COURT OF APPEALS DECISION DATED AND FILED

December 30, 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. 2007AP1965 **Cir. Ct. No. 2007CV37**

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

STATE OF WISCONSIN EX REL. JAMES D. LAMMERS,

PETITIONER-APPELLANT,

V.

MATTHEW J. FRANK AND JEFFREY ENDICOTT,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. James Lammers appeals a circuit court order that dismissed his petition for habeas corpus review of his competence to defend against prison disciplinary proceedings and the effect of his mental illness on the conduct underlying the disciplinary actions. The circuit court concluded that

habeas did not lie because certiorari review was an adequate alternate remedy that Lammers had failed to timely pursue. We previously issued a decision affirming the circuit court on the alternate ground that the allegations in Lammers' writ petition were insufficient to warrant the relief sought. The Wisconsin Supreme Court summarily vacated our decision because the parties had not been afforded an opportunity to address the issue on which we decided the appeal. It remanded to this court "for further proceedings, to include supplemental briefing and consideration of the legal sufficiency of the petition for writ of habeas corpus."

¶2 We have now received and reviewed the parties' supplemental briefing. Nothing in the supplemental briefs alters our view that, even if habeas is the appropriate mechanism to evaluate an incompetency or mental illness claim in the prison disciplinary context, Lammers' allegations are insufficient to establish a constitutional violation warranting habeas relief. We therefore affirm the circuit court's dismissal of Lammers' writ petition.

BACKGROUND

¶3 According to the petition, Lammers is serving consecutive prison sentences on a 1990 arson conviction and a 1996 battery by a prisoner conviction, which would have had a mandatory release date of February 12, 2004. Since 1990, however, he has received a series of 60 conduct reports, largely for behavior such as disobeying orders, disrespect, and disruptive behavior, which have collectively extended his mandatory release date by 1,839 days, to March 1, 2009.

¶4 In 1998, after Lammers had filed more than 175 lawsuits against various public officials, the Attorney General moved for the appointment of a guardian ad litem in one of Lammers' ongoing suits and asked that the GAL also serve as a gatekeeper for future litigation. The basis for the request was that

Lammers suffered from a delusional disorder, persecutory type, which led him to believe that government officials were involved in a conspiracy against him, and which rendered him incompetent to represent himself regarding claims encompassed within his delusions. After taking evidence, the court entered an order finding that Lammers was "mentally incompetent to have charge of his affairs, at least to the extent of commencing and prosecuting litigation." The court appointed a guardian ad litem, but refused to extend its order beyond the case that was then before it. In 2000, however, another court did ban Lammers from initiating any *pro se* suits until such time that a court certifies that Lammers has regained the mental capacity to evaluate whether his allegations have a well-grounded basis in fact and law. In subsequent proceedings, up to January of 2007, various courts have refused to lift the ban, finding no change in Lammers' competency with regard to the ability to pursue litigation.

¶5 Lammers now alleges that his mental illness prevented him from being able to understand any of the disciplinary proceedings against him between 1990 and 2004, or to develop a factual basis for challenging those proceedings. He also claims that the ban on his *pro se* litigation, in conjunction with his indigency, prevented him from challenging any of the disciplinary actions from 2000 onward by certiorari.

¶6 In addition, Dr. R. Bronson Levin examined Lammers in 2005 and concluded that Lammers' delusional disorder had directly contributed to the vast majority of the conduct underlying his prison disciplinary decisions. Dr. Levin noted that the conduct reports revolved around Lammers

> not understanding the rules, his not accepting the rules, believing that those rules are set up to infringe on his basic constitutional rights, believing that the people that are enforcing those rules are acting illegally, reacting with

> verbal tirades towards those people, and then not comprehending the system by which he was being punished for that, thinking that that was more evidence that the system was stacked against him. In cases where I actually asked him about those — there are too many conduct reports to have gone through each one, but I asked him about some of those. It is just clear that these fixed delusional beliefs are the basis for not only his actions but for his interpretations of those systems. So it is my conclusion that [the] majority of the conduct reports are basically just examples of his mental illness and the way he interacts with the system.

Dr. Levin also concluded that the segregation imposed as a result of the conduct reports had made Lammers' mental illness far worse, pushing him from a paranoid personality disorder into psychosis.

¶7 Lammers petitioned for a writ of habeas corpus, but the circuit court quashed the writ on the grounds that certiorari was an available alternate remedy.

STANDARD OF REVIEW

¶8 Whether a writ of habeas corpus is available to the party seeking relief is a question of law that this court reviews *de novo*. ***State ex rel. Woods v. Morgan***, 224 Wis. 2d 534, 537, 591 N.W.2d 922 (Ct. App. 1999).

DISCUSSION

¶9 A person whose liberty is being restrained in the absence of a valid judgment or order may apply for a writ of habeas corpus to obtain review of an alleged constitutional or jurisdictional error. *See* U.S. CONST. art. 1, § 9, cl. 2; WIS. CONST. art. 1, § 8, cl. 4; WIS. STAT. §§ 782.01(1) and (3) and 782.02 (2005-

06)[1]; ***State ex rel. Cramer v. Wisconsin Court of Appeals***, 2000 WI 86, ¶47, 236 Wis. 2d 473, 613 N.W.2d 591. Habeas is an extraordinary remedy, however, which is not available if the petitioner has failed to exhaust an alternate remedy, unless it appears that such action would be insufficient to test the legality of the detention. *See* WIS. STAT. § 974.06(8); ***State ex rel. Fuentes v. Wisconsin Court of Appeals***, 225 Wis. 2d 446, 451, 593 N.W.2d 48 (1999).

¶10 Here, Lammers' liberty is currently being restrained due to the extension of his mandatory release date by a series of prison disciplinary proceedings. He contends those proceedings violated his constitutional due process rights in two ways: first, prison officials "punished [him] for his mental illness" because the conduct on which the reports were based actually stemmed from Lammers' mental illness; and, second, his mental illness "rendered him incapable of rationally defending against the prison conduct reports." Lammers further contends that certiorari review would be an inadequate mechanism for reviewing his present due process claims because facts outside of the record of the disciplinary proceeding are necessary to establish the alleged constitutional violations.

Adequacy of Certiorari Review

¶11 The respondents maintain that habeas is unavailable here because certiorari review is the standard procedure for reviewing prison disciplinary decisions, and should have been used here. The respondents, however, still have not provided any persuasive explanation for how a court would actually be able to

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

evaluate an incompetency claim requiring a hearing on facts outside of the disciplinary proceedings themselves. The respondents' reliance on ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, 263 Wis. 2d 55, 667 N.W.2d 1, is misplaced because the administrative mechanism for accepting late affidavits that allowed some limited review outside the original certiorari record there would not encompass a hearing of the nature Lammers is seeking here. Nor are we persuaded that the inmate complaint review system would be adequate for this purpose, when the inmate was alleged to have been incompetent at the time of the proceedings.

¶12 Because the respondents have not convinced us that certiorari would be an adequate mechanism to review a competency issue arising out of a disciplinary proceeding, we will assume without deciding that habeas is an appropriate mechanism. The next step, then, is to consider whether the allegations in Lammers' petition were sufficient to state a constitutional due process claim warranting habeas relief.

Ability to Consider Legal Sufficiency of the Petition

¶13 Lammers contends that the respondents waived any objection to the legal sufficiency of the petition by failing to raise the issue in their motion to quash. Because waiver is a doctrine of judicial administration, however, we retain the authority to address an issue on appeal even if it has not been properly preserved. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Moreover, the principle of efficient judicial administration allows us to affirm proper decisions by the circuit court, even when they were reached for the wrong reasons. ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). We believe the Wisconsin Supreme Court implicitly recognized these principles

when it directed this court to consider the legal sufficiency of the petition upon remand, and we will do so.

Punishment for Mental Illness

¶14 Lammers makes broad assertions in his writ petition that due process is violated when a person is held responsible for conduct that was the result of mental illness. The two Wisconsin cases Lammers cites for that proposition, however, involved an affirmative defense of not guilty by reason of mental disease or defect in a criminal trial. *See, e.g.,* ***State v. Seifert***, 155 Wis. 2d 53, 69, 454 N.W.2d 346 (1990), and ***State v. Esser***, 16 Wis. 2d 567, 585, 115 N.W.2d 505 (1962). Even assuming some similar type of affirmative defense would be available in the prison disciplinary context, Lammers does not assert anywhere in his writ petition that he ever attempted to defend against the disciplinary charges on the grounds that his failure to obey prison rules was the result of his mental illness. If Lammers did not raise such a defense to any of the conduct reports, prison officials would have had no reason to dismiss the charges on that basis. Lammers does not cite any authority that would allow an inmate to retroactively challenge the imposition of discipline based on a defense theory of mental illness that was not raised during the disciplinary proceeding. Nor does he cite any analogous cases that would allow such relief in the context of a criminal case. If due process is not offended by requiring a criminal defendant to raise at trial a defense that he was mentally ill at the time the offense was committed in order to preserve it, we see no reason why a lesser standard would apply in the prison disciplinary context.

¶15 Lammers also cites federal authority for the proposition that the conditions of punitive incarceration for disciplinary infractions may fall more

harshly on mentally ill inmates. *See, e.g.,* ***Jones'El v. Berge***, 164 F. Supp. 2d 1096, 1116-18 (W.D. Wis. 2001). Lammers, however, does not assert that he is currently being held in solitary confinement or any other conditions different from those of the general population. He also specifically states in his petition that he is not alleging that he is mentally ill at this time. Therefore, the conditions of confinement cases for mentally ill inmates—which involve requests for injunctive relief against existing conditions—are not relevant to his current situation based on the allegations in the petition.

¶16 We conclude that Lammers' petition fails to allege any facts that would warrant relief on the theory that prison officials improperly punished him for behavior that was the product of mental illness.

Competence to Defend Against Disciplinary Proceedings

¶17 Lammers' allegation that he was not competent to defend against the disciplinary actions would appear to raise the sort of procedural due process claim that could be raised retroactively in some circumstances. Lammers points to ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 507, 563 N.W.2d 883 (1997), as an analogous situation in which retroactive habeas corpus proceedings were utilized to evaluate a claim of incompetency that arose during an administrative probation revocation proceeding.

¶18 In ***Vanderbeke***, the Wisconsin Supreme Court held that a probationer has a due process right to a competency determination when reason to doubt the probationer's competency arises during a probation revocation proceeding. ***Id.*** at 506-07, 516-18. The court then went on to fashion a competency procedure to be used in probation revocation proceedings. ***Id.*** at 507, 518-22.

¶19 Lammers contends that, if a probationer has a due process right to a competency determination during revocation proceedings, an inmate ought to have a right to some similar sort of competency procedure during disciplinary proceedings. We will assume that that is correct. *Compare* ***Robinson v. McCaughtry***, 177 Wis. 2d 293, 304, 501 N.W.2d 896 (Ct. App. 1993) (noting general rule that inmates are not constitutionally entitled to any procedural due process beyond the requirements set forth in ***Wolff v. McDonnell***, 418 U.S. 539 (1974)) *with* ***Vanderbeke***, 210 Wis. 2d at 515 (explaining that the right to a hearing is meaningless without the competence to understand or participate in it). What Lammers' arguments fail to address, however, is: (1) what level of competence is actually required to defend against a prison disciplinary charge; and (2) what information was before the disciplinary committees in each of the challenged administrative proceedings at issue here that should have given the committees reason to doubt that Lammers met that threshold.

¶20 It is a well-established principle that the level of competence required to satisfy due process varies with the purpose for which the competency determination is made. ***Vanderbeke***, 210 Wis. 2d at 516 n.8. For example, different skills may be required to develop written legal arguments for a brief on appeal than are required to represent oneself in a criminal proceeding, which may in turn require a higher degree of competence than merely assisting an attorney in presenting a defense.

¶21 A prison disciplinary proceeding is far more informal than a criminal trial. There are relaxed evidentiary rules and procedures for presenting evidence. In order to defend against a conduct report, then, an inmate might need only understand what conduct he is alleged to have committed and what prison rule that conduct violated, and the ability to provide and request statements or other

evidence relevant to whether he did in fact engage in the alleged conduct. In addition, WIS. ADMIN. CODE § DOC 303.78 requires each correctional institution to make staff members available to serve as advocates in disciplinary hearings.

¶22 The advocate's purpose is to help the accused understand the charges against him or her and to help in the preparation and presentation of any defense he or she has, including gathering evidence and testimony, and preparing the accused's own statement. WIS. ADMIN. CODE § DOC 303.78(2). The advocate may speak on behalf of the accused at a disciplinary hearing or may help the accused prepare to speak for himself or herself. ***Id.***

¶23 Here, Lammers' writ petition has essentially rolled all of his prison disciplinary proceedings into one global complaint. However, in order to obtain relief from the multiple extensions of his mandatory release dates, he would need to show that his due process rights were violated in each disciplinary proceeding. His allegations are insufficient to do so.

¶24 First, Lammers does not allege when or how prison officials were made aware of all of his competency evaluations in relation to when each of his disciplinary hearings was held. He is challenging conduct reports that were issued between 1990 and 2004, based on judicial competency determinations that were made beginning in 1998, as well as several prior diagnoses of mental illness. The only psychological evaluation linking Lammers' mental illness to his disciplinary actions was not issued until 2005. Thus, Lammers' petition fails to explain what reason prison officials would have had to raise the competency issue during any particular disciplinary action. There would have been no obligation to hold competency proceedings without some reason to doubt Lammers' competency.

¶25 Second, even making an inference that prison officials were aware before some of the later disciplinary actions that Lammers had been found incompetent to conduct *pro se* litigation, the basis for those judicial determinations was that Lammers' persecution delusions interfered with his ability to rationally evaluate whether he had valid legal claims. However, the psychological reports underlying those determinations also stated that Lammers was competent with regard to matters outside of his particular delusions. Thus, even if Lammers lacked the ability to rationally evaluate the motivations of prison officials in certain respects, it does not necessarily follow that Lammers could not accurately explain his own conduct. Since Lammers has not specified the actual misconduct underlying any of his disciplinary actions, his allegations are insufficient to show that his particular delusions would have impeded his ability to defend against any particular conduct report.

¶26 Third, although Lammers was found incompetent for the purpose of conducting *pro* se civil litigation, he was not precluded from proceeding in such actions with the assistance of a guardian ad litem. Lammers has not explained why, if he had sufficient competence to assist a guardian ad litem in civil litigation, he would not also have had sufficient competence to defend himself in more informal administrative proceedings with the assistance of an inmate advocate.

CONCLUSION

¶27 Lammers claims that he was punished for conduct that stemmed from his mental illness, without any recognition that such claims must be timely raised as an affirmative defense rather than retroactively. He claims a right to relief from conditions of punitive incarceration for disciplinary infractions that

may be unduly harsh for mentally ill inmates, but also specifically alleges that he is not currently mentally ill and does not claim he is currently being held in such conditions. And he claims that prison officials should not have proceeded on disciplinary charges at a time when he was incompetent to defend against them, without citing any information that was actually before the disciplinary committees which would have given the committees reason to doubt Lammers' competency in that context. We conclude that the writ petition was properly quashed because the allegations were insufficient to state a claim for relief.

By the Court.—Order affirmed.

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