COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3324 **Cir. Ct. No. 00-CV-1066**

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

STATE OF WISCONSIN EX REL. LESLIE J. SCHATZ,

PETITIONER-RESPONDENT,

V.

GARY R. MCCAUGHTRY, WARDEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed.*

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

¶1 PER CURIAM. Gary McCaughtry appeals from an order reversing a prison disciplinary decision against Leslie Schatz. On all but one of Schatz's challenges to the decision, we conclude the adjustment committee did not err; on the remaining issue regarding timely receipt of the repair documentation, we conclude any error was harmless. We therefore reverse.

¶2 The conduct report charged Schatz with disruptive conduct for an incident that led to damage to a scale on the kitchen loading dock. The adjustment committee found Schatz guilty and imposed a sanction that included restitution in the amount of $415.42. Schatz appealed to the warden, who remanded it to the committee to hear testimony from a certain corrections officer and consider that testimony with all the evidence. The adjustment committee's second decision was unchanged from the first one. Schatz again appealed, eventually reaching the circuit court. The circuit court agreed with Schatz on several issues, reversed the committee's decision, and ordered McCaughtry to expunge the finding of guilt from Schatz's record. McCaughtry now appeals.

¶3 Review on certiorari is limited to whether: (1) the agency kept 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 it might reasonably make the order or determination in question. ***Coleman v. Percy***, 96 Wis. 2d 578, 588, 292 N.W.2d 615 (1980). We review the action of the prison adjustment committee independently of the trial court. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990).

¶4 The rule against disruptive conduct has since been amended, but at the time it provided: "Any inmate who intentionally or recklessly engages in, causes or provokes disruptive conduct is guilty of an offense. 'Disruptive conduct' includes … overt behavior which is unusually loud, offensive, or vulgar, and may include arguments, yelling, loud noises, horseplay, or loud talking, which

may annoy another." WIS. ADMIN. CODE § DOC 303.28 (Register, June, 1994, No. 462).[1] The term "recklessly" means

> that the inmate did an act or failed to do an act and thereby created a situation of unreasonable risk that another might be injured. The act or failure to act must demonstrate both a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury.

WIS. ADMIN. CODE § DOC 303.04(3).

¶5 Schatz argues that a reasonable person could not find him guilty of disruptive conduct. On certiorari review, we apply the substantial evidence test, that is, whether reasonable minds could arrive at the same conclusion reached by the department. ***State ex rel. Richards v. Traut***, 145 Wis. 2d 677, 680, 429 N.W.2d 81 (Ct. App. 1988). We conclude that Schatz could reasonably be found guilty of disruptive conduct. The conduct report stated that a corrections officer was informed by an inmate that while the inmate was weighing himself on the kitchen scale, Schatz "jumped on" the scale and bumped the inmate into it, causing damage to the scale. Although there may have been other evidence that could reasonably lead to a different conclusion, the committee could reasonably conclude that Schatz intentionally engaged in horseplay.

¶6 Schatz argues, and the circuit court agreed, that the committee erred by failing to provide an explanation for its apparent rejection of his defenses of mistake and involuntary intoxication. At the first hearing on the conduct report, Schatz did not testify, but he did submit a written statement. In that statement he said that while

[1] All references to the provisions of WIS. ADMIN. CODE ch. DOC 303 are to version ch. DOC 303 (Register, June, 1994, No. 462).

performing his work duties, he was carrying a coffee urn and attempted to step onto the scale to avoid an obstruction in his path, but somehow lost his footing and balance, thereby striking the other inmate. He described this as a mistake defense under WIS. ADMIN. CODE § DOC 303.05(3), which provides that it is a defense if: "The inmate honestly erred …, and such error negates the existence of a state of mind essential to the offense." The "record of witness testimony" prepared by the committee stated that the presence of the corrections officer who wrote the conduct report was not requested at the hearing, and it did not describe any testimony by him. However, the committee's decision stated: "The committee contacted [the corrections officer]. He stated there was nothing in the inmate's path."

¶7 In response to Schatz's appeal, the warden remanded to the committee to reconvene and hear testimony of the corrections officer. For reasons that are not clear, the committee apparently did not allow Schatz to be present at the reconvened hearing. Instead, Schatz submitted a document that objected to that decision and listed several written questions for the corrections officer to answer. One of those asked, "[I]s it possible that there were flat carts and a food cart in the area of the scale which would block the area to the store?" The officer marked the "true" line that Schatz had provided, and added a handwritten note: "I didn't remember anything on the floor that would have blocked the way." In its second decision, the committee stated that the officer "doesn't remember anything on the floor that would have blocked the inmate's way to the store, so that he had to step on the scale in order to get to the store. We find the reporting staff credible." We are satisfied that this was a sufficient discussion of Schatz's mistake defense. The committee apparently interpreted the officer's response as being contrary to Schatz's account.

¶8 Involuntary intoxication is a potential defense under WIS. ADMIN. CODE § 303.05(2), if Schatz lacked substantial capacity either to appreciate the

wrongfulness of the conduct or to conform his conduct to the rules. Schatz's statement for the committee's first hearing said simply: "I had also been working with Contact Cement just before going up to get the urn of coffee, how much of an effect this might [have] had I don't know." We do not believe the committee erred by failing to expressly address this argument. The evidence supporting it was minimal, and although Schatz claimed this as a defense, even in his own statement he said he did not know how much of an effect the glue might have had.

¶9 Schatz also argues that restitution is not a permitted penalty for the offense of disruptive conduct because that offense is not listed in WIS. ADMIN. CODE § DOC 303.83(5). That rule provides that in deciding on the punishment for an offense, the committee shall consider the value of the property involved, if the alleged violation was one of several property offenses listed there, and the list does not include disruptive conduct. Schatz interprets the rule to mean that the value of the property can be taken into consideration only for those listed property offenses, and therefore restitution cannot be ordered for other offenses. We do not agree with this interpretation. The rule provides only that the committee must consider the value of the property in certain kinds of cases. We see nothing in it that limits discretion to consider the value of property in other kinds of cases. If such a limitation on restitution was intended, we might reasonably expect to find it in WIS. ADMIN. CODE § DOC 303.84(1), which lists the possible penalties. However, that rule authorizes the imposition of restitution in "every case where an inmate is found guilty."

¶10 Finally, Schatz argues that he was not shown or given a copy of the papers documenting the cost of repairing the scale until he received the second decision from the committee, and therefore he was not able to challenge that amount or confirm that it complied with the method for valuing property provided

in WIS. ADMIN. CODE § DOC 303.72(5). Even if we assume, without deciding, that Schatz should have been given this information at some earlier point, we conclude that any error was harmless. *See* WIS. ADMIN. CODE § DOC 303.87. Schatz has not suggested, either in this court or earlier in the administrative or circuit court proceedings, that he has any specific factual basis to challenge the correctness of the restitution amount or its compliance with § DOC 303.72(5).

By the Court.—Order reversed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).