

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 10, 2002

Cornelia G. Clark
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. 02-0171
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-2051

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. JONATHAN P. COLE,

PETITIONER-APPELLANT,

V.

GERALD A. BERGE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
PAUL B. HIGGINBOTHAM, Judge. *Reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. Jonathan Cole, pro se, appeals the circuit court's order dismissing his petition for writ of certiorari. The issue is whether the petition is moot. We conclude that it is not. Therefore, we reverse.

¶2 Cole brought a petition for certiorari review in the circuit court of a February 21, 2001, decision of the Supermax administrative confinement review committee continuing his administrative confinement. The circuit court dismissed Cole’s certiorari petition as moot because the administrative confinement review committee had subsequently held another hearing on August 15, 2001, to review Cole’s confinement.

¶3 Cole argues that his challenges to the administrative confinement review hearing were not rendered moot because the committee subsequently held another periodic review. We agree that the petition in this case is not moot. Our recent decision in *State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶¶19-23, 252 Wis. 2d 404, 643 N.W.2d 515, is on point.¹ It is well established that “[a]n issue is moot when its resolution will have no practical effect on the underlying controversy.” *Id.* at ¶19. Applying that rule to a prison security classification hearing in *Treat*, we explained that “the question of mootness turns upon a determination whether a decision in Treat’s favor on this issue would afford him some relief that he has not already achieved by virtue of the subsequent ... review.” *Id.* We concluded that Treat’s claim of procedural error during the hearing was not moot because “if Treat were to prevail on his claim of error in his risk assessment and resulting security classification, he would be entitled not only to another program review, but to one that assessed his risk rating and security classification using a different—a corrected—methodology.” *Id.* at ¶22. So, too, Cole will be entitled to a new hearing using a corrected methodology if he prevails

¹ We decided *State ex rel. Treat v. Puckett*, 2002 WI App 58, 252 Wis. 2d 404, 643 N.W.2d 515, after the circuit court issued its decision in this case.

on his claim because the State does not assert, nor does the record show, that the August 15, 2001, hearing was not tainted by the alleged procedural defects.

¶4 Respondent Berge relies on *State ex rel. Clarke v. Carballo*, 83 Wis. 2d 349, 265 N.W.2d 285 (1978), for the proposition that the petition in this case is moot. In *Clarke*, the supreme court concluded that Clarke's claim that the department did not follow its own procedures during his parole hearing was moot because Clarke had already had another parole hearing. *Id.* at 357-58. A minority of the *Clarke* court would have concluded that the case was not moot because there was nothing in the record to show that the subsequent hearing was error-free. *Id.* at 358. In *Treat*, we distinguished *Clarke*, explaining that *Clarke* did not apply because there was no indication in the record, and the respondent did not assert, that the subsequent hearing afforded Clarke the relief he sought. *Treat*, 2002 WI App 58 at ¶¶21-22 and n.11.

¶5 We turn now to the merits of the petition. Cole raises a number of challenges to the administrative confinement review hearing. He contends that his advocate did not perform the duties outlined in WIS. ADMIN. CODE § DOC 303.78(2) because she failed to submit all of his questions to his potential witnesses and told him to procure documents he requested for his defense by himself, at his own expense. Cole also argues that his advocate had a conflict of interest because he called her as a witness and his request to have her appear as a witness was approved by prison officials and that he was not allowed to call and question other important witnesses at the hearing. Cole filed a motion in the circuit court asking that the return be supplemented to include documents Cole believed were relevant to the witness issue, but the circuit court did not address the motion because it concluded that Cole's claims were moot.

¶6 On the record before us, we are unable to address the petition on the merits because the scope of the record has yet to be determined, the State has not yet presented its arguments on the issues raised, and the issues are sufficiently complex that we are hesitant to address them in the absence of a response from the State. Therefore, we reverse the circuit court's order dismissing the petition and remand for further proceedings on the alleged procedural defects in the administrative confinement review committee hearing held February 21, 2001.

By the Court.—Order reversed and cause remanded with directions.

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

