COURT OF APPEALS
DECISION
DATED AND FILED

January 3, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1773
2005AP1774

Cir. Ct. No. 2004CV988
2004CV989

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

STATE OF WISCONSIN EX REL. MATTHEW TYLER,

PETITIONER-APPELLANT,

V.

JUDY P. SMITH AND MATTHEW J. FRANK,

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Winnebago County: BARBARA H. KEY, and T.J. GRITTON, Judges. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Matthew Tyler appeals *pro se* from circuit court orders upholding on certiorari review determinations that he committed the conduct set forth in two Department of Corrections conduct reports. We affirm.

¶2 Conduct report #1545539 charged Tyler with sexually assaulting two of his cellmates, and conduct report #1545541 charged Tyler with threatening a cellmate. After hearings, the adjustment committee found Tyler guilty and penalized him for his conduct. Tyler exhausted his administrative remedies and then sought certiorari review in the circuit court. The circuit court upheld the administrative determinations of guilt. On appeal, Tyler challenges proceedings in the circuit court and at the administrative level. We address the circuit court proceedings first.

¶3 Tyler commenced two circuit court certiorari proceedings challenging the determinations of guilt on the two conduct reports. Before the certiorari proceedings were consolidated on Tyler's motion, Tyler filed a motion in each proceeding to compel the filing of an amended return to the writ of certiorari. In the sexual assault certiorari proceeding, the circuit court denied Tyler's motion to add to the record Form DOC–67, Notice of Offender Placement in Temporary Lockup (TLU), along with a two-page supplement statement. While Tyler's placement in TLU was mentioned in the record of Lt. Houle's testimony at the hearing on the conduct report for threatening another inmate, Tyler does not demonstrate that either the document itself or the two-page supplement was considered by the adjustment committee in determining his guilt or penalty. We fail to see how this document bore in any substantive way upon the disciplinary proceedings. The circuit court did not err in excluding this document from the record on certiorari.

¶4 We also fail to see the significance of the interview request "regarding advocate [Officer] Wolff" and why the return to the writ should have been amended to include it. Tyler contends that this document will show that Tyler raised an issue of conflict of interest on the part of the assigned staff

advocate for the proceeding on the sexual assault conduct report. In Tyler's circuit court motion to amend the return to the writ, Tyler alleged that he sent an interview request for Officer Wolff, met with Officer Wolff and sent him his concerns in a letter. Therefore, we fail to see how the interview request itself bore in any substantive way on the adjustment committee's proceedings. Additionally, our review of Tyler's submissions in his appeal to the warden, his inmate complaint and his request for a corrections complaint examiner review do not include a reference to an alleged conflict of interest on the part of the staff advocates. The circuit court did not err in excluding this document from the record on certiorari.

¶5 The circuit court also properly denied Tyler's request to add the conduct report for threatening another inmate to the certiorari record for the sexual assault case. The conduct report for threatening an inmate was not referred to in the disposition of the conduct report for the sexual assault.

¶6 Tyler complains that the circuit court handled the two certiorari reviews together. This complaint lacks merit. Tyler filed a motion captioned "Motion to Joinder of Cases" under WIS. STAT. § 805.05 (2003-04) (consolidation).[1] Tyler contends that the circuit court erroneously treated the cases as consolidated. We need not parse Tyler's use of "joinder" and "consolidated." Tyler asked for the cases to be handled together by the circuit court and they were.

[1] Consolidation under WIS. STAT. § 805.05(1)(a) permits more than one action to be the subject of a joint hearing and disposition. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶7 Tyler next argues that the circuit court erroneously granted the motion of the warden and the Secretary of the Department of Corrections to submit documents summarizing the statements of confidential informants in the sexual assault case to the court *in camera.* Tyler did not have access to these documents. The Department of Corrections' motion was accompanied by an affidavit of counsel stating that counsel had reviewed the documents and that, if disclosed, the safety of the parties who gave the statements would be endangered. Tyler objected to the motion because he thought he already knew the identities of the confidential informants. The circuit court granted the motion, and the documents were submitted to the circuit court for *in camera* review. The circuit court did not err. WISCONSIN ADMIN. CODE § DOC 303.86(5) and (6) (May 2003)[2] requires that such information be kept in a confidential manner "[i]f the institution finds that testifying would pose a risk of harm to the witness …." DOC 303.86(4).[3]

¶8 We turn to the administrative proceedings. Tyler raises the following specific claims of error by the Department of Corrections: refusal to consider evidence, withholding of exculpatory evidence by prison staff, inadequate conduct reports, handling of witnesses, and the performance of Tyler's staff advocate. We are not persuaded by any of these challenges.

¶9 Tyler argues that each and every one of his objections to the disciplinary proceedings should have been addressed or responded to at the

[2] All references to the Wisconsin Administrative Code are to the May 2003 version unless otherwise noted.

[3] Tyler claims that in its oral ruling on the certiorari petitions, the circuit court identified the confidential informants. The transcript of the oral ruling does not bear out this claim.

administrative level. We are not bound by the manner in which a party frames the issue. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). Tyler's argument essentially implicates the determinations that we make on certiorari review independently of the circuit court. ***State ex rel. Staples v. DHSS,*** 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). On certiorari review, we determine: "(1) whether the [agency] kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978) (citation omitted). We evaluate whether there was substantial evidence to support the agency's decision, i.e., "whether reasonable minds could arrive at the same conclusion reached by the [agency]." ***State ex rel. Palleon v. Musolf***, 120 Wis. 2d 545, 549, 356 N.W.2d 487 (1984). We are bound by the agency's credibility determinations. *See* ***Robertson Transp. Co. v. Public Serv. Comm.***, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

¶10 Tyler argues that the Department of Corrections did not rebut his challenges to the disciplinary proceedings' procedures and evidence. The Department of Corrections does not bear the burden of rebutting all of Tyler's allegations of error. Rather, the Department of Corrections must only comply with the applicable hearing procedure. As we hold throughout this opinion, this occurred.

¶11 Tyler complains that the conduct reports are inadequate. We disagree. The conduct reports comply with WIS. ADMIN. CODE § DOC 303.66, and they set out the facts of the offenses.

¶12 Tyler contends that it was error to file two conduct reports against him. This argument lacks merit. Tyler was charged with committing separate acts on separate occasions against different victims.[4] Separate conduct reports were warranted.

¶13 Tyler argues that he was denied the right to present exculpatory evidence. Specifically, Tyler wanted to present the testimony of Patrick Fox, a previous cellmate, to establish that he never sexually assaulted or threatened Fox. However, this evidence was not relevant to the question of whether Tyler committed the acts alleged in the sexual assault conduct report. Relevant evidence is that evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Additionally, for the sexual assault conduct report, Tyler was allowed to and did call two witnesses: the two cellmates who alleged that he had sexual contact with them. Additional witnesses are only allowed for good cause shown. WIS. ADMIN. CODE § DOC 303.81(1). There was good cause to exclude Fox because his testimony was not relevant.

¶14 Tyler argues that Lt. Houle withheld exculpatory evidence allegedly found in the investigative reports. Tyler merely speculates that such evidence was excluded from Lt. Houle's report. Tyler also wanted access to the discipline and medical records of one of the complaining witnesses. Tyler was permitted to question the witnesses in the proceeding on the sexual assault conduct report.

[4] We acknowledge that one of the cellmates whom Tyler sexually assaulted was also the inmate whom Tyler threatened. However, the circumstances of each offense were sufficiently different to warrant two conduct reports.

However, he was not permitted to delve into the reasons for the witness' incarceration or the medications taken by the witness because such questions were not relevant to the conduct report.

¶15 The DOC administrative rules do not provide for an inmate defending a conduct report to receive investigative reports and witnesses' personal records. The adjustment committee decided the case based upon the conduct report, the testimony at the hearing and the statements of the confidential informants.

¶16 Tyler appears to complain that the identity of his accusers was withheld from him. The record reveals that Tyler called his accusers as witnesses at the adjustment committee hearings and elicited their testimony in addition to presenting written questions to them. This argument lacks merit.

¶17 Tyler complains that the staff advocates the warden appointed for him did not effectively assist him in challenging the conduct reports. The law of ineffective assistance of counsel does not apply to the role of the staff advocate in the prison disciplinary setting. ***State ex rel. Ortega v. McCaughtry,*** 221 Wis. 2d 376, 397, 585 N.W.2d 640 (Ct. App. 1998). The staff advocate's role is to:

> [H]elp the accused inmate to understand the charges against the inmate and to help in the preparation and presentation of any defense the inmate has, including gathering evidence and testimony, and preparing the inmate's own statement. The advocate may speak on behalf of the accused inmate at a disciplinary hearing or may help the inmate prepare to speak.

WIS. ADMIN. CODE § DOC 303.78(2).

¶18 Tyler and the assigned staff advocates met before the adjustment committee hearings. Tyler does not credibly suggest what other evidence the

advocates might have gathered. The advocates attended the adjustment committee hearings. Tyler has not shown that the assigned staff advocates failed to comply with WIS. ADMIN. CODE § DOC 303.78(2).

¶19 Tyler complains that the sexual assault conduct report proceeding was complex. Tyler is wrong. The evidence consisted of testimony that Tyler sexually assaulted two former cellmates and Tyler's denial.

¶20 Tyler asserts that the conduct report for threatening an inmate was complex. Again, Tyler is wrong. Tyler admitted to Lt. Houle that he made the statement which was the basis for the conduct report. The adjustment committee found that this statement constituted intimidation of the cellmate. Tyler disputed the purpose of this statement and claimed that he was merely venting anger toward the roommate, not intimidating him. The credibility of the witnesses was for the adjustment committee to determine.

¶21 Finally, Tyler challenges the sufficiency of the evidence that he committed the acts set forth in the conduct reports. We evaluate whether there was substantial evidence to support the agency's decision. ***Palleon,*** 120 Wis. 2d at 549. We are bound by the agency's credibility determinations. *See* ***Robertson Transp.***, 39 Wis. 2d at 658.

¶22 With regard to the sexual assault conduct report, the adjustment committee heard from the complainants, confidential informants and Tyler. The adjustment committee found the complainants and the confidential informants more credible regarding the details of the sexual assault than Tyler. The adjustment committee also held further proceedings to enhance the record.

¶23 With regard to the conduct report for threatening an inmate, the adjustment committee considered Tyler's denial and the testimony that he made the statement as alleged. The committee did not find credible Tyler's contention that he was merely venting anger, not intimidating or threatening his cellmate. The adjustment committee also held further proceedings to enhance the record.

¶24 The adjustment committee was charged with weighing the witnesses' credibility. The committee did not find Tyler credible in his denials. There was substantial evidence to support the findings of guilt on both conduct reports.[5] Additionally, we conclude that the agency acted according to law and did not act arbitrarily or unreasonably.

By the Court.—Orders affirmed.

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

[5] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").