

**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. 2005AP490

Cir. Ct. No. 2004CV450

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. GARRY A. BORZYCH,

PETITIONER-RESPONDENT,

v.

**DANIEL BERTRAND, WARDEN, GREEN BAY
CORRECTIONAL INSTITUTION,**

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Daniel Bertrand, the Warden at Green Bay Correctional Institution, appeals a circuit court order vacating a prison disciplinary

action and an order denying his motion for reconsideration. The issue is whether the circuit court had the authority to vacate the prison disciplinary action. We affirm in part and reverse in part.

¶2 Borzych was found guilty, by a prison disciplinary officer, of battery. The Corrections Complaint Examiner found procedural errors and remanded for a rehearing. The officer corrected the errors, but again found Borzych guilty of battery. The officer gave Borzych the punishment originally imposed, and added an additional penalty of thirty days' loss of electronics. No explanation was given for the increased penalty.

¶3 Borzych sought certiorari review in the circuit court. The circuit court found the evidence sufficient for a finding of guilt on the battery charge, but concluded that the entire conduct report should be vacated because the record did not support the increased penalty. The court relied on *State v. Naydihor*, 2004 WI 43, 270 Wis. 2d 585, 678 N.W.2d 220, which explains that, in criminal proceedings, retaliation is presumed when a court increases a sentence after resentencing without explaining why the additional penalty is justified. *Id.*, ¶33. Because Borzych had already served the additional thirty-day penalty, the circuit court concluded the entire conduct report should be vacated to deter prison officials from vindictively increasing penalties when inmates have successfully asserted their rights. The Warden moved for reconsideration, and the circuit court denied the motion.

¶4 As a preliminary matter, the Warden concedes that the prison disciplinary committee should not have given Borzych an additional penalty after

the rehearing without explaining why the additional penalty was appropriate. The Warden does not challenge this portion of the circuit court's decision on appeal.¹ However, the Warden contends that the proper remedy is to expunge the additional penalty, rather than to vacate the entire disciplinary action.

¶5 “On certiorari review, we determine *de novo* whether the department acted within its jurisdiction, whether it acted according to applicable law, whether the action was arbitrary or unreasonable, and whether the evidence supported the determination in question.” *State ex rel. Riley v. DHSS*, 151 Wis. 2d 618, 623, 445 N.W.2d 693 (Ct. App. 1989). In *Riley*, the inmate sought certiorari review of an administrative confinement decision. *Id.* at 621. He also sought review of the prison's decision to place him in temporary lockup prior to his administrative confinement, arguing that the prison did not provide sufficient reasons for placing him in temporary lockup. *Id.* at 621 n.1. On appeal to this court, we agreed that the prison had not provided an adequate explanation of its reasons for placing Riley in temporary lockup. *Id.* at 621-22 n.1. However, we also concluded that we had no authority to reverse the decision underlying the imposition of the temporary lockup sanction. *Id.* at 622 n.1. We concluded that the limited scope of certiorari review precluded this course of action. *Id.* Instead, we ordered that any reference to Riley's placement in temporary lockup be expunged from his prison record. *Id.*

¶6 While we recognize that in this case, like *Riley*, the penalty has already been served, which means that Borzych is effectively given no relief, *Riley*

¹ Even though it has made this concession in this case, the Warden does not concede that the *Naydihor* “presumption of vindictiveness” rule, as a general matter, applies to prison disciplinary hearings.

explained that on certiorari review we do not have the broad equitable power to vacate a prison disciplinary action to remedy a penalty that is in error. We have only the power to vacate the improper penalty. Therefore, we reverse the circuit court's orders in part and remand the case to the circuit court with directions to enter an order directing the department to reinstate the decision finding Borzych guilty of battery and the penalties that flowed from it, except for the additional thirty-day penalty, which should be expunged from all prison records.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

