COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP2682
2008AP2683
2008AP2684

Cir. Ct. Nos. 2007CV2967
2007CV3122
2007CV3277

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

STATE OF WISCONSIN EX REL. SCOTT A. HEIMERMANN,

PETITIONER-APPELLANT,

V.

MICHAEL S. THURMER AND RICK RAEMISCH,

RESPONDENTS-RESPONDENTS.

APPEALS from orders of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Scott Heimermann appeals the circuit court's order denying three writs for certiorari relief from prison disciplinary decisions. He also

appeals the order denying his motion for reconsideration. We affirm for the reasons discussed below.

¶2 In conduct report No. 1912739 (the first report), which is the subject of Appeal No. 2008AP2682, the prison disciplinary committee found Heimermann guilty of Enterprises and Fraud, contrary to WIS. ADMIN. CODE § DOC 303.32, and Violations of Institution Policies and Procedures, contrary to WIS. ADMIN. CODE § DOC 303.63. This report was based on allegations that Heimermann had submitted a request to have printed off of his library word processing disk an "I-Buy, Incorporated, Business Plan" and multiple letters to potential investors under cover to the Mayer, Brown, Rowe & Maw law firm. In conduct report No. 1911922 (the second report), which is the subject of Appeal No. 2008AP2684, the committee found Heimermann guilty of another count of Enterprises and Fraud based on allegations that he had attempted to send materials related to his business venture to another inmate through the Legal Route mail system, including an affidavit related to an ongoing civil rights action. In conduct report No. 1912753 (the third report), which is the subject of Appeal No. 2008AP2683, the committee found Heimermann guilty of another count of Enterprises and Fraud based on allegations that he had requested photocopies of more letters soliciting investments in his business venture, using a return address other than the prison and without mentioning that he was still incarcerated.

¶3 WISCONSIN ADMIN. CODE § DOC 303.32(1) provides that "[a]ny inmate who engages in a business or enterprise, whether or not for profit, or who sells anything except as specifically allowed under other sections is guilty of an offense." An exception to this rule is that "[a]n inmate who was owner or part owner of any business or enterprise prior to sentencing may communicate with the

inmate's manager or partner concerning the management of the enterprise or business." WIS. ADMIN. CODE § DOC 303.32(1)(a).

¶4 Heimermann raises six claims of error on the present appeal. He contends: (1) he should have qualified for the preexisting business management exception because he was already in the process of developing a start-up plan to market his patent when he was transferred into the Wisconsin DOC's custody from an out-of-state placement; (2) he has a constitutional right to license and exercise a federal patent that should trump state prison disciplinary rules; (3) a patent is not itself a business, so communication about selling a patent should not violate the prison's no-business rule, particularly when initiated by third parties or directed to government officials; (4) his silence in letters as to the fact that he was still incarcerated was not the same as misrepresenting that he was no longer incarcerated; (5) reliance on materials filed in a civil suit as evidence of improper business activity violated his right to access to the courts; and (6) the prison's no-business rule should not be enforced against him on public policy grounds that favor the development of patents that could be of use in reducing the waste of government resources. We reject each contention.

¶5 First, regardless whether Heimermann first developed his business plan in a state prison or out-of-state prison, both periods of time were after his initial sentencing, and his correspondence was with potential investors, not current managers or partners in a business enterprise. Therefore, the preexisting business management exception does not apply here.

¶6 Second, we are not persuaded by Heimermann's contention that his constitutional rights are being violated by the application of the rule to him. The cases he cites on the supremacy of federal patent law do not address prison

regulations. As to his First Amendment argument, Heimermann cites ***King v. Federal Bureau of Prisons***, 415 F.3d 634, 636 (7th Cir. 2005). ***King*** refers to the federal regulation prohibiting a federal prisoner from conducting a business and states that this is a permissible restriction on a prisoner's residual freedom. Another case on which Heimermann relies, ***Abu-Jamal v. Price***, 154 F.3d 128 (3rd Cir. 1998), frames the First Amendment issue in the context of the prison business regulation in this way: "Prison regulations, like the business or profession rule, which restrict an inmate's First Amendment rights must operate in a neutral fashion, without regard to the content of the expression. We analyze content neutrality in the prison context differently than we do for non-inmates." ***Id.*** at 133-34 (citation omitted). Heimermann does not explain how the business regulation rule is being applied to him based on the content of the expression he asserts is protected by the First Amendment.

¶7 Third, and along similar lines, the fact that merely holding a patent does not in and of itself constitute conducting a business does not mean that a business cannot be based on the licensing or use of a patent. It is plain from the content of Heimermann's I-Buy business plan and letters soliciting investors that he was seeking to make money from his patent. Therefore, we are satisfied that Heimermann's conduct could properly be characterized as conducting business. There is no exception in the prison rule for conducting business that might be of use to the government or that was initiated by a third party.

¶8 Fourth, Heimermann was not found guilty of fraud based solely on his silence about his current incarceration status, but rather based on the misleading use of an address on his letterhead other than the prison address. By using that address, he was implying that he was no longer incarcerated, and the acknowledgment in the text of the letter that he had developed his patent while in

prison did not correct the misleading implication that he was currently residing somewhere other than in prison. Therefore, we are satisfied the evidence was sufficient to find him guilty of that fraud count.

¶9 Fifth, Heimermann's right to access to the courts was not violated by the committee's consideration of materials another inmate had prepared for use in a civil suit as being evidence of improper business activity. Heimermann was not being punished for filing the civil suit, but rather for conduct that was revealed as a result of the civil suit. There are any number of situations in which testimony or evidence provided in a civil suit may provide grounds for subsequent criminal prosecution. We see no reason why evidence from a civil case could not also provide grounds for a prison disciplinary action.

¶10 Finally, assuming without deciding that a challenge to the enforceability of a prison rule on public policy grounds could properly be raised in the scope of a certiorari proceeding, we are not persuaded that the prison's rule limiting inmates' business activities is contrary to public policy.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).