

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-0879

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. CLARENCE C. JOSEPH,

PETITIONER-APPELLANT,

v.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
JOSEPH E. SCHULTZ, Judge. *Affirmed and cause remanded with directions.*

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Clarence Joseph, an inmate at Waupun Correctional Institution (WCI), appeals from an order dismissing his appeal by certiorari from a decision of the Program Review Committee (PRC) placing him in administrative segregation. The trial court concluded that the appeal became moot when Joseph was released from administrative segregation, and it dismissed the

action. We disagree with the court's conclusion on mootness but, reaching the merits, we reject Joseph's challenges to the committee's decision. We therefore remand to the circuit court with directions to enter an order affirming the decision of the committee.

BACKGROUND

On June 6, 1996, the acting WCI associate warden of security (security warden) recommended that Joseph be placed in administrative confinement under WIS. ADM. CODE § DOC 308.04(2)(c) on the ground that he was a threat to staff and inmates at the institution.¹ The recommendation stated that during an investigation three confidential informants said that Joseph was a high-ranking member of the Gangster Disciples, and that the Gangster Disciples were meeting in the Chapel during the Buddhist services for the purposes of organizing and structuring an unsanctioned group at WCI. The recommendation stated that the sources of information that would be relied on at the hearing would

¹ WISCONSIN ADMINISTRATIVE CODE § DOC 308.04(1) and (2)(c) provide:

(1) Administrative confinement is an involuntary nonpunitive status for the segregated confinement of an inmate solely because the inmate is dangerous, to ensure personal safety and security within the institution. Inmate misconduct shall be handled through the disciplinary procedures.

(2) An inmate may be placed in administrative confinement for any of the following reasons:

....

(c) The inmate has identified himself or herself as a leader of an inmate gang or there are reasonable grounds to believe that the inmate is a leader of an inmate gang, as defined in s. DOC 303.02(9), and there is reason to believe that the inmate's continued presence in the general population will result in a riot as defined under s. DOC 303.18 or in a disturbance as defined under s. DOC 306.22(1).

be Joseph's SSD file,² the statements of the confidential informants, and the security warden's conclusion that there were reasonable grounds to believe that Joseph was a member of an inmate gang as defined by WIS. ADM. CODE § DOC 303.02(9)³ and that his continued presence in the general population would result in a disturbance as defined by WIS. ADM. CODE § DOC 306.22(1).⁴

The recommendation included questions and answers that were identified as parts of interviews with confidential informants #1, #2 and #3. The recommendation also stated that, as a result of the investigation, Joseph had received a conduct report and had been found guilty of group resistance and petitions, and violations of institution policies and procedures.⁵ Finally, the

² It appears his SSD file is the record of his program assignments and conduct at the institution.

³ WISCONSIN ADMINISTRATION CODE § DOC 303.02(9) provides:

“Inmate gang” means a group of inmates which threatens, intimidates, coerces or harasses other inmates or engages in activities which intentionally violate or encourage the intentional violation of statutes, administrative rules, or institutional policies and procedures.

⁴ WISCONSIN ADMINISTRATIVE CODE § DOC 306.22(1) provides:

(1) A “disturbance” is any of the following:

(a) An assault on any person by 2 or more inmates;

(b) The taking of a hostage by an inmate;

(c) The destruction of state property or the property of another by 2 or more inmates;

(d) The refusal by 2 or more inmates, acting in concert, to comply with an order, to return to cells or rooms; or

(e) Any words or acts which incite or encourage inmates to do any of the above.

⁵ These are violations of WIS. ADM. CODE §§ DOC 303.20 and 303.63, respectively.

recommendation noted that Joseph was serving a life sentence for shooting a gang member in the back three times, and described the circumstances of that offense and other prior offenses.

Joseph received the recommendation and notice of his right to a review pursuant to WIS. ADM. CODE §§ 308.03 and 308.04, which included notice of the information that would be considered in the review. Joseph requested a formal PRC review, which was held on July 1, 1996. Joseph appeared with a staff advocate. The PRC had before it the security warden's recommendation, the social worker's recommendation, Joseph's institutional record of conduct reports and program assignments, and exhibits and witnesses submitted by Joseph. The social worker's report supported placement in administrative confinement "based upon the security warden's recommendation and the factors contained in it—to allow longer periods of monitoring due to serious nature of C.R. [conduct report]."

Joseph presented two inmates as witnesses. One stated that Joseph was not a member of any gang that he (the inmate) was involved in. The other stated that he knows who the gang members are and Joseph is not a member of the Gangster Disciples. Joseph also presented a written statement of an inmate who denied that Joseph, "A.K.A. Criss-Cross to most prisoners here at WCI," was involved in the incidents described in the statements attributed to confidential informant #3 in the security warden's recommendation. Joseph submitted the written statement of another inmate who lived in Joseph's cell hall, which stated that he had no knowledge of Joseph being a coordinator or chief.

Joseph submitted his own written statement in which he denied being a gang member, disputed the confidential informants' statements as related in the security warden's recommendation, and asserted that the informants were

unreliable and were simply accusing him to take the weight off themselves. He made an oral statement to the same effect. The typed notes from the hearing state that Joseph “questioned if the confidential informants’ statements were documented in accordance with Administrative Code.” The notes do not indicate a response to this question.

The hearing committee decided to place Joseph in administrative confinement, giving its reason as follows:

The Committee today votes unanimously to place Mr. Joseph in administrative confinement based upon the preponderance of evidence available. It appears to this committee that if Mr. Joseph is returned to the gen. Pop., his activities will present a substantial risk of serious physical harm to staff and inmates and the risk of a disturbance within the institution. The file evidence considered includes a record of homicidal behavior and inmate gang involvement which includes a leadership role. The committee notes specifically: (1) the nature of Mr. Joseph’s committing offense which resulted in loss of life, (2) the reasonable grounds to believe that Mr. Joseph has a leadership role in an inmate [sic] gang within the institution. The committee believes that Mr. Joseph’s history of assaultive behavior and his role within the inmate gang substantiates the request for administrative confinement, as defined in the administrative code. The committee will, therefore recommend placing Mr. Joseph in close custody and will set a 3-month recall for a review of this matter.

Joseph appealed the committee decision to the warden pursuant to WIS. ADM. CODE § DOC 308.04(8). In his appeal, Joseph asserted that it was unreasonable for the committee to use the offense for which he was imprisoned as a reason for its decision when his record in the institution showed no violent behavior; that he was prejudiced by his social worker supporting the security warden’s recommendation without reviewing the information herself; that the committee did not consider the evidence he submitted; and the confidential informants’ statements were unreliable. Joseph also stated:

I asked the committee to examine the reliability and the motivation of the confidential informants, but they refused to acknowledge my request. I also asked the committee to determine if the informants' statements were obtained in accordance with [the administrative rule], and whether they could be examined for questioning, and that request was also not acknowledged.

The warden affirmed the committee's decisions, stating that the evidence supported the decision.

Joseph filed a petition for a writ of certiorari in the circuit court seeking review of the decision. After the record was filed pursuant to the writ and the parties had filed their briefs, the State moved to dismiss on the ground of mootness. The motion stated that the PRC had conducted the required review of Joseph's status⁶ and determined that he should be returned to the general population.

Joseph objected to dismissal for mootness on the ground that, even though he was released from administrative confinement, the committee's decision to place him there could adversely affect his parole eligibility and his programming and placement within the institution. Joseph also argued that the trial court's decision on his appeal by certiorari of the conduct report reversed that conduct report and, since the same evidence was used for the PRC's decision, the PRC's decision should be reversed.

⁶ WISCONSIN ADMINISTRATIVE CODE § DOC 308.04(9) provides that the PRC must review an inmate in administrative confinement every three months.

It is necessary at this point to turn to the proceedings on the conduct report that the security warden referred to in his recommendation to the PRC.⁷ That conduct report was issued on February 28, 1996, and asserted violations of group resistance and petition, WIS. ADM. CODE § DOC 303.20; conspiracy, WIS. ADM. CODE § DOC 303.21; disruptive conduct, WIS. ADM. CODE § DOC 303.28; and violations of institution policies and procedures, WIS. ADM. CODE § DOC 303.63. The conduct report stated that during the course of an investigation of gang-related activities, four confidential informants were developed. “Joseph was identified as the ranking Gangster Disciple in charge of running gang operations in the South Cell Hall and that [sic] he goes by the nickname of ‘Criss-Cross.’” The report then stated certain questions and answers directed to and answered by confidential informant #1 and confidential informant #2. These are the same questions and answers regarding confidential informant #1 and confidential informant #2 contained in the security warden’s recommendation to the PRC.

After the disciplinary committee found that Joseph was guilty of group resistance and petition, and violations of policies and procedures, Joseph sought review by writ of certiorari in the circuit court after an unsuccessful appeal to the superintendent. The trial court decided in Case No. 96 CV 172 that WCI had not satisfied the requirements of WIS. ADM. CODE § DOC 303.86(4) with respect to the use of the confidential informants’ statements at the disciplinary hearings because there was no recorded finding by the disciplinary committee that

⁷ During this appeal, Joseph requested that this court take judicial notice of the conduct report and the trial court’s decision on his appeal from the disciplinary committee’s decision on the conduct report in Case No. 96 CV 172 (Dodge County Circuit Court, November 27, 1996). We initially declined to do so on the ground that he had not provided us with those documents. However, after he did so, and in the absence of an objection from the State, we granted his motion for judicial notice by order dated August 21, 1997.

testifying would pose a significant risk of bodily harm to the witnesses and because the “snippet” of questions and answers appearing in the conduct report did not satisfy the requirement that “the contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness.”⁸ WISCONSIN ADMINISTRATIVE CODE § DOC 303.86(4). This decision was issued on November 27, 1996, before the State moved to dismiss the petition in this action on the grounds of mootness.

The trial court determined that Joseph’s return to the general population rendered his petition for review by certiorari of the PRC decision moot. The court rejected Joseph’s argument that the PRC decision would adversely affect his parole possibilities because “his administrative confinement resulted largely from a conduct report which this court expunged from petitioner’s disciplinary record.” The court concluded that this expungement would be apparent when Joseph came up for review for parole.

⁸ WISCONSIN ADMINISTRATIVE CODE § DOC 303.86(4) provides in full:

If a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness’s identity. The contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness. The committee may question the witnesses, if they are otherwise available. Two anonymous statements by different persons may be used to corroborate each other. A statement can be corroborated in either of the following ways:

(a) By other evidence which substantially corroborates the facts alleged in the statement such as, eyewitness account by a staff member or circumstantial evidence; or

(b) By evidence of a very similar violation by the same person.

On appeal, Joseph argues that the trial court erred in dismissing his appeal based on mootness because even though the disciplinary action on the conduct report may be expunged from his record, his administrative confinement, occurring in a separate proceeding, is still part of his record and may adversely affect parole or placement and programming within the correctional system. Concerning the merits of his appeal, Joseph argues that the use of the confidential informants' statements against him were improper for the same reasons the trial court found the use of these statements improper in the disciplinary proceeding; reliance on the offense for which he was committed was improper; and the written decision was inadequate. He continues to seek reversal of the PRC decision and an expungement from his record of the administrative confinement.

We first address the trial court's determination of mootness. An issue is moot when its resolution has no practical effect. *See DeLaMatter v. DeLaMatter*, 151 Wis.2d 576, 591, 445 N.W.2d 676, 683 (Ct. App. 1989). We observe at the outset that, while the trial court based its decision on the assumption that expungement of the disciplinary action would remove all negative effects because the PRC decision rested essentially on the conduct report, the State does not agree that the PRC decision rested primarily on the conduct report. The State's argues that the reason why the court's decision in Case No. 96 CV 172 does not require reversal of the PRC decision is that there was ample evidence before the PRC to support its decision without the conduct report. Because the process for administrative confinement is separate from that of disciplinary proceedings,⁹ and because the State argues that the court's decision on the conduct

⁹ Cf. WIS. ADM. CODE § DOC ch. 303 (setting forth the procedure for inmate discipline) with WIS. ADM. CODE § DOC ch. 308 (providing for an involuntary nonpunitive status for the segregated confinement of an inmate solely because the inmate is dangerous, to ensure personal safety and security within the institution).

report should have no bearing on the review of the PRC decision, we can only assume that an expungement of the conduct report has not resulted in the expungement of the PRC decision. For these reasons, we cannot agree with the trial court's reason for concluding that Joseph's appeal of the conduct report is moot. We therefore examine Joseph's assertions that the PRC decision may adversely affect him even though he has been released from administrative confinement because it may adversely affect his programming and placement within the institution.¹⁰ The State argues that Joseph has not proved that the PRC decision has adversely affected him. We conclude, however, that an existing negative impact is not required to avoid a dismissal for mootness. The State does not assert that the PRC decision will not or cannot affect Joseph's programming and placement in the institution, and it is apparent from Joseph's file contained in the return to the writ that confinements in administrative segregation are recorded in his institutional file.

We consider it relevant that in *State ex rel Riley v. DHSS*, 151 Wis.2d 618, 621 n.1, 627-28, 445 N.W.2d 693, 694 (Ct. App. 1989), we directed the circuit court to order expungement of any reference to an inmate's confinement in temporary lockup from his prison records, even though the lockup had ended, and to order expungement of his "administrative confinement and ... any resulting change in his status." We made the order with respect to the temporary lockup while recognizing that his release from temporary lockup and placement in administrative confinement made the issue of the propriety of the temporary lockup "technically moot." *Riley*, 151 Wis.2d at 621 n.1, 445 N.W.2d

¹⁰ Because it is unnecessary, we do not address Joseph's argument that the PRC decision may adversely affect his chances for parole.

at 694. Moreover, our order with respect to the administrative confinement, which we found to be the result of the committee exceeding its authority, indicates that the appropriate remedy for the reversal of a decision to confine an inmate administratively is expungement of that confinement from the inmate's record. The purpose of expungement is to prevent an improper administrative confinement from having an adverse impact on the inmate's status within the institution. This is a significant part of the remedy of a successful appeal in an administrative confinement since, in many instances such as this, the period of confinement is less than the time for resolving the issue on appeal. We conclude that the potential adverse impact of Joseph's administrative confinement on his placement and programming within the institution is sufficient to avoid dismissal based on mootness.

We now turn to the merits of the appeal, addressing first Joseph's challenge to the confidential informants' statements on the grounds that WCI did not comply with WIS. ADM. CODE § DOC 308.04(4)(e)4, the rule relating to use of confidential informants' statements in administrative confinement reviews. This rule provides that at administrative confinements reviews:

The right to present and question witnesses in accordance with sub. (6) and the hearing procedures for major disciplinary offenses except that, in the case of a confidential informant, a designated security staff member shall investigate to determine whether testifying would pose a significant risk of bodily harm to the witness. If the designated staff member finds a significant risk of bodily harm, the designated staff member shall attempt to obtain a signed statement under oath from the witness and determine that the statement is corroborated in accordance with s. DOC 303.86(4). The designated staff member shall edit the signed, corroborated statement to avoid revealing the identity of the witness. A copy of the edited statement shall be delivered to the inmate. A copy of the edited statement shall also be delivered to the PRC and may be considered as evidence. The security staff member on the

PRC shall have access to the original signed statement and may question the confidential informant if available. The original signed statement shall be available to the superintendent and administrator of the division of adult institutions upon review and shall be kept for at least 6 months and throughout any pending litigation commenced during that 6 month period.

Joseph argues on appeal that the rule was violated because he was not provided a copy of the informants' statements, edited as permitted under the rule, but only the "snippets" considered by the trial court in Case No. 96 CV 172 to be insufficient under the same language in WIS. ADM. CODE § DOC 303.86(4). However, we see nothing in the record to indicate that Joseph presented either to the PRC or to the warden the argument that he was entitled to see more of the statements because the portions he was given were edited beyond what is permitted by the rule. The record reflects that Joseph asked at the PRC review whether the statements were documented in accordance with the administrative rule and disputed the informant's reliability. In his appeal to the warden he asserted that the committee refused to examine the reliability and motivation of the informants and refused to determine whether their statements were obtained in compliance with the rule. We conclude that Joseph's failure to assert, either at the PRC review or in the appeal to the warden, that the portions of the statement provided him had been impermissibly edited under the rule, constitutes a waiver that prevents him from raising the issue in his certiorari petition.

In *Saenz v. Murphy*, 162 Wis.2d 54, 66, 469 N.W.2d 611, 616 (1991), the court held that failure to raise a procedural error before a disciplinary committee and in the appeal to the warden waived the right to complain of that error in an action in circuit court under 42 U.S.C. 1983. The court held that the same principles that underlie the requirement that an inmate exhaust administrative remedies before commencing a § 1983 action applied to find a

waiver where the inmate did not do so. *Id.* The court reasoned that, had the inmate done so in that case, the committee or the warden (by ordering a remand) would have had the opportunity to correct the error. *Id.* at 66-67, 469 N.W.2d at 616.

In *Santiago v. Ware*, 205 Wis.2d 292, 319, 556 N.W.2d 356, 367 (Ct. App. 1996), we applied *Saenz* and concluded that failure to raise a claim that a procedural right was violated in an inmate's administrative appeal waived that issue in a subsequent § 1983 action. While we acknowledged that since *Saenz*, our supreme court ruled that exhaustion is not required in § 1983 actions, *see Casteel v. Vaade*, 167 Wis.2d 1, 5, 481 N.W.2d 476, 477 (1992), we nevertheless concluded that the waiver portion of the *Saenz* decision was still good law. More recently, federal law was amended to expressly provide for an exhaustion requirement in actions by prisoners, whether under § 1983 or not, *see* the Prison Litigation Reform Act of 1996, Pub. 2. No. 104-134 § 803 (codified as amended in scattered sections of 28 U.S.C.). And state law now requires that prisoners exhaust administrative remedies before commencing any action or special proceeding against officers, agents, and employees of the department of corrections. *See* § 801.02(7), STATS. Thus the principles of exhaustion are firmly in place with respect to inmates' petitions for review by certiorari, and our reasoning in *Saenz* on the corresponding principles of the waiver doctrine apply with equal force to petitions for review by certiorari of adverse institutional decisions.

We do not consider the requirement that Joseph first raise the issue before the agency to be a "technical" one. The rule permits the security officer to edit the statements to protect the identity of the informant. Joseph contends that more was edited than was necessary for that purpose. We cannot review the

validity of Joseph's contention without some understanding of why the security officer provided Joseph with this portion and no more. We have examined the complete statements, but, in the absence of any additional record on this point, we would only be guessing as to what portions did and did not have to be modified in order to protect the identity of the informants.

Joseph also challenges on appeal the reliability of the confidential informants' statements. Possibly he is questioning whether the statements were obtained as required by the rule. We conclude that his statement at the hearing and his appeal to the warden can be fairly construed as raising these issues, and we therefore address them.

Review by certiorari is not a de novo inquiry. *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). We review the agency decision, and our review is limited to four issues: (1) whether the tribunal stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable, representing its will instead of its judgment; and (4) whether the evidence was such that it might reasonably have made the determination under review. *Id.* The decision of the tribunal being reviewed is presumed correct, and if any reasonable view of the evidence supports its decision, we affirm. *State ex rel. Bluemound Amusement Park v. Mayor of Milwaukee*, 207 Wis. 199, 204, 240 N.W. 847, 849 (1932). We do not review the weight or credibility of the evidence. *Id.*, 207 Wis. at 204-05, 240 N.W. at 849.

In addition to the requirement concerning a copy to the inmate, WIS. ADM. CODE § DOC 308.04(e)4 contains three other requirements for use of a confidential informant's statement at a PRC review: (1) the security officer must determine that testifying would pose a significant risk of bodily harm; (2) the

statement must be signed under oath; and (3) the statement must be corroborated as provided under WIS. ADM. CODE § DOC 303.86(4), which provides that two anonymous statements by different persons may corroborate another.

The statements of confidential informants #1, #2 and #3 are each signed under oath by the declarant. Each statement contains a space in which the investigating officer is instructed to state the reason why the informant will not testify in person and to explain the risk to the informant if he or she testifies. In this space on each statement is written: “declarant believes that if his identity were made known to the individuals that he identified in this statement, the members of the Gangster Disciples street gang, his life would be in danger.” The page containing this statement is the page signed under oath by the declarant and is also signed by the security officer conducting the investigation. We conclude that the first and second requirements of the rule are satisfied. We reject Joseph’s argument that the court’s determination in Case No. 96 CV 172 is dispositive of the issue of who must make the finding on risk, because the court there applied WIS. ADM. CODE § DOC 303.86(4), which expressly states that the adjustment (disciplinary) committee shall make this finding.

With respect to the requirement of corroboration, we conclude that the statements of informants #1 and #2 corroborate each other. Each identifies a photograph of Joseph, states that the nickname of the person in the photograph is “Criss-Cross”; describes his position in the Gangster Disciples in similar ways; and describes the same places as the meeting places for gang leaders. We are unable to find in confidential informant #3’s statement an identification of Joseph as “Criss-Cross.” However, it is unnecessary to decide whether the statement of informant #3 is corroborated because we conclude that the statement of informants #1 and #2 constitute sufficient evidence to support the committee’s conclusion that

there were reasonable grounds to believe that Joseph had a leadership role in an inmate gang within the institution. Indeed, the statements are corroborated in part by Joseph's own statement that he did attend the Buddhist services (although he said he did so because he was a Buddhist) and by the written statement of one of his own witnesses who states Joseph is known as Criss-Cross. The weight of the evidence and the credibility of the witness is for the committee to decide, not this court. *See Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978).

The PRC committee properly considered the offense for which Joseph was imprisoned, in addition to the informants' statements. It was relevant because it was evidence that Joseph was involved with gangs and violent behavior prior to the beginning of his prison term, which was August 5, 1992. However, even without that evidence, the statements of confidential informants #1 and #2 were sufficient.

Joseph was entitled to a written decision stating the reasons for the decisions based on the evidence, *see* WIS. ADM. CODE § DOC 308.04(6). We conclude that the written decision he received meets this requirement. The committee did not need to provide a detailed explanation of why it believed the informants instead of Joseph and his witnesses.

In summary, we conclude Joseph has waived a challenge to the amount of the portions of the confidential informant statements that he received, and his challenge to the use of the statements of confidential informants #1 and #2 on other grounds is without merit. We conclude that those statements and the other evidence the committee properly considered support its decision to place Joseph in administrative confinement, and that the written decision was adequate.

On remand, the trial court should enter an order affirming the committee's decision.

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

Not recommended for publication in the official reports.

