COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0216

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

VANCES H. SMITH,

PLAINTIFF-APPELLANT,

V.

GARY MCCAUGHTRY AND LYNN OESTREICH,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Vances Smith, an inmate at Waupun Correctional Institution (WCI), appeals from an order dismissing his 42 U.S.C. § 1983 action and underlying Eighth Amendment claims. Smith argues that the circuit court erred by *sua sponte* raising the issue of qualified immunity for defendants-respondents Gary McCaughtry and Lynn Oestreich (WCI's warden and security

officer). Smith also argues that the court erred in permitting the respondents to first address the immunity argument in a motion for reconsideration. For the reasons set forth below, we affirm the order.

BACKGROUND

This is the second appeal arising from the same incident. In the first appeal, ***Smith v. McCaughtry***, No. 94-0451, unpublished slip op. (Wis. Ct. App. Feb. 24, 1995), we ordered the WCI disciplinary committee to expunge from Smith's record a major conduct report resulting from a charged infraction of library pass rules. We held that the decision to charge Smith with a major offense, and to further impose a major penalty, "arbitrarily and unreasonably blew a minor incident well out of proportion." Slip op. at 4.

After our decision, Smith commenced the present action, alleging that the library pass incident violated his civil rights under 42 U.S.C. § 1983. Specifically, Smith argued that respondents violated his Eighth Amendment rights because the punishment imposed for the library pass incident was disproportionate to the charged offense. Smith alleged personal injury—among other things, distress and anguish—resulting from the punishment.

Respondents moved to dismiss Smith's claims and Smith moved for summary judgment. The circuit court denied respondents' motion to dismiss Smith's Eighth Amendment claims.[1] The court also rejected Smith's summary

[1] The circuit court granted the respondents' motion to dismiss Smith's Fourteenth Amendment claims. Smith does not address this issue on appeal, and we do not consider this matter further.

judgment motion and *sua sponte* raised the issue of respondents' potential qualified immunity, stating:

> A … problematic issue is the possible qualified immunity of some or all of the defendants from suit under sec. 1983. Government officials are ["]shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.["] ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982) (citations omitted). The test for immunity is two-pronged; "the first inquiry should be whether the plaintiff has alleged a violation of a constitutional right … that was clearly established at the time of the defendant's actions." ***Santiago v. Leik***, 179 Wis.2d 786, 791, 508 N.W.2d 456 (Ct. App. 1993)…. [S]ince this issue was not briefed, no decision will be made at this time.

Thereafter, respondents moved the circuit court to reconsider its denial of their motion to dismiss Smith's Eighth Amendment claims. The court did reconsider, and subsequently dismissed the claims on two grounds. First, it found that the punishment Smith received—three days' adjustment segregation and ninety days' program segregation—did not violate the amendment's prohibition against cruel and unusual punishment. The court specifically noted that although this court previously found respondents acted unreasonably, ***Smith***, slip op. at 4, their behavior did not constitute a breach of the Eighth Amendment because it did not rise to the level of "shocking." *See* ***Hanson v. State***, 48 Wis.2d 203, 206, 179 N.W.2d 909, 911 (1970). Second, the court found that under ***Harlow***, respondents were entitled to qualified immunity because when they imposed punishment, their actions "could reasonably have been thought consistent" with constitutional requirements. *See also* ***Santiago v. Leik***, 179 Wis.2d 786, 795, 508 N.W.2d 456, 460 (Ct. App. 1993). Stated otherwise, it found that "even if defendants [-respondents] read all … [the relevant] cases before rendering their disposition

they would not have been alerted to a possible violation of … [Smith's] Eighth Amendment rights."

ANALYSIS

Smith argues that the circuit court erred in *sua sponte* raising the issue of respondents' qualified immunity, and in granting respondents' motion to reconsider its previous denial of their motion to dismiss Smith's claim. We reject both arguments. We also affirm the circuit court's decision to grant qualified immunity.

The circuit court has the duty to protect the rights of litigants who appear before it. ***Village of Big Bend v. Anderson***, 103 Wis.2d 403, 407, 308 N.W.2d 887, 890 (Ct. App. 1981). The right to qualified immunity is the right to avoid not only standing trial but such pretrial matters as discovery on grounds that they disrupt effective government. ***Behrens v. Pelletier***, 116 S. Ct. 834, 839 (1996); *see also* ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985) (qualified immunity is the "entitlement not to stand trial or face the other burdens of litigation."). Consequently, a court charged with protecting litigants' rights does not err in *sua sponte* raising the important right of qualified immunity.

We also reject Smith's claim that the court erred in granting respondents' motion for reconsideration. Motions for reconsideration of nonfinal orders are part of Wisconsin's common law. ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 294, 491 N.W.2d 119, 124 (Ct. App. 1992). We specifically reject Smith's contention that ***In re Estate of O'Neill***, 186 Wis.2d 229, 519 N.W.2d 750 (Ct. App. 1994) is to the contrary. In ***O'Neill***, the moving party sought reconsideration of a final order, not a nonfinal order such as the one at issue here.

Smith implies that the circuit court also erred in granting qualified immunity. However, we agree with the court that the respondents here met the ***Harlow*** standard. Governmental officials performing discretionary functions generally are shielded from liability for civil damages if their conduct does not violate *clearly established* statutory or constitutional rights which a reasonable person would have known at that time. ***Harlow***, 457 U.S. at 818. We agree with the circuit court that a decision to impose three days' adjustment segregation and ninety days' program segregation after a finding of a conduct violation is not the type of decision a reasonable corrections official would have thought constitutionally proscribed.

Specifically, while we recognize that we previously held the decision to find Smith guilty of a major conduct violation "arbitrary and unreasonable," this does not violate Smith's Eighth Amendment rights for several reasons. First, the punishment imposed was not "excessive and unusual" or "so disproportionate to the offense committed as to shock public sentiment," and hence does not trigger the Eighth Amendment. ***Hanson***, 48 Wis.2d at 206, 179 N.W.2d at 911 (quotations and quoted sources omitted). Second, there has been no authoritative statement "clearly establishing" a method for determining proportionality in sentencing; therefore, under ***Harlow***, the officials are shielded. *See, e.g.,* ***Harmelin v. Michigan***, 501 U.S. 957 (1991) (Supreme Court justices do

not agree on whether the Eighth Amendment guarantees proportional punishments).[2]

Because we agree with the circuit court that the punishment was not "cruel and unusual," and that respondents could not have known the punishment imposed was constitutionally proscribed, we affirm the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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[2] Two justices are of the opinion that the Eighth Amendment contains no proportionality guarantee; three justices believe it encompasses a narrow proportionality principle that applies to capital as well as noncapital sentences; three justices believe the amendment prohibits grossly disproportionate sentences; and one justice believes it prohibits grossly disproportionate sentences as well as all death penalties. The justices in ***Harmelin v. Michigan***, 501 U.S. 957 (1991), were further divided on how proportionality, if applicable, would work under the facts of the case under consideration.