

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2331

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. TONY SHAW,

PETITIONER-APPELLANT,

v.

GARY R. MCCAUGHTRY,

RESPONDENT-RESPONDENT.

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

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. Tony Shaw, an inmate at the Waupun Correctional Institution (WCI), appeals a circuit court order which dismissed his certiorari review of his administrative segregation. Shaw asserts that the program review committee improperly considered evidence that was also used to support a prior conduct report which was expunged after the segregation decision. He also

contends that the remaining evidence before the committee was insufficient to support the decision to segregate him. Because we reject the appellant's contention that expunging a conduct report automatically bars the reuse of any evidence presented in the underlying disciplinary proceeding, and because the appellant has provided no other authority for excluding the challenged materials in the present proceeding, we affirm.

BACKGROUND

On March 8, 1996, the WCI Adjustment Committee found Shaw guilty of conspiracy, disruptive conduct and violations of institution policies and procedures, based in large part upon second-hand confidential informant statements which implicated him in gang activity.¹ The warden affirmed the conspiracy and disruptive conduct charges, but the circuit court, upon certiorari review, reversed the entire disciplinary decision on the grounds that the adjustment committee had "failed to abide by its own rules when considering the statements of certain unidentified informants." Specifically, the court found the committee had failed to make a finding on the record that the witnesses had refused to testify due to a significant risk of bodily harm, and failed to provide Shaw with edited copies of the informant's statements. The circuit court ordered the finding of guilt to be expunged from Shaw's record.

On November 20, 1996, while the certiorari action on Shaw's disciplinary proceeding was still pending, the WCI Program Review Committee voted to place Shaw in administrative confinement due to the danger which his

¹ The committee considered the report of a social worker, who in turn had relied upon confidential witness statements.

gang activities posed to the security of the institution. The program review committee considered much of the same evidence which the adjustment committee had previously considered, including several letters recovered from Shaw's possession and the same social worker's report summarizing the statements of several confidential informants. The minutes from the administrative confinement hearing indicate that Shaw "questioned the availability of the confidential informant statements" and was assured that "the original informant statements were made available for the committee to review." In his administrative appeal, Shaw complained that the committee should not have considered the confidential informant statements because they were under review by the circuit court. However, he did not claim that the program review committee had failed to provide him with edited copies of the program review statements or failed to find that testifying would endanger the witnesses, and he has not made either of those arguments in the present appeal.

STANDARD OF REVIEW

Our certiorari review is limited to the record created before the committee. *State ex rel. Whiting v. Kolb*, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). We will consider only whether: (1) the committee stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) the evidence was such that the committee might reasonably make the order or determination in question. *Id.*

ANALYSIS

Shaw argues that the program review committee improperly “utilize[d] information that was expunged from appellant’s records that [were] used in disciplinary proceedings.” It appears that Shaw’s entire appeal is based upon his misunderstanding of WIS. ADM. CODE § DOC 303.85(2). That section provides:

Records of alleged disciplinary infractions which have been dismissed or in which the inmate was found not guilty may be kept for statistical purposes, but they may not be considered in making program assignment, transfer, or parole release decisions, nor may they be included in any inmate’s case record.

Essentially, Shaw reads the phrase “records of alleged disciplinary infractions” to mean all documents that were used in a disciplinary proceeding. In context, however, the “records” which are allowed to “be kept” but not otherwise used against an inmate under this section plainly refer to listings of what infractions each inmate has committed. The program review committee was not barred from considering any evidence merely because it had been used in a disciplinary action which was later reversed. If Shaw believed that any of the evidence before the program review committee was otherwise tainted, he should have brought that to the committee’s and warden’s attention. See *Santiago v. Ware*, 205 Wis.2d 295, 327, 556 N.W.2d 356, 368 (Ct. App. 1996) (issues not brought before the committee and warden are waived).

Because Shaw has not shown that any of the evidence relied upon by the committee should have been excluded from consideration, there is no basis for his contention that the evidence against him was insufficient to support his administrative confinement.

By the Court.—Order affirmed.

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

