COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 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. 98-2191

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

STATE OF WISCONSIN EX REL. JERRY SAENZ,

PETITIONER-APPELLANT,

V.

GARY MCCAUGHTRY, WARDEN,

RESPONDENT-RESPONDENT.

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

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

PER CURIAM. Jerry Saenz appeals from an order affirming a prison discipline decision. We affirm.

The conduct report alleged that Saenz made threatening statements to and spat in the face of a corrections officer. He was found guilty of threats, disobeying orders, disrespect and attempted battery.

Saenz argues that he was denied his right to the assistance of an advocate. The committee had before it a written statement by an advocate that Saenz had not responded to an attempted written communication. The committee also had before it Saenz's written statement that he had "not talked to an advocate and vice versa." The committee found that Saenz was not credible, and that he was contacted by the advocate. On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the department. ***State ex rel. Richards v. Traut***, 145 Wis.2d 677, 680, 429 N.W.2d 81, 82 (Ct. App. 1988). The committee could reasonably reach the conclusion that it did. Saenz did not deny receiving a written communication, but said only that he had not talked to an advocate.

Saenz argues that the evidence did not support a finding of guilt on the charge of attempted battery. The committee concluded that by spitting in the staff member's face, Saenz was attempting to cause bodily injury because a foreign substance in the eyes can cause serious injury. Saenz concedes that this would be a correct finding of guilt, except that the committee failed to consider that "it may have been possible" that the officer was wearing glasses that would have prevented any possibility of serious injury. We reject the argument. The record is silent as to whether the officer was wearing glasses. Saenz could have said in his written statement, or testified before the committee, whether the officer was wearing glasses. Although the burden of proof is on the institution to establish guilt, *see* WIS. ADM. CODE § DOC 303.76(6), that does not mean the record must contain evidence refuting every possible defense.

Saenz argues that the committee could not use a "warning card" as evidence because it was physical evidence and a copy was not provided to him under WIS. ADM. CODE § DOC 303.66(2). The committee's decision indicates that it relied on a "copy of warning card" as physical evidence. The decision does not otherwise refer to the card. Our review of the record shows that the card appears to be a record of warnings and conduct reports given to an inmate. Even if we were to agree that the committee should not have considered the card as evidence, it is not clear that any relief would be appropriate. The card is not relevant to whether Saenz committed this particular offense, so its relevance, if any, would be to the degree of punishment ordered. We do not regard this type of a record, when used for this purpose, as "physical evidence" that must be attached to the conduct report.

By the Court.—Order affirmed.

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