COURT OF APPEALS DECISION DATED AND FILED

December 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3211

Cir. Ct. No. 2004CV1453

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN EX REL. DA VANG,

PETITIONER-APPELLANT,

V.

PHIL KINGSTON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Da Vang appeals from a circuit court order denying his petition for a writ of certiorari. The writ petition challenges the refusal of prison officials to terminate his release account and further alleges that a prison schedule which requires inmates to choose between going to the law library

or the recreation room violates both the administrative code and certain constitutional provisions. Vang also raised a claim in the circuit court that the statute which precludes prisoners from recovering their costs from the state or state agents in actions relating to prison conditions violates the Wisconsin Constitution. We affirm for the reasons discussed below.

¶2 The key facts underlying Vang's claims are straightforward. Vang is serving two consecutive life sentences without the possibility of parole. He requested that the prison business office terminate his release account and transfer the funds therein to his general account so that he could buy a typewriter, pointing out that he had no need for a release account since he would never be released. Prison officials denied the request and Vang's administrative appeals were unsuccessful. Prison officials also rejected Vang's complaints regarding a schedule which allows inmates only four and one-half hours per week combined for both out-of-cell leisure time activity and law library time. Vang then sought certiorari review in the circuit court, and added a claim for costs. He now appeals from the trial court's denial of his petition.

¶3 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). We will consider only whether: (1) the agency stayed within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that the agency might reasonably make the order or determination in question. ***Id***.

Release Account

¶4 WISCONSIN ADMIN. CODE § DOC 309.466 provides in relevant part:

> **Release account funds. (1)** After the crime victim and witness assistance surcharge has been paid in full, as provided for in s. DOC 309.465 and upon transfer of the inmate to the first permanent placement and in all subsequent placements, the institution business office shall deduct 15% of all income earned by or received for the benefit of the inmate, except from work release and study release funds under ch. DOC 324, until $500 is accumulated, and shall deposit the funds in a release account in the inmate's name.
>
> **(2)** Release account funds may not be disbursed for any reason until the inmate is released to field supervision, except to purchase adequate clothing for release and for out-of-state release transportation. Following the inmate's release, these funds shall be disbursed in accordance with s. DOC 309.49 (5).

The purpose of the release account is to ensure "that the inmate has sufficient funds when released from the institution to purchase release clothing, out-of-state transportation, and other items and services needed on release." WIS. ADMIN. CODE § DOC 309.02(18).

¶5 Vang contends that the intended purpose of his release account can never be accomplished because he will never be released. He then cites ***Doty v. Doyle***, 182 F. Supp. 2d 750, 754 (E.D. Wis. 2002), for the proposition that a release account may be terminated if it its purpose cannot be accomplished, like any other trust account. While ***Doty*** so asserts, we note this assertion is dicta because that was not the issue the court actually decided. Additionally, ***Doty*** is not a U.S. Supreme Court case. It does not control Wisconsin courts.

¶6 Our review of the issue in the context of this certiorari action is limited to whether department officials acted contrary to their own rules or other established law. Under the plain language of the administrative code, prison officials were *required* to maintain $500 in Vang's release account. They did not act arbitrarily or contrary to law by complying with the code. Nor, by Vang's own

admission, is he attempting to challenge the constitutionality of the current code provision in this action. Therefore, while Vang's arguments about the apparent absurdity of maintaining release accounts for persons serving life sentences would perhaps provide a valid reason for amending the code, Vang has not established any current legal right to termination of his release account.

Library Access & Recreational Time

¶7 Pursuant to WIS. ADMIN. CODE § DOC 309.155(3), an inmate is entitled to have access to legal materials "at reasonable times and for reasonable periods." Under WIS. ADMIN. CODE § DOC 309.36(2), each institution must "permit inmates to participate in leisure time activities for at least 4 hours per week. Institutions with the facilities to permit more leisure time activity should do so." Leisure time activity is "free time outside of the cell or room during which the inmate may be involved in activities such as recreational reading, sports, film and television viewing, and handicrafts." Section DOC 309.36(1).

¶8 Vang asserts that these provisions, taken together, require prison authorities to provide him with a certain amount of law library time each week in addition to four hours of out-of-cell leisure time activities. According to Vang, however, current prison policy at the Columbia Correctional Institution[1] only allows inmates three, ninety-minute periods totaling four and one-half hours per week for either out-of-cell recreational activity or law library time, forcing inmates

[1] Vang asserts in his reply brief that the Columbia Correctional Institution is the only prison in the Wisconsin system to make inmates choose between law library time and recreational activities. If that is true, department officials may wish to look into whether prisons throughout the state are applying a consistent interpretation of the code with regard to whether law library time constitutes an out-of-cell leisure activity. Such review, however, is beyond the scope of this appeal.

to choose between two separately protected rights. In other words, Vang claims that if an inmate were to use four hours of his out-of-cell leisure time for recreational activities such as those specified in WIS. ADMIN. CODE § DOC 309.36(1), the remaining half hour he could spend in the law library (even assuming portions of the ninety-minute period could be spent in two different places) would not constitute a "reasonable period" of time for legal research within the meaning of WIS. ADMIN. CODE § DOC 309.155. Conversely, if the inmate used his allotted time in the law library, Vang claims he would be denied his four hours of out-of-cell leisure time activity in the recreation room. Vang argues that the prison's current policy therefore violates the Department of Corrections' own administrative rules.

¶9 Department of Correction officials determined that WIS. ADMIN. CODE § DOC 309.36(2) does not mandate that inmates have "recreation" periods, per se—merely that they have four hours of out-of-cell leisure time activity per week. They concluded that time spent in the law library qualified as such out-of-cell leisure time activity. Vang argues that the definition of leisure time activity does not explicitly include law library time, and that if the department had intended leisure time activity to encompass law library time, it would not have created a separate provision relating to legal research. We note, however, that the list of activities cited in the rule is not exhaustive, and that department officials could reasonably conclude that the focus of the rule was on allowing inmates out of their cells for a certain amount of time each week, rather than on the specific activities pursued. Under that construction, prison officials reasonably determined that time spent in the law library satisfied both administrative rules at once.

¶10 Interwoven into Vang's argument that the prison policy violates the administrative code are several claims that the policy also violates the

constitutional guarantees upon which the code provisions appear to be grounded. *See, e.g.,* ***Bounds v. Smith***, 430 U.S. 817, 828 (1977) (holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law") *and* ***Antonelli v. Sheahan***, 81 F.3d 1422, 1432 (7th Cir. 1996) (holding that "[l]ack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened"). Vang relies heavily on ***Allen v. City and County of Honolulu***, 39 F.3d 936, 939 (9th Cir. 1994), which states that the "Fourteenth Amendment right to court access and [the] Eighth Amendment right to outdoor exercise are not 'either/or' rights," and that "[a]n inmate should not have to forgo outdoor recreation to which he would otherwise be entitled simply because he exercises his clearly established constitutional right of access to the courts." We reject Vang's claim that he is being forced to choose between his constitutional rights here, however, because his allegations are insufficient to show that the prison policy has actually violated either one.

¶11 With regard to the right to court access, department officials noted that an inmate with an approaching court deadline could request additional law library time. Vang has not explained why that additional time would be insufficient. Moreover, in order to state a valid claim for denial of court access, an inmate must establish actual prejudice "by alleging that he missed court deadlines, failed to make timely filings, or that legitimate claims were dismissed because of the denial of reasonable access to legal resources." ***Ortloff v. U.S.***, 335 F.3d 652, 656 (7th Cir. 2003). Since Vang made no such specific allegations here,

department officials properly rejected his contention that he was being denied his right to court access.

¶12 As to the right to physical exercise, the Eighth Amendment does not require that inmates be allowed outdoors or even necessarily out of their cells to engage in such activity. There is no constitutional violation so long as an inmate has sufficient space to do things like push-ups, sit-ups, and jogging in place in his cell. ***Thomas v. Ramos***, 130 F.3d 754, 762-64 (7th Cir. 1997). Vang did not allege that the prison policy of making him choose between going to the recreation room and the library so restricted his movement or ability to exercise in his cell that his health was threatened.

Recovery of Costs

¶13 Finally, Vang contends that WIS. STAT. § 814.25(2)—which precludes prisoners from recovering their costs from the state or state agents in actions relating to prison conditions—violates article I, section 9 of the Wisconsin Constitution. That issue is not ripe for determination here, however, because under other provisions of Chapter 814, costs are only awarded to the prevailing party. Since Vang did not prevail on the merits of this action, he would not be entitled to costs regardless of the constitutionality of § 814.25(2).

By the Court.—Order affirmed.

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