

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2008

David R. Schanker
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. 2007AP2295

Cir. Ct. No. 2006CV4040

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. DEREK KRAMER,

PETITIONER-APPELLANT,

V.

PHIL KINGSTON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
WILLIAM E. HANRAHAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Derek Kramer appeals an order affirming a prison disciplinary decision. A hearing officer found that Kramer's possession of white supremacist publications, recruiting materials and symbols violated WIS. ADMIN. CODE § DOC 303.20 (Group Resistance) and § DOC 303.47 (Possession of

Contraband). Kramer argues that the finding was arbitrary and not supported by the evidence because he received the materials through the prison mail room or property room and they do not appear on the list of prohibited publications, and the materials relate to an external group, not an inmate group. He also argues that his First Amendment and Equal Protection rights were violated by prohibiting his possession of these documents.¹ We reject these arguments and affirm the order.

¶2 Sufficient evidence supports the findings that Kramer’s possession of white supremacist documents, recruiting information and symbols constitutes group resistance and possession of contraband. Under WIS. ADMIN. CODE § DOC 303.20, an inmate is not allowed to participate in any group activity that is not approved by the superintendent, and no individual inmate or other person from inside or outside the institution may attempt to carry out organized activities within the institution that promote identification with an unauthorized group. An inmate may not participate in any activity with an “inmate gang,” or possess any gang literature, creed or symbols. An “inmate gang” means a group of inmates which is not sanctioned by the warden. *See* WIS. ADMIN. CODE § DOC 303.02(11).

¶3 The documents in Kramer’s footlocker came from the National Alliance, a group identified as a gang by Captain Bruce Muraski, the head of the Intelligence Gang Unit at the prison. The document encouraged membership in that unsanctioned group. Possession of these materials was also prohibited by the

¹ The parties’ briefs also address whether the warden has authority to consider additional evidence that was not presented to the hearing officer. We need not review that issue because the additional evidence Kramer presented to the warden did not constitute a defense or establish any violation of his constitutional rights.

prison Rules and Information Handbook. The handbook prohibits possession of materials in support of all organizations except those “specifically sanctioned” by the prison. The documents seized from Kramer’s footlocker and Muraski’s identification of the National Alliance as a white supremacist gang establish Kramer’s violation of the rules against group resistance and possession of contraband.

¶4 The fact that the documents passed through the prison mail room or property room is no defense. Kramer is required to obey administrative rules even if the contraband passed through the mail room or property room. The prison is not estopped from enforcing regulations merely because it failed to recognize the violation at an earlier time.

¶5 It is also no defense that the documents were not included in a “not allowed” publication list. The list is illustrative, not exhaustive. The prison cannot be expected to identify by name every publication that violates prison rules. The list would be unreasonably extensive and would need constant updating. The generic prohibition against recruitment literature for unsanctioned groups applies regardless of whether the specific publication is on the “not allowed” list.

¶6 Kramer argues that the materials relate to an external group, not an inmate group, and that distinction was recognized in an overbreadth and vagueness challenge to WIS. ADMIN. CODE § DOC 303.20. See *Koutnik v. Brown*, 456 F.3d 777, 782 (7th Cir. 2006). *Koutnik* is distinguishable because it involved regulation of an inmate’s outgoing mail, which did not implicate prison security or gang activity and which did not include recruitment material. *Koutnik* upheld § DOC 303.20’s prohibition against possessing symbols of any group not

approved by the warden. *Id.* The Seventh Circuit also deferred to prison officials' determination of gang activity. *Id.* at 785. *Koutnik* does not prohibit enforcement of any regulation that prohibits an inmate from possessing recruitment literature or gang symbols.

¶7 Kramer argues that the prison regulations impinge on his First Amendment rights. Prison regulations that impinge on a prisoner's constitutional rights are valid if they are reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Prison security is a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). The regulations prohibiting access to recruitment materials and gang symbols is reasonably designed to reduce the potential for disruptive conduct, and it is within the broad discretion of prison officials to prevent disorder by prohibiting the materials. *Thornburgh v. Abbott*, 490 U.S. 401, 412-13 (1989). Prison censorship of reading materials may be justified by governmental interest in maintaining prisoner security and order. *Id.* at 408.

¶8 Kramer also fails to establish any violation of his Equal Protection rights. Kramer contends that another inmate was not charged with any code violation for possessing the same materials. To prevail, Kramer must show intentional discrimination due to his membership in a particular class. *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990). Inconsistent treatment is not enough. *Id.* Kramer made no showing that he is a member of any class that was subject to discrimination.

By the Court.—Order affirmed.

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

