COURT OF APPEALS
DECISION
DATED AND RELEASED

April 17, 1997

NOTICE

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.

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No. 96-2962

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

STATE OF WISCONSIN EX REL. JAMES R. SCHULTZ,

PETITIONER-RESPONDENT,

v.

GERALD BERGE AND TOM GOZINSKE,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: ROBERT R. PEKOWSKY, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Vergeront and Deininger, JJ.

EICH, C.J. Gerald Berge and Tom Gozinske, the warden and the inmate complaint investigator at the Fox Lake Correctional Institution, appeal from an order requiring them to deliver a memory-bank typewriter to inmate James R. Schultz and prohibiting them from enforcing a rule of the Department of Corrections prohibiting inmates from possessing such typewriters. Because we conclude that appellants did not arbitrarily or capriciously deny Schultz access to the typewriter and, further, that the trial

court erred in concluding that principles of equitable estoppel may be applied to enjoin enforcement of the rule, we reverse the order.[1]

The facts are not in dispute. In 1987, while incarcerated at a different institution, Schultz acquired a typewriter with a one-page memory or text-storing capacity. He was transferred to Fox Lake in December 1994, and at some point he received an updated version of DOC 309, Internal Management Procedure # 1-B, which provides, "Typewriters may not have a memory bank or be capable of storing text." A little over a month later, the typewriter was damaged during a routine search of Schultz's cell, and correctional officers agreed to pay Schultz its value, depositing $70 in his inmate account. Schultz then ordered a new typewriter, with similar text-storing capabilities, from a mail-order company. When the new machine was delivered, Fox Lake staff determined that it was prohibited by IMP #1-B and notified Schultz that it would not be delivered to him.

Schultz filed an inmate complaint, and the prison complaint officer recommended dismissal on grounds that the "institution[']s obligation to ... Schultz was satisfied and he was made whole when he agreed to and accepted [the] $70.00 for his loss.... FLCI['s] ... reports adequately detail the controlling regulations and all inmates ... are required to follow them." Schultz appealed to the warden, who confirmed the complaint officer's decision. Schultz exhausted his administrative remedies and petitioned the trial court for a writ of certiorari.[2] Acknowledging that the rule applied to

[1] Schultz has moved to summarily dismiss the appeal under § 809.21, STATS. For reasons stated in this opinion, the motion is denied.

[2] Schultz originally filed a small claims action for return of the typewriter. After several changes of venue, the action was converted to a petition for certiorari. Appellants suggest that the trial court lacked jurisdiction to consider Schultz's petition because it was not served on them until after the time for initiating such an action had expired. Because *pro se* prisoners "in some circumstances deserve some leniency" in complying with procedural requirements, ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992), *cert. denied*, 506 U.S. 894 (1992), we consider Schultz's petition to have been timely filed.

Schultz's typewriter—and recognizing that the rule was predicated upon "legitimate [prison] security interest[s]"—the trial court concluded that, because the prison authorities had failed to enforce the rule against Schultz in the past, they were estopped from enforcing it with respect to his new typewriter, which was essentially the same model as the old one. Then, balancing "the public interest in health, welfare and safety at stake against the injustice that may occur if estoppel is not applied,"[3] the court stated, without elaboration, that it was "not satisfied" that Schultz's possession of the memory-storage typewriter "produce[d] a substantial threat to … prison security," and reversed the prison's dismissal of Schultz's inmate complaint. The order had the effect of directing that the typewriter be delivered to Schultz.

In certiorari proceedings, we review the decision of the agency, not the trial court, ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990), and our review is limited to the record made before the agency. ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). We determine only: (1) whether the agency stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented the agency's will and not its judgment; and (4) whether the evidence supports the determination. ***Id.***; ***State ex rel. Riley v. DHSS***, 151 Wis.2d 618, 623, 445 N.W.2d 693, 694 (Ct. App. 1989).

[3] In ***State v. City of Green Bay***, 96 Wis.2d 195, 198, 291 N.W.2d 508, 509 (1980), the supreme court held that the Department of Natural Resources was estopped from collecting a forfeiture from the city for its failure to comply with orders concerning certain solid waste disposal facilities. Recognizing the rule that the government may not be estopped from enforcing rules or orders intended to protect public health and welfare, the court said that a proceeding to collect a forfeiture was outside the scope of that exception and, as a result, principles of equitable estoppel were applicable to the DNR. ***Id***. at 210-11, 291 N.W.2d at 515-16. The court then stated that, even if the elements of estoppel are proved (as the court ruled the city had done), "in order to estop a governmental entity, the court must balance the public interest at stake if the doctrine is applied against the injustice that might be caused if the estoppel doctrine is not applied." ***Id***. at 210, 291 N.W.2d at 515.

Acknowledging that Schultz's previous typewriter, like his new one, was prohibited by the rule, appellants Berge and Gozinske argue that their earlier failure to enforce the rule against him does not bar them from enforcing it now. They are correct. As the supreme court recognized in ***State v. City of Green Bay***, 96 Wis.2d 195, 201-02, 291 N.W.2d 508, 510 (1990), """We have not allowed estoppel to be invoked against the government when application of the doctrine interferes with the police power for the protection of the public health, safety, or general welfare.""" (Quoted sources omitted.) In ***WestGate Hotel, Inc. v. Krumbiegel***, 39 Wis.2d 108, 114, 158 N.W.2d 362, 365 (1968), the supreme court refused to apply estoppel principles to prohibit a city health department from applying a health related rule to a hotel, despite the department's having "ignored" similar deficiencies in the past, concluding: "It … is axiomatic that a law-enforcing body, when faced with the practical difficulties of enforcing all of its regulations at once, is not thereby barred from future enforcement of the law ...."

Schultz puts forth several arguments against the State's position, peppering them with constitutional references. He states, for example, that: (1) he has an "equal protection right" to possess the new typewriter based on the prison's "allow[ing him] to possess [the] original typewriter"; (2) he has a "legitimate entitlement to possess [the] typewriter" because the prison assisted him in purchasing it; (3) barring him from possessing the new typewriter violates his "due process" rights because his former typewriter had been "allowed into the institution" by prison authorities; and (4) appellants' application of the rule to his situation was "arbitrary and capricious and contrary to well established law" because prison authorities had "permitted" him to acquire and possess the old typewriter and assisted him in acquiring the new one. It is

apparent that whatever constitutional (or other) gloss[4] Schultz attempts to add to his arguments, they all come down to a single assertion: that, because of appellants' failure to enforce the rule against him in the past, they should be estopped from doing so now. That argument, as we have indicated, fails in the face of ***City of Green Bay***, ***Krumbiegel***, and similar cases.

Finally, we consider the trial court's statement that it was "not satisfied that a one page text storing function produces a substantial threat to prison security." First, because we have held that the court erroneously concluded that estoppel was available to bar enforcement of the rule, we need not engage in the ***City of Green Bay*** "balancing test" which the supreme court said in that case was the final element of the estoppel analysis. ***City of Green Bay***, 96 Wis.2d at 210, 291 N.W.2d at 515.

Additionally, as we have noted above, despite the court's earlier determination that the typewriter rule advanced a legitimate institutional security objective, there is nothing in its decision to indicate or suggest why the court believed application of the rule to Schultz bore no relationship to valid security objectives. Nor has Schultz aided our inquiry. We believe it is for the party challenging an agency's action to do more than say it was wrong–to point out why the action should be voided. And Schultz has not done so on this appeal. Other than advancing the general assertion

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[4] Schultz also asserts that another inmate elsewhere in the Wisconsin correctional system has a typewriter similar to his own—a fact that does not appear to be of record in this case. Even so, again, it is an estoppel argument—that because DOC has not enforced the rule against one other prisoner, it should be barred from enforcing it against him—and it necessarily meets the same fate as his other estoppel claims. *See* ***WestGate Hotel, Inc. v. Krumbiegel***, 39 Wis.2d 108, 114, 158 N.W.2d 362, 365 (1968) (past or continued existence of one violation of a rule does not bar its enforcement in case before the court).

Finally, Schultz attempts to challenge the validity of the typewriter rule itself, claiming that a Dane County Circuit Court judge ruled that it had been improperly adopted. Not only are circuit court decisions not precedential, but the supreme court has recognized that declaratory judgment proceedings under chapter 227, STATS., constitute the "'exclusive' means of [obtaining] judicial review of the validity of a rule." ***Sewerage Comm'n v. DNR,*** 102 Wis.2d 613, 629, 307 N.W.2d 189, 197 (1981); *see also* § 227.40, STATS.; ***J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n,*** 114 Wis.2d 69, 78-79 & n.3, 336 N.W.2d 679, 684 (Ct. App. 1983).

that there is no legitimate penological interest in not allowing him to possess the typewriter, Schultz neither develops any argument on the point or offers any evidence of record to support his position. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992); ***Dieck v. Antigo Sch. Dist.***, 157 Wis.2d 134, 148 n.9, 458 N.W.2d 565, 571 (Ct. App. 1990) (court of appeals will not consider arguments that are undeveloped or based on factual assertions unsupported by references to the record), *aff'd*, 165 Wis.2d 458, 477 N.W.2d 613 (1991).

We conclude, therefore, that appellants' failure to enforce the rule against Schultz in the past does not bar them from doing so now, and that the trial court erroneously placed the burden on the appellants to establish the propriety of their actions. We therefore reverse the judgment and remand to the trial court for entry of a judgment or order dismissing Schultz's action. We also deny his motion for summary affirmance.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.