COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 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. 02-0917 **Cir. Ct. No. 02-CV-30**

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

JAMES J. KAUFMAN,

PETITIONER-APPELLANT,

V.

JUDY P. SMITH, WARDEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. James J. Kaufman appeals pro se from an order affirming a prison disciplinary decision and dismissing his certiorari petition for review of two other prison disciplinary decisions. He claims that WIS. STAT.

§ 893.735 (1999-2000),[1] the forty-five day statute of limitation for a prisoner to file a petition for certiorari review, is unconstitutional because it deprives prisoners in segregation access to the courts and that because he was denied materials and law library time, the time for filing his certiorari petitions was tolled. He also claims that he was denied due process in the disciplinary proceedings. We affirm the order of the circuit court.

¶2 On November 19, 2001, and again on January 8, 2002, Kaufman petitioned the circuit court for a writ of certiorari to review three prison disciplinary sanctions imposed against him between April and October, 2001. The first conduct report (CR#1) was issued on April 17, 2001, and all administrative appeals from the sanction were concluded on August 26, 2001. A second conduct report (CR#2) was issued on October 5, 2001. A remand proceeding was conducted by the adjustment committee and a decision issued on November 12, 2001. Kaufman did not file an appeal or inmate complaint with respect to the decision made at the remand hearing. The third conduct report (CR#3) was issued on October 16, 2001. Administrative appeals from the sanction and the related inmate complaint were concluded on December 19, 2001. We will address the arguments as to each conduct report successively.

¶3 The circuit court concluded that Kaufman's appeal of CR#1 was untimely because it was not filed within forty-five days of the final administrative decision as required by WIS. STAT. § 893.735(2). Our review of the dismissal is de novo. *See* ***State ex rel. Johnson v. Litscher***, 2001 WI App 47, ¶4, 241 Wis. 2d

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

407, 625 N.W.2d 887. Kaufman concedes that he failed to meet the forty-five day deadline. However, he argues that § 893.735(2) is unconstitutional as applied to prisoners confined in segregation because their limited access to law library resources and supplies renders them unable to meet the statutory deadline. He claims that forty-five days is an unreasonably short period of time.

¶4 We reject Kaufman's claim. First, what Kaufman is really challenging is not the application of the statute but the policies of the institution in which he is confined. This is not the proper forum to test those institutional policies. Second, Kaufman's argument is conclusory and he did not present any evidence that he had inadequate access to the bare minimum materials required to file a timely certiorari action. There is no evidentiary basis to support a conclusion that the forty-five day statute of limitation deprives a prisoner of access to the courts.[2]

¶5 Kaufman suggests that he suffered from two disabilities which prevented him from timely commencing the action—library sanction for a period of ninety days and the denial of "legal loans" preventing him from purchasing writing materials and postage. The only two disabilities that toll the statute of limitation are mental illness and being under the age of eighteen. WIS. STAT. § 893.16. Neither applies to Kaufman. Further, there is no evidentiary support

[2] For the same reason we reject Kaufman's claim that the respondent is equitably estopped from asserting the statute of limitations as a defense because the respondent prevented the commencement of the action. This claim is merely a variation on the theme that the institution policies and procedures denied Kaufman timely access. Not only is there no evidentiary support for that proposition, but the respondent's conduct does not amount to the "fraud or a manifest abuse of discretion" necessary to invoke equitable estoppel against a state official or agency. ***Wis. Patients Comp. Fund v. St. Mary's Hosp.***, 209 Wis. 2d 17, 37, 561 N.W.2d 797 (Ct. App. 1997).

that the statute of limitation was tolled by timely delivery of materials to prison officials or while Kaufman was awaiting the delivery of required documents that only prison officials could supply. *See* ***State ex rel. Nichols v. Litscher***, 2001 WI 119, ¶32, 247 Wis. 2d 1013, 635 N.W.2d 292, *review denied*, 2002 WI 23, 250 Wis. 2d 556, 643 N.W.2d 93 (Wis. Jan. 29, 2002) (No. 98-1563-CR) (period for filing a petition for review is tolled on the date a pro se prisoner delivers the petition to prison authorities for mailing); ***State ex rel. Locklear v. Schwarz***, 2001 WI App 74, ¶26, 242 Wis. 2d 327, 629 N.W.2d 30 (when filing depends on the delivery of documents from state officials, the limitation period is tolled between the time the prisoner requests the documents and the time the prisoner receives the documents); ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 238, ¶14, 239 Wis. 2d 327, 620 N.W.2d 409 (time tolled when a prison inmate places a certiorari petition in the institution's mailbox for forwarding to the circuit court). Kaufman misstates that ***Locklear*** held that the denial of legal materials, photocopies, documents, and postage also trigger the tolling of the statute of limitation. ***Locklear*** detailed the problems encountered by the prisoner in attempting to photocopy materials but did not make the holding Kaufman describes. *See* ***Locklear***, 2001 WI App 74 at ¶¶33-39. Kaufman was not entitled to the benefit of any tolling of the statute of limitation and the circuit court properly dismissed the certiorari review of CR#1.

¶6 Certiorari review of CR#2 was dismissed because Kaufman failed to exhaust administrative remedies after a decision was made by the adjustment committee following a remand.[3] The warden returned CR#2 to the committee to

[3] WISCONSIN STAT. § 801.02(7)(b) requires a prisoner to exhaust administrative remedies.

"correct the record." Kaufman concedes that he did not file an appeal after the committee's decision on remand and did not pursue an inmate complaint to address alleged procedural errors in the proceeding. However, he asserts that because no new hearing was ordered or actually conducted, no further administrative appeal was required. His assertion is unsupported and conclusory. Indeed, the committee issued a new decision which stated new reasons for the discipline imposed. Kaufman was required to test the new decision by administrative review. *See* ***State ex rel. Hensley v. Endicott***, 2001 WI 105, ¶16, 245 Wis. 2d 607, 629 N.W.2d 686 (prisoners must exhaust all their administrative remedies prior to commencing a civil action because an administrative appeal may help to narrow a dispute or avoid the need for litigation). There is no provision that allows Kaufman to bypass further administrative remedies when a new decision is made on remand. Dismissal of certiorari review of CR#2 was proper.

¶7 We turn to the merits of Kaufman's challenge to discipline imposed as a result of CR#3.

> [W]e review the action of the prison adjustment committee independently of the trial court. Our review is limited to the record created before the committee. We determine (1) whether the committee stayed within its jurisdiction, (2) whether it acted according to law, (3) whether the action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) whether the evidence was such that the committee might reasonably make the order or determination in question.
>
> The test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion the committee reached. "The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence, and we may not substitute our view of the evidence for that of the committee."

State ex rel. Whiting v. Kolb, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990) (citations and quoted source omitted).

¶8 Kaufman was charged with lying about a staff member when he stated that he was being harassed by an officer in retaliation for Kaufman's naming the officer as a defendant in a lawsuit. CR#3 details the investigation done by the charging officer. Kaufman alleged that the harassment had been going on for about three months. The officer allegedly harassing Kaufman indicated that she had not received any official papers naming her as a defendant in a lawsuit and that Kaufman had only told her she was a defendant. The charging officer concluded that Kaufman was lying about being subjected to harassment because Kaufman was angry about being placed in temporary lock-up. At the hearing, Kaufman explained that he believed the officer was harassing him and treating him differently than other inmates because of the lawsuit. His contention was that his statement was not a lie. The committee found that Kaufman made allegations of harassment to undermine the officer's credibility and that he was unable to substantiate his claim of harassment. The committee's conclusion that a violation occurred was based on a credibility assessment. A reviewing court may not weigh the evidence or substitute its judgment for that of the committee. ***Id.*** There was sufficient evidence to support the committee's decision.

¶9 Kaufman complains that he was denied procedural due process because he was not provided a witness request form so he could produce witnesses, his staff advocate did not timely contact him or undertake requested investigation, he was denied access to inmate complaints he filed because he lacked funds for photocopy expenses, and two adjustment committee members were biased because they were defendants in his lawsuit. The first two

contentions were waived because they require factual determinations and Kaufman did not raise them at the hearing before the adjustment committee. ***Saenz v. Murphy***, 162 Wis. 2d 54, 63, 469 N.W.2d 611 (1991), *overruled on other grounds by* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶¶29-31, 234 Wis. 2d 626, 610 N.W.2d 821 (explaining that an exception to the waiver rule exists for issues that present only a question of law). *See also* ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 795, 601 N.W.2d 287 (Ct. App. 1999); ***Santiago v. Ware***, 205 Wis. 2d 295, 324-25, 556 N.W.2d 356 (Ct. App. 1996) (applying the waiver doctrine). By not objecting at the hearing, Kaufman waived his right to assert procedural objections regarding the performance of his staff advocate or his inability to request witnesses. We also conclude that Kaufman waived any issue with respect to the alleged bias of committee members because he did not raise it in his administrative appeal.[4] *See* ***Santiago***, 205 Wis. 2d at 325.

¶10 Kaufman consistently asserted that he was denied an opportunity to present evidence because he was not provided inmate complaints that alleged harassment by officers. Again, evidentiary support for Kaufman's claim that he was denied these documents because he lacked sufficient funds is missing. Even assuming that Kaufman was unable to pay for the requested copies, and that the adjustment committee was aware of why such documents were not available to Kaufman, there was not denial of due process. Although an inmate is entitled to procedural due process, we question whether that entitlement requires the

[4] Even if preserved for review, Kaufman's claim of bias lacks evidentiary support. Kaufman does not identify which committee members were allegedly biased. He did not offer proof that at the time of the disciplinary hearing the members had been served with his lawsuit or had actual knowledge that they were defendants in the suit. The fact that an official is named in an unrelated lawsuit by the inmate does not necessarily require disqualification. ***Redding v. Fairman***, 717 F.2d 1105, 1112-13 (7th Cir. 1983).

institution to provide copies of documents at no cost. Kaufman cites nothing in support of his claim that he was entitled to those documents regardless of his inability to pay for them. ***Wolff v. McDonnell***, 418 U.S. 539, 566 (1974), which sets out the minimal procedural due process requirements of a prison disciplinary proceeding, recognizes that "[p]rison officials must have the necessary discretion … to limit access to other inmates to collect statements or to compile other documentary evidence" and specifically refused to impose "a more demanding rule with respect to witnesses and documents." ***Id.*** at 567. We are not convinced that regulations requiring inmates to pay for photocopies must give way upon a claim that the documents are needed to defend a conduct report.

¶11 Finally, Kaufman contends that the prosecution of CR#3 violated his First Amendment right of free speech, specifically his right to express his belief that he was subject to harassment by the staff member. An inmate's right to exercise free speech within the confines of a prison may be curtailed if justified by "legitimate penological objectives of the corrections system." ***Jones v. N.C. Prisoners' Labor Union, Inc.***, 433 U.S. 119, 125 (1977). Enforcement of prison rules prohibiting false accusations against prison staff does not violate the First Amendment because such accusations have "a direct tendency to undermine 'the reasonable considerations of penal management.'" ***Craig v. Franke***, 478 F. Supp. 19, 21 (E.D. Wis. 1979) (citation omitted). CR#3 was based on a rule prohibiting false statements against staff members; it is a rule that advances legitimate penological objectives. Imposition of punishment for violation of the rule does not violate the First Amendment.

By the Court.—Order affirmed.

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