his complaint.

question of law we review *de novo*. See *Nichols v. Nichols*, 162 Wis. 2d 96, 103, 469 N.W.2d 619 (1991) (“Application of a statute to an undisputed set of facts is a question of law.”).

¶5 To the extent Kaufman seeks injunctive relief or a declaratory order, his motion was properly dismissed because Kaufman did not comply with the notice of claim statute. WISCONSIN STAT. § 801.02(7)(bm) requires a prisoner to comply with WIS. STAT. § 893.82 before commencing an action or special proceeding.³ Section 893.82, in turn, requires that if the action is against a state employee, notice of the claim must be served upon the attorney general within 120 days of the event giving rise to the claim. WIS. STAT. § 893.82(3). If the claimant is a prisoner, he or she may not commence the action until the attorney general denies the claim or until 120 days pass after service of the written notice. WIS. STAT. § 893.82(3m). Finally, the notice of claim must be sworn to by the petitioner. WIS. STAT. § 893.82(5).

¶6 Kaufman did not comply with several of the requirements listed in WIS. STAT. § 893.82. First, Kaufman did not serve notice within 120 days of the event giving rise to the injury. Kaufman complains about the inclusion of his CCAW records in his Wisconsin record and about their use at his administrative confinement hearings. Regarding the inclusion of his CCAW records in his Wisconsin record, Kaufman was aware of that fact when he was placed in administrative confinement on June 1, 2000. Regarding the use of his CCAW

³ Both WIS. STAT. § 801.02(7)(bm) and WIS. STAT. § 893.82(3m) exempt a prisoner seeking injunctive relief from the notice requirement if “the court finds that there is a substantial risk to the prisoner’s health or safety.” Kaufman did not allege, and the court did not find, a substantial risk to Kaufman’s health or safety.

records at administrative confinement hearings, the latest administrative confinement review about which Kaufman complains was on January 6, 2001.⁴ Kaufman's notice to the attorney general is dated June 4, 2001. Either way, his notice was late. Second, Kaufman commenced his action prior to 120 days after he allegedly served notice, which contravenes the statute. Kaufman's notice is dated June 4, 2001, and his motion was filed August 13, 2001. Third, Kaufman's notice is not a sworn statement.

¶7 Construing Kaufman's action as a petition for a writ of certiorari, dismissal was proper because Kaufman failed to exhaust his administrative remedies. WISCONSIN STAT. § 801.02(7)(b) and WIS. ADMIN. CODE § DOC 310.04 require an inmate to exhaust his or her administrative remedies prior to commencing an action or civil proceeding against any employee of the Department of Corrections. The appendix to Kaufman's complaint contains two inmate complaints. The first is dated January 6, 2001. This complaint was rejected because Kaufman had not complied with the administrative confinement appeal process outlined at WIS. ADMIN. CODE § DOC 308.04(11)(c). The decision from which Kaufman appealed was dated February 6, 2001. Kaufman's appeal to the corrections complaint examiner was dated March 13, 2001, rendering it untimely under WIS. ADMIN. CODE § DOC 310.13(1) (requiring an inmate to appeal a decision to the corrections complaint examiner within ten days).

⁴ Both the circuit court and the State measured Kaufman's deadlines from June 1, 2000, the date his CCAW records were used to place him in administrative confinement in Wisconsin. June 1, 2000, is the earliest date on which we can be sure Kaufman was aware that his CCAW records were included in his Wisconsin record. Therefore, June 1, 2000, would be the appropriate date from which to measure regarding Kaufman's assertion that the inclusion of the CCAW records in his Wisconsin record is unlawful. However, to the extent Kaufman complains about the use of his records at administrative confinement reviews, the deadlines should be measured from the dates of those reviews.

Kaufman's second complaint included in the record is dated April 11, 2001. The latest review to which it refers occurred on December 6, 2000. Therefore, the complaint was untimely under both WIS. ADMIN. CODE § DOC 308.04(9) (requiring an inmate to appeal a decision by the administrative confinement review committee to the warden within ten days) and § DOC 310.09(3) (requiring an inmate to file a complaint within fourteen days of the incident giving rise to the complaint). Because Kaufman did not file a timely complaint, he did not exhaust his administrative remedies.

¶8 Because we affirm the circuit court's dismissal of Kaufman's cause on procedural grounds, we do not address the merits of his complaint.

By the Court.—Order affirmed.

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

