COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1534 **Cir. Ct. No. 2013CV2266**

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

STATE OF WISCONSIN EX REL. SCOTT C. KIESON,

PETITIONER-APPELLANT,

V.

WILLIAM POLLARD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Reversed in part and cause remanded for further proceedings*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Scott Kieson, an inmate at the Waupun Correctional Institution (WCI), appeals the circuit court's order that affirmed on the merits two related administrative decisions arising out of a prison disciplinary

action. Kieson also challenges the court's decision that quashed, without reaching the merits, a portion of Kieson's certiorari petition seeking review of two additional administrative decisions that arose out of a separate disciplinary action. For the reasons discussed below, we affirm the circuit court's decision on the orders arising from the first disciplinary action, but reverse and remand to have the circuit court conduct further proceedings consistent with this opinion on the orders arising from the second disciplinary action.

BACKGROUND

¶2 Kieson filed a timely petition for a writ of certiorari seeking review of four final administrative decisions made by Department of Corrections personnel: (1) a decision issued by the warden of WCI on March 28, 2013, that affirmed the substance of discipline imposed on conduct report 2343460; (2) a decision issued by the Inmate Complaint Review System (ICRS) reviewing authority on May 23, 2013, on inmate complaint WCI-2013-6528, that affirmed the dismissal of procedural claims of error relating to conduct report 2343460; (3) a decision issued by the warden of WCI on April 23, 2013, that affirmed the substance of discipline imposed on conduct report 2343444; and (4) a decision issued by the ICRS reviewing authority on June 3, 2013, on inmate complaint WCI-2013-8176, that affirmed the dismissal of procedural claims of error relating to conduct report 2343444. The circuit court issued a writ of certiorari directing the warden of WCI to prepare and transfer the record of the administrative proceedings to the court for judicial review.

¶3 The warden moved to quash a portion of the writ of certiorari on the grounds that Kieson was seeking judicial review of two "separate" and "unrelated" administrative actions in one court case. The circuit court granted the motion to

quash, and thereafter required Kieson to choose only one conduct report to proceed upon, and declined to consider the merits of Kieson's challenges to the two administrative orders arising out of the second conduct report. The circuit court subsequently affirmed the administrative decisions relating to the first conduct report on both procedural and substantive grounds.

¶4 We will set forth additional facts relevant to the respective dismissals of Kieson's certiorari claims in our discussion below.

STANDARD OF REVIEW

¶5 Our certiorari review is limited to the record created before the administrative agency. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). With regard to the substance of the prison disciplinary decision, we will consider only whether: (1) the disciplinary committee stayed within its jurisdiction; (2) it acted according to law; (3) its decision reflected reasoned judgment rather than an arbitrary imposition of will; and (4) there was substantial evidence upon which the committee might reasonably make the order or determination in question. ***Id.*** We may, however, independently determine whether an inmate was afforded due process during administrative proceedings. *See* ***State ex rel. Staples v. DHSS***, 128 Wis. 2d 531, 534, 384 N.W.2d 363 (Ct. App. 1986).

¶6 A motion to quash a writ of certiorari is akin to a motion to dismiss, testing the legal sufficiency of the writ petition. *See* ***Fee v. Board of Review for Town of Florence***, 2003 WI App 17, ¶7, 259 Wis. 2d 868, 657 N.W.2d 112 (WI App 2002).

DISCUSSION

First Conduct Report

¶7 Conduct report 2343460 alleged that various items of contraband, including pornographic pictures and matches, were found in Kieson's single cell, G-22, pursuant to a search performed during a period of institutional lockdown. The report was signed by Correctional Officer Beasley, and did not mention the involvement of any other staff members in the search.

¶8 Kieson filed a written response denying both that he had possessed the specified contraband items and that any such items had even been found during the search of his cell. Kieson also submitted an information request form (DOC-643) seeking a copy of a property receipt form (DOC-237) that Kieson asserted he had signed immediately following the cell search, and a witness request form (DOC-73) seeking Beasley's attendance at the disciplinary hearing. The correctional officer who reviewed the information request form directed Kieson to write to the property department to obtain a copy of the property receipt form.

¶9 At the disciplinary hearing, Kieson reiterated that he had "never seen [the alleged contraband] and [did not] know where it came from." Kieson also asserted that Beasley had not searched his cell, and therefore questioned "how [Beasley] could … know it was in my cell." Kieson submitted two written questions for the hearing officer to ask Beasley: (1) whether Beasley performed the search of cell G-22, and (2) whether Beasley could state, "as a fact," that the contraband was ever in Kieson's possession or control.

¶10 Beasley testified at the hearing. The hearing officer apparently misread Kieson's first question, and asked Beasley whether she had searched cell A-22, rather than G-22.[1] Beasley answered, "No." Nonetheless, Beasley affirmed that she knew as a fact that the contraband had been in Kieson's possession or control. In response to an additional question asked by Kieson's advocate, Beasley explained that the search had been conducted "the day the academy was here" and that "one of the rookies" had brought the materials to her.

¶11 The hearing officer deemed Beasley's testimony to be credible because she was "involve[d]" in the search and had no stake in the outcome of the disciplinary hearing, while he deemed Kieson's denial of responsibility for the contraband to be not credible because Kieson was the sole occupant of the cell. The hearing officer then determined—based upon the facts that contraband had been "brought out of cell A-22 … to Beasley," and because Kieson was "the only inmate in the cell"—that it was more likely than not that Kieson had knowingly possessed the contraband, in violation of institution rules, as charged in the conduct report.

¶12 As we noted above, Kieson sought timely administrative relief on both procedural and substantive grounds. On this appeal, Kieson challenges the ICRS decision denying his procedural due process claims and the warden's decision denying his challenge to the sufficiency of the evidence. We address each claim in turn.

[1] We note that Kieson's capital-case "G" in his handwritten question looks very similar to a small-case "a" because the cross-line of the G is nearly vertical, rather than horizontal, giving the cross-line the appearance of the flat right edge of a slightly unclosed a.

¶13 As to due process, Kieson contends that he was denied a meaningful opportunity to call a key witness in his defense because the conduct report did not name the correctional officer who actually searched his cell, thus seeming to suggest that the reporting officer Beasley had performed the search. Kieson asserts that he listed only Beasley on his witness request form as a result of that omission in the conduct report, and thus was not able to adequately pursue his defense that prison officials had made a mistake as to the cell in which the contraband had been found. For instance, Kieson notes that he could have asked questions about how many cells the "rookie" had searched that day and what procedure was used to document the search results before turning the contraband over to Beasley.

¶14 Kieson's due process argument appears to invoke overlapping claims to both notice and the right to call witnesses.[2] *See* ***Wolff v. McDonnell***, 418 U.S. 539, 563-64, 566 (1974) (due process for a prison disciplinary hearing requires, among other things, advance written notice of a claimed violation sufficient to provide an inmate "a chance to marshal the facts in [the inmate's] defense," and an opportunity "to call witnesses and present documentary evidence

[2] In his ICRS complaint, Kieson alleged violations of several specific administrative code provisions, including: WIS. ADMIN. CODE §§ DOC 303.66(2) (requiring author of conduct report to state "facts in detail"; 303.76(6)(a) (directing hearing officer to consider "all relevant information"); 303.76(5)(b) (allowing inmate to present witnesses in accordance with other code provisions); and 303.78(2) (inmate may have assistance of staff advocate). On January 1, 2015, while Kieson's certiorari petition was still pending in the circuit court, the Department of Corrections repealed and recreated Chapter 303 in its entirety, resulting in the renumbering, and in some cases, rewording, of the cited administrative provisions. *See* CR 11-022, Wisconsin Administrative Register, Sept. 2014, No. 705. Because Kieson appears on this appeal to make essentially the same underlying arguments about notice and the right to call witnesses under the general rubric of due process, without citing the outdated administrative code provisions that were in effect at the time, we do not attempt to track the changes.

in [the inmate's] defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals").

¶15 The warden contends that Kieson had a meaningful opportunity to request the identity and/or presence of the officer who actually searched his cell because Kieson was present when his cell was searched and therefore already knew that Beasley had not personally conducted the search. The record supports the warden's assertion since Kieson himself alleged in his administrative appeal to the warden that, although he did not know the names of the officers who had performed the search of G-22, he knew that Beasley had not performed the search because Kieson had been handcuffed to the railing outside his cell when the search was conducted. In this context, it is apparent that Kieson's strategy at the hearing was to take advantage of the absence of the officer who had actually performed the search by attempting to undermine Beasley's credibility. We are therefore satisfied that Kieson was provided sufficient notice to allow him to mount a defense, and that he was not denied the right to call a witness in his defense since he never sought to call the unidentified officer.

¶16 Regarding the sufficiency of the evidence, Kieson contends that Beasley's testimony that she knew "as a fact" that the contraband was found in Kieson's cell is unreliable and/or incredible on its face, given Beasley's admission that she did not personally conduct the search of the cell where the contraband was found. We disagree. A fact finder is permitted to make fair inferences from the testimony or evidence presented, and it would be fair to infer that searches conducted by academy members as an apparent training exercise would have been supervised by other correctional personnel. Additionally, it is possible that the searches were captured on surveillance video. Therefore, it would not be inherently inconsistent for Beasley to claim firsthand knowledge of a search that

had been conducted by another correctional officer. Again, it is apparent that Kieson made a strategic decision not to ask additional questions that could have shed further light on the basis for Beasley's knowledge. In short, the hearing officer was entitled to rely on Beasley's assertion that she had knowledge that the contraband was found in Kieson's cell.

¶17 Kieson also contends that there was no substantial evidence to support the hearing officer's factual finding that the contraband was found in his cell since the conduct report alleged that Kieson was housed in cell G-22, and the hearing officer found that the contraband had been found in cell A-22.

¶18 Although the warden does not address this discrepancy between the cell numbers, we noted above that it appears likely that the discrepancy stemmed from a misreading of Kieson's handwritten question. In any event, it is beyond the scope of this court's review to challenge factual determinations that were made during the administrative proceedings, or to make our own findings as to which cell number was accurate. In short, the assertion in the conduct report that the contraband was found in Kieson's cell constituted substantial evidence upon which the hearing officer was entitled to rely.

Second Conduct Report

¶19 The warden presented four grounds in support of his motion to quash the portion of the writ of certiorari relating to Kieson's second conduct report, and renews his arguments on all four of those grounds on appeal. We address each in turn.

¶20 First, the warden notes that common law certiorari is akin to judicial review of administrative actions under WIS. STAT. ch. 227, and asserts that ch. 227

"is replete with sections that refer to a single agency decision in a judicial review proceeding." From that premise, the warden argues that the court should "follow the rule of Chapter 227 and limit certiorari review to one administrative decision at a time."

¶21 However, not one of the provisions of WIS. STAT. ch. 227 cited by the warden states that a petitioner under ch. 227 is limited to seeking review of one administrative decision at a time. *See* WIS. STAT. §§ 227.53(1), 227.53(1)(a)1., 227.53(1)(a)2., 227.53(1)(a)3., 227.53(1)(b), 227.53(1)(c), 227.54, 227.55, and 227.56. Nor has the warden cited any case law or other legal authority suggesting such a construction of ch. 227.

¶22 It is a basic principle of statutory construction that, unless it "would produce a result inconsistent with the manifest intent of the legislature … [t]he singular includes the plural, and the plural includes the singular." WIS. STAT. § 990.001(1). It is not manifestly apparent that the legislature had any intent of requiring citizens who wish to challenge multiple decisions made by the same administrative agency to file a separate action for judicial review of each decision. If, for instance, a property owner wished to challenge multiple tax assessments from the same year involving separate parcels of land, we are aware of no "rule of Chapter 227" that would prevent the property owner's claims for judicial review from being raised in a single action, so long as the action was timely with respect to each assessment. In sum, we are not persuaded that any analogy to WIS. STAT. ch. 227 supports quashing a portion of the common law writ of certiorari in this case.

¶23 The warden's second asserted ground for quashing a portion of Kieson's writ of certiorari is that allowing a prisoner to obtain common law

certiorari review of two unrelated administrative actions in one judicial action would be "inconsistent with" WIS. STAT. § 814.29(1m)(e) of Wisconsin's Prisoner Litigation Reform Act (PLRA), and would thus represent a "violation of public policy." In particular, the warden points to the requirement that when a prisoner—as defined in WIS. STAT. § 801.02(7)(a)2.—seeks leave to commence an action, special proceeding, writ, or appeal without being required to prepay the filing fee, the agency having custody of the prisoner shall freeze the prisoner's trust fund account and make incremental withdrawals therefrom until the filing fee has been paid. *See* § 814.29(1m)(e). Based on that provision, the warden argues that a prisoner ought to be required to pay two filing fees when seeking certiorari review of two unrelated administrative actions.

¶24 Setting aside the warden's failure to cite any authority or any legal standard for dismissing a writ petition on public policy grounds, as well as the general rule that public policy arguments are more appropriately directed to either the legislature or the superintending authority of the Wisconsin Supreme Court, we disagree with the proposition that allowing a prisoner to challenge more than one administrative decision in a single judicial action is in any way inconsistent with WIS. STAT. § 814.29(1m)(e).

¶25 A filing fee goes toward covering the costs of the administrative tasks involved in opening a new case file, such as assigning a case number, entering information about the parties and case into the court's electronic database, and appending labels to a new file folder. The amount of work the clerk of court must do in order to open a new file bears little if any relation to the number of claims that a litigant is pursuing in the action. Nor does the amount of the filing fee vary depending upon how many claims are raised. Furthermore, the number of actual issues that may need to be addressed in a single certiorari action does not

necessarily correspond to the number of conduct reports that are being reviewed because conduct reports themselves may, and often do, contain multiple charges.

¶26 Here, in response to Kieson's writ petition, the clerk of the circuit court opened a single case file, assigned as Dane County Case Number 2013CV2266. Kieson did not seek to proceed without prepayment of the filing fee under WIS. STAT. § 814.29(1m), but rather paid the full filing fee required by statute to initiate a certiorari action, fulfilling the PLRA mandate. Section 814.29(1m)(e) did not authorize the circuit court to require Kieson to divide his claims into two actions and pay two filing fees or to quash a portion of his certiorari action based on his failure to do so.

¶27 The warden's third asserted ground for quashing a portion of the writ of certiorari is that allowing Kieson to obtain common law certiorari review of two unrelated administrative decisions in one judicial action would, in the warden's words, "essentially permit him to circumvent the 3-strikes rule" of the PLRA set forth in WIS. STAT. § 802.05(4). Section 802.05(4)(b) permits a circuit court to dismiss any action brought by a prisoner without requiring the defendant to answer the pleading if the court determines that the action is frivolous, is brought for an improper purpose, seeks damages from a defendant with immunity, or fails to state a claim upon which relief could be granted. Section 802.05(4)(c) directs the circuit court to notify the Wisconsin Department of Justice whenever it dismisses a prisoner's action pursuant to subsection (b). WISCONSIN STAT. § 801.02(7)(d) then prohibits any prisoner who has accumulated three such dismissals, i.e., "strikes," from filing any subsequent action without prepayment of the filing fee unless the court determines that the prisoner is in imminent danger of serious physical injury. The warden argues that an inmate challenging multiple disciplinary actions would accumulate only one strike even if the circuit court

were to dismiss claims relating to more than one conduct report for one of the reasons specified in § 802.05(4)(b).

¶28 Once again, the warden's argument appears to presume, without discussing any authority or legal standard for the proposition, that a court has the authority to dismiss a certiorari petition on public policy grounds. Even if we accept that premise, the warden has failed to persuade us that the general public policy concerns underlying the three-strikes rule—i.e., reducing the amount of and taxpayer subsidies for prisoner litigation—should bar a prisoner from seeking certiorari review of multiple conduct reports or other administrative decisions by prison officials in one judicial action.

¶29 This court has previously held that the dismissal of one or more claims from a civil complaint for one of the reasons set forth in WIS. STAT. § 802.05(4)(b) does not count as a strike under § 802.05(4)(c) when the case proceeds on other valid grounds. ***State ex rel. Henderson v. Raemisch***, 2010 WI App 114, ¶26, 329 Wis. 2d 109, 790 N.W.2d 242. The warden has offered no principled basis for treating multiple claims that a prisoner may raise in a certiorari petition more strictly for purposes of the three-strikes rule than multiple claims that a prisoner may raise in a civil complaint. To the contrary, in this court's experience we have seen far fewer strikes issued for challenges to prison disciplinary actions than for, say, civil lawsuits seeking damages from prison officials. Nor has the warden pointed to any legislative history that would suggest the strike provisions in the PLRA were intended to change any preexisting law that may have existed with respect to joinder rules, which promote the distinct policy of judicial efficiency.

¶30 The warden's fourth asserted ground for quashing a portion of the writ of certiorari is that allowing a prisoner to obtain common law certiorari review of two unrelated conduct reports in one judicial action would "reward those prisoners who have multiple disciplinary infractions in a short period of time." This argument appears to combine the warden's perceived public policy concerns over allowing an inmate to obtain judicial review of two conduct reports with only one filing fee and one potential strike, with the 45-day deadline set forth in WIS. STAT. § 893.735 for a prisoner to file a certiorari action.

¶31 In addition to the reasons we have already provided for why we do not share the warden's public policy concerns regarding single filing fees and strikes for multiple-claim certiorari actions, we note that the 45-day certiorari deadline actually limits the number of certiorari claims that are likely to be combined into a single writ petition. And, we see no principled basis for placing greater limitations on prisoners who have multiple certiorari claims arise within a 45-day period than we place on prisoners who have multiple civil claims accrue within a typically much longer statute of limitations period.

¶32 On this appeal, the warden offers an additional basis for quashing a portion of the writ of certiorari, beyond the four he asserted in his initial motion. In response to an argument Kieson made in the circuit court and in his appellant's brief, the warden asserts that WIS. STAT. § 803.02—which permits a party to join in "an original claim, counterclaim, crossclaim, or 3rd-party claim … as many claims, legal or equitable, as the party has against an opposing party," § 803.02(1)—does not apply to writ actions.

¶33 It is not immediately apparent whether the joinder rule set forth in WIS. STAT. § 803.02 encompasses writ petitions. On the one hand, the reference

in the joinder statute to original claims, counterclaims, cross-claims, and third-party claims would seem to align with the types of pleadings filed under WIS. STAT. §§ 801.02(1), 801.02(2), and 802.01(1), and thus could perhaps reasonably be interpreted to apply only to claims initiated by such procedures. On the other hand, WIS. STAT. § 801.01(2) provides that the rules and procedures set forth in WIS. STAT. chs. 801 to 847 govern "all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule." Actions seeking equitable relief by certiorari, quo warranto, habeas corpus, mandamus, or prohibition plainly fall within the broad scope of § 801.01(2)—s*ee, e.g.,* § 801.02(5)—and, as we discussed above, the warden has not pointed to any specific statute or other legal authority that would provide a limitation on joinder of claims, either in writs generally or in certiorari actions specifically. In any event, we conclude that it is unnecessary to determine here whether § 803.02 authorizes the joinder of multiple common law certiorari claims arising from separate administrative decisions because we are satisfied that the joinder of such claims is otherwise permitted by common law.

¶34 We find support for the proposition that certiorari actions are not limited under common law to seeking review of a single administrative decision from cases involving prison disciplinary proceedings such as the ones at issue here. WISCONSIN ADMIN. CODE § DOC 303.76(7)(d) provides that the warden's decision on a disciplinary appeal "is final regarding the sufficiency of the evidence," but goes on to note that "[a]n inmate may appeal procedural errors as provided under s. DOC 310.08(3)." Thus, as we explained in ***State ex rel. Frasch v. Cooke***, 224 Wis. 2d 791, 796-97, 592 N.W.2d 304 (Ct. App. 1999), the time for an inmate to file a certiorari action seeking review of alleged procedural errors

relating to a prison disciplinary decision is tolled until after the inmate has pursued a complaint through the ICRS, so that substantive and procedural claims may be brought together once all administrative remedies have been exhausted. *See also* ***State ex rel. Smith v. McCaughtry***, 222 Wis. 2d 68, 77-78, 586 N.W.2d 63 (Ct. App. 1998) (holding that an inmate who wishes to challenge a disciplinary action on both procedural and substantive grounds must complete the ICRS procedure before seeking judicial review on *either* claim), *abrogated in part on other grounds by* ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶13, 245 Wis. 2d 607, 629 N.W.2d 686 (holding that there is no futility exception to the exhaustion requirement of the PLRA). Under this line of cases, it is standard practice for prisoners to file certiorari actions seeking review of two separate, final orders, made by different entities within the prison system—as, in fact, was the case here.

¶35 Moreover, the warden has not pointed to any case law from this or any other jurisdiction that requires administrative decisions to be related in any particular manner in order to be challenged in a joint writ petition, either with respect to prison disciplinary proceedings or in any other context.

¶36 We conclude that the circuit court had no legal basis to quash a portion of Kieson's writ petition merely because it raised challenges to multiple administrative decisions in a single action. Accordingly, we reverse and remand with directions for the circuit court to proceed on Kieson's claims for judicial review of the administrative decisions related to his second conduct report.

By the Court.—Order reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).