

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 3, 2000

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-0157**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. KRISTOFER ASHMORE  
A/K/A TRAVIS AUSTIN ASHMORE,**

**PETITIONER-APPELLANT,**

**v.**

**GARY R. MCCAUGHTRY,**

**RESPONDENT-RESPONDENT.**

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

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

¶1 PER CURIAM. Kristofer Ashmore appeals from an order dismissing his petition for certiorari review of two prison disciplinary decisions.

A review of one of the decisions is claim precluded. He states no grounds for reversing the other decision. We therefore affirm.

¶2 In March 1998, conduct report 914233-382 issued against Ashmore for a disciplinary violation. The disciplinary committee found Ashmore guilty and the warden affirmed that decision. Ashmore then filed a petition for certiorari review in the trial court in July 1998. In October 1998, he commenced an inmate complaint review system (ICRS) appeal of the decision. In February 1999, while the ICRS appeal remained pending, the circuit court dismissed the certiorari review petition because Ashmore had failed to exhaust his administrative remedies before filing it, as required by WIS. STAT. § 801.02(7)(b) (1997-98).<sup>1</sup> In April 1999, the secretary of the Department of Corrections affirmed the dismissal of the ICRS appeal as untimely filed.

¶3 Conduct report 920122-492 also issued in March 1998, charging Ashmore with attempted escape and possession of contraband. The disciplinary committee found him guilty of these charges, and the warden affirmed. He filed his ICRS appeal in October, and the administrative proceeding was finally concluded in April 1999, when the secretary of the Department of Corrections affirmed dismissal of the appeal.

¶4 Following the April 1999 final resolution of his ICRS appeals, Ashmore commenced this action. The trial court concluded that claim preclusion barred review in case 914233-382. In case 920122-492 the court concluded that review of Ashmore's claims of procedural error was barred by his failure to timely file an ICRS appeal. The court also concluded that the evidence before the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

disciplinary committee supported the finding of guilt. On appeal Ashmore challenges those determinations.

¶5 The trial court properly dismissed the petition on conduct report 914233-382. Ashmore received a final determination on review of that determination when the trial court dismissed his first petition in February 1999. His untimely administrative appeal did not grant him the right to a second review proceeding. A final judgment is conclusive in all subsequent actions between the parties as to matters which were litigated or might have been litigated in former proceedings, if there was a final judgment on the merits in the previous case. *See Davis v. American Family Mut. Ins. Co.*, 212 Wis. 2d 382, 388, 569 N.W.2d 64 (Ct. App. 1997). Contrary to Ashmore's contention, a dismissal for failure to exhaust administrative remedies is a final judgment on the merits. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 555, 525 N.W.2d 723 (1995) (Final judgment on the merits is one that finally disposes of a claim even when it does not decide the substantive issues).

¶6 The trial court properly denied review of the alleged procedural errors in case 920122-492. As noted, a prisoner may not commence an action for review of a disciplinary decision until all available administrative remedies are exhausted. *See* WIS. STAT. § 801.02(7)(b). For procedural errors in disciplinary proceedings the administrative remedy is an ICRS appeal. *See* WIS. ADMIN. CODE § DOC 310.08(3). However, Ashmore never exhausted that remedy because he foreclosed it by failing to file his ICRS appeal within the required fourteen days. *See Wright v. Morris*, 111 F.3d 414, 417 n.3 (6th Cir. 1997) (An untimely administrative appeal does not satisfy the exhaustion requirement); WIS. ADMIN. CODE § DOC 310.09(3).

¶7 Ashmore nevertheless contends that the Department of Corrections “accepted” his ICRS appeal and thereby excused his late filing. Therefore, in Ashmore’s view, the exhaustion requirement was, in fact, satisfied. However, the record contradicts his assertion. Ashmore received the initial determination on his appeal in a document entitled “Rejection of Complaint.” In it, the reviewing officer stated that “I find no compelling reason to warrant investigation of this untimely complaint.” That determination was subsequently affirmed by the warden and by the secretary of the Department of Corrections.

¶8 The disciplinary committee heard sufficient evidence to find Ashmore guilty of attempted escape and possessing contraband. We independently review the disciplinary committee’s decision. *See State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We will uphold the decision if it is supported by any reasonable view of the evidence. *See State ex rel. Palleon v. Musolf*, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984). Here, the charges resulted from Ashmore’s request to visit the prison’s ear, nose and throat clinic. When a doctor examined Ashmore he discovered a paperclip concealed in Ashmore’s mouth. Ashmore admitted that he intentionally concealed the clip there. In the doctor’s opinion, Ashmore was faking his alleged illness. From these facts, the committee could reasonably infer that Ashmore intended to escape by arranging his transfer to a lower security medical area, and then using the paperclip to pick the locks on his restraints. As for the contraband charge, the admission that Ashmore intentionally concealed the paper clip in his mouth alone proved the charge.

¶9 Finally, Ashmore contends that the adjustment committee improperly relied on the doctor’s opinion, which he asserts was privileged, and a correctional officer’s unqualified expert opinion that paperclips provide a means to

open a prisoner's restraints. Ashmore raised neither issue during the disciplinary proceeding and therefore waived both. *See Saenz v. Murphy*, 162 Wis. 2d 54, 64-67, 469 N.W.2d 611 (1991), *overruled on other grounds by State ex rel. Anderson-El v. Cooke*, 2000 WI 40, ¶ 31 n.12, 234 Wis. 2d 626, 610 N.W.2d 821. Additionally, disciplinary proceedings are not bound by the rules of evidence. *See* WIS. ADMIN. CODE § DOC 303.86(1)(a).

*By the Court.*—Order affirmed.

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

