COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1054 **Cir. Ct. No. 2006CV2177**

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

STATE OF WISCONSIN EX REL. VICTOR ROBINSON,

PETITIONER-APPELLANT,

V.

RICHARD SCHNIETER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Victor Robinson appeals from an order affirming a prison discipline decision. We affirm.

¶2 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).

¶3 As an initial matter, the respondent argues that certiorari review is not available in this case because Robinson served his certiorari petition on the warden rather than the Department of Corrections secretary. This argument was not raised in the circuit court. Normally we do not consider issues raised for the first time on appeal, and we see no reason to do that in this case. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

¶4 Robinson was found guilty of participating in an activity with an inmate gang, in violation of WIS. ADMIN. CODE § DOC 303.20(3) (Dec. 2000). In the conduct report, that charge was based on two confidential informant statements. The first statement said that when Robinson arrived at the prison, he began to recruit inmates for the Vice Lords, and that Robinson is a high-ranking member in that gang. The second statement asserted Robinson is a high-ranking member who wanted to "teach each [man] with strong mind to help build the house within here Vice Lord Nation." After being found guilty of that charge, Robinson pursued his administrative remedies, and the warden remanded for a new hearing because Robinson had not been provided with notice of the "[d]ate, approximate time & location" of the violations. On remand, according to the adjustment committee decision, "a rehearing was started … to get a clearer timeline which was given to him with the dates of 08/02-08/20/2005 for the violation of 303.20."

¶5 On appeal, Robinson argues that the hearing committee refused to comply with the warden's direction, and that the broad date range, with no further information, was not sufficient notice to comply with due process because it deprived him of any reasonable chance to disprove the confidential informant statements. He argues that he could not, for example, use documentary evidence from within the prison to show that he was actually at a different location than where the alleged conversations took place. We disagree. Due process requires notice sufficient to allow the inmate to "marshal the facts and prepare a defense." ***Wolff v. McDonnell***, 418 U.S. 539, 564 (1974). We conclude that the above range of dates, together with the conduct described in the conduct report, was sufficient notice.

¶6 Robinson was also found guilty of communicating to another a plan to physically harm another, in violation of WIS. ADMIN. CODE § DOC 303.16(1) (Dec. 2000). This finding was based on a transcript of a recorded telephone call from prison, in which Robinson was reported to have said:

> It's second shift, and they got _____ they trippin' on them nines and, they're so scary. And I be trying to keep myself calm down, because I gonna knock one of their heads off their shoulders, ya' know I mean. Then, they got this skinny broad, I don't know what her problem is. I mean this woman ain't…ain't…ain't don't weigh as much as a pair of draws, ya' know what I mean? She be 'round here followin' us up like she weighs three hundred pounds.

Based on the physical description of the correctional officer, which enabled staff to identify the specific officer, and the reference to knocking heads off shoulders, the committee found Robinson guilty of communicating to the other party on the phone call a plan to harm that officer.

¶7 By order of the warden on remand after the first hearing, at the second hearing Robinson was provided for the first time with a signed transcript of this portion of the call, rather than the version in the conduct report. Robinson argues that he should have further been provided with the complete phone call recording, because he could have used it as exculpatory evidence "to show that the 'threats' allegation was a misrepresentation of the Black language conventions of the phone call conversation." We do not agree that the rest of the transcript, or the recording itself, was necessary for this purpose. It is difficult to see, and Robinson does not explain in any detail, how the other content of the conversation would add further context to the passage quoted above.

By the Court.—Order affirmed.

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