**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 24, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-1369** **Cir. Ct. No. 01-CV-483**

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

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**STATE OF WISCONSIN EX REL.**
**MICHAEL S. ELKINS,**

**PETITIONER-APPELLANT,**

**V.**

**GARY MCCAUGHTRY,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 DYKMAN, J. Michael Elkins appeals from an order dismissing his petition for certiorari review of a prison disciplinary action. He also challenges the trial court's denial of his motions for contempt and substitution of judge. The trial court dismissed the petition on the grounds that Elkins had failed to exhaust

his administrative remedies. We agree. In addition, we conclude that the trial court properly exercised its discretion when it denied Elkins's motion for contempt, and that Elkins's motion for substitution of judge was untimely. Therefore, we affirm.

## BACKGROUND

¶2 Elkins is an inmate at the Green Bay Correctional Institution (GBCI), but this appeal arises from a incident occurring while he was incarcerated at the Waupun Correctional Institution (WCI). In February of 2001, while at the Waukesha County Jail for a court appearance, Elkins had a verbal altercation with jail personnel when he was not permitted a court-ordered telephone call to his daughter. An officer issued an incident report, which Elkins claims was dismissed by the jail supervisor. On February 15, 2001, Elkins returned to WCI. He was issued a conduct report charging him with disobeying orders, disrespect and disruptive conduct for the incident at the Waukesha County Jail. The hearing officer found Elkins guilty. Elkins appealed and the warden affirmed the decision on March 26, 2001.

¶3 On April 2, 2001, Elkins filed a request for corrections complaint examiner (CCE) review. On April 5, 2001, he was transferred to GBCI. He did not receive an "acknowledge number" from WCI on his complaint, and so filed an inmate complaint from GBCI on May 11, 2001. The inmate complaint examiner (ICE) rejected this complaint as untimely, because it was not filed within fourteen days of the warden's decision. Elkins then sought review by the CCE. The complaint was again rejected as untimely under WIS. ADMIN. CODE § DOC 310.09(6). The CCE further stated that "double jeopardy is not a factor in non-

criminal administrative processes." The secretary of the department of corrections affirmed.

¶4 Elkins petitioned for certiorari review in the circuit court, alleging that he had exhausted his administrative remedies. He contends that WCI could not discipline him when the jail supervisor had previously dismissed the charges against him arising from the same incident. He also alleges that he was denied his right to have witnesses at his hearing.

¶5 The DOC moved to dismiss and the trial court granted the motion, ruling that Elkins had not followed proper procedure for appealing a disciplinary decision because the first complaint filed, on April 2, 2001, was not an inmate complaint but a request for CCE review. The first inmate complaint Elkins filed was dated May 11, 2001, well outside the fourteen-day deadline for appealing a disciplinary decision. Thus the trial court concluded that Elkins had not exhausted his administrative remedies and dismissed the petition. Elkins appeals.

## DISCUSSION

### *Exhaustion of Administrative Remedies*

¶6 Whether a petition or complaint states a claim for relief is a question of law, which we review de novo. ***State ex rel. Freeman v. Berge***, 2002 WI App 213, ¶12, 257 Wis. 2d 236, 651 N.W.2d 881. All facts pleaded are assumed to be true, and a petition will be only dismissed when it is quite clear that under no circumstances can a petitioner recover. ***Id.***

¶7 Under the Prisoner Litigation Reform Act (PLRA), WIS. STAT. § 801.02(7)(b) (2002-02),[1] a prisoner must exhaust all administrative remedies made available by the DOC before seeking certiorari review in circuit court. ***State ex rel. Hensley v. Endicott***, 2001 WI 105, 245 Wis. 2d 607, 629 N.W.2d 686. After being found guilty in a disciplinary proceeding, an inmate has ten days to appeal that decision to the warden. WIS. ADMIN. CODE § DOC 303.76(7). If the warden issues an adverse decision, an inmate claiming both procedural and non-procedural errors must then exhaust the remedies available under the Inmate Complaint Review System (ICRS). Sections DOC 310.08(3) and 310.04; ***State ex rel. Smith v. McCaughtry***, 222 Wis. 2d 68, 79, 586 N.W.2d 63 (Ct. App. 1998), *modified in part*, ***Hensley***, 2001 WI 105. The first step is to file a complaint with an inmate complaint examiner (ICE). Section DOC 310.09(6) This is to be done "within 14 calendar days after the occurrence giving rise to the complaint, except that the institution complaint examiner may accept a late complaint for good cause." ***Id***. Following an unfavorable decision by the ICE, § DOC 310.13(1) requires that the inmate next file an appeal with the CCE. This is sometimes referred to as a "Step 2" complaint, the initial filing with the ICE being "Step 1."

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[1] Wisconsin Stat. § 801.02(7)(b) reads:

> No prisoner may commence a civil action or special proceeding, including a petition for a common law writ of certiorari, with respect to the prison or jail conditions in the facility in which he or she is or has been incarcerated, imprisoned or detained until the person has exhausted all available administrative remedies that the department of corrections has promulgated by rule or, in the case of prisoners not in the custody of the department of corrections, that the sheriff, superintendent or other keeper of a jail or house of correction has reduced to writing and provided reasonable notice of to the prisoners.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The CCE makes a recommendation to the DOC secretary, who then takes final action. Sections DOC 310.13(6) and 310.14. After receipt of the secretary's decision, an inmate has forty-five days to file a petition for certiorari review. WIS. STAT. § 893.735 (2001-02).

¶8 The question presented is whether Elkins properly exhausted his administrative remedies before filing his petition for certiorari review. The DOC argues, and the trial court agreed, that although Elkins filed a Step 2 complaint with the CCE on April 6, 2001, he did not complete the first mandatory step, an inmate complaint filed with the ICE, until May 11, 2001. Thus Elkins failed to timely complete the ICRS procedure because his ICE complaint was received several weeks after the fourteen-day deadline, which had expired on April 9, 2001.

¶9 Elkins argues that good cause exists for extending the period in which to appeal the warden's decision to the ICE. However, Elkins's briefs confuse the issue. He appears to use "Step 1" and "Step 2" interchangeably to refer to the complaint received by the CCE on April 6, 2001. For example, he states that the record "includes the Appellant's first Complaint, which is clearly stamped April 6, 2001 after it was submitted on April 4, 2001, well within the fourteen-day time limit."[2] Several pages later he agrees that the first complaint he filed was a Step 2 complaint but contends that the CCE should have returned the document and told him that he needed to file a Step 1 complaint first. And, in his petition he alleges that he "filed his 'Step 1' 'I.C.I.' to the Waupun Complaint Examiner" but then mailed a "Step 2" to Madison when he did not receive a response to the first complaint. In short, when Elkins asserts that he filed a Step 1

[2] Elkins dated and signed this CCE complaint on April 2, 2001.

complaint while still at WCI, we cannot tell whether he is referring to the complaint received by the CCE on April 6, 2001, or if in fact there was an earlier complaint that is not in the record.

¶10 In any event, because the affidavit from the institution complaint supervisor at WCI states that "[t]here is no record at all of inmate Michael Elkins ever filing an inmate complaint at WCI regarding an incident at the Waukesha county jail on February 13, 2001," we determine, as did the trial court, that the first document filed by Elkins after the warden denied his appeal was the April 6, 2001 Step 2/CCE complaint.

¶11 As stated, WIS. ADMIN. CODE § DOC 310.08(3), requires the filing of a Step 1 complaint to the ICE to initiate the administrative remedies for appealing a disciplinary decision when an inmate raises both substantive and procedural issues. ***Smith***, 222 Wis. 2d at 79. It is not enough for Elkins to complete the steps in the administrative appeal process. He must do so in a timely manner. This same issue, but involving the federal PLRA, was addressed by the Seventh Circuit in ***Pozo v. McCaughtry***, 286 F.3d 1022 (7th Cir. 2002). The federal PLRA, 42 U.S.C. § 1997e (2000), served as the model for Wisconsin's PLRA, and, like WIS. STAT. § 801.02(7)(b), contains an exhaustion of administrative remedies requirement.[3] Therefore, cases interpreting the exhaustion requirements of the federal law are instructive in resolving issues that arise in the application of Wisconsin's PLRA. ***Hensley***, 2001 WI 105 at ¶¶10-13

[3] Under the federal statute, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2000).

(following the reasoning of cases interpreting the federal statute and holding that there is no common law futility exception to the exhaustion requirement in Wisconsin's PLRA). In ***Pozo***, the Seventh Circuit held that an inmate had failed to properly exhaust his administrative remedies, and therefore dismissed his action challenging the conditions of confinement. Pozo filed the proper administrative complaint, but instead of promptly appealing the adverse decision within ten days, he waited one year before he appealed. This belated appeal was then rejected by the DOC as untimely. Nevertheless, Pozo argued that because the DOC had the discretion to consider late appeals, his extremely tardy filing was still sufficient to exhaust administrative remedies for purposes of bringing an action under U.S.C. 42 § 1983. The Seventh Circuit was not persuaded:

> [U]nless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to "exhaust" state remedies by spurning them, which would defeat the statutory objective of requiring the prisoner to give the prison administration an opportunity to fix the problem—or to reduce the damages and perhaps to shed light on factual disputes that may arise in litigation even if the prison's solution does not fully satisfy the prisoner.

***Pozo***, 286 F.3d at 1023-24. For these reasons, "a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require," in order to successfully exhaust administrative remedies. ***Id***. at 1025.

¶12 Admittedly, Elkins presents a more sympathetic case than the inmate in ***Pozo***. Elkins did not let a year go by before attempting to complete his administrative remedies. And, unlike Pozo, he offers an explanation for his late filing. Elkins contends that his May 11, 2001 ICE complaint should have been accepted by the DOC because there was good cause for his missing the § DOC 310.09(6) deadline, which passed on April 9, 2001. Elkins argued to the circuit

court that "clearly a move from one prison to another is good cause. [A]dditionally a chief judge ordering said prison to give me my legal work after I had been denied paper and pencil for weeks, is another good cause." On appeal, Elkins adds to his good cause argument, stating that he filed a Step 2 complaint on April 2, 2001, because that was the form given to him by WCI prison staff when he was in segregation. He states that inmates must request DOC forms from prison staff during certain "handout times." According to Elkins, he told the officer that he wanted to appeal the warden's decision. The officer informed him that "a 'Step-2' was needed since 'Step-1' just goes back to the warden." Elkins asserts that he had no reason not to believe the officer so he filled out a Step 2 complaint and mailed it to the Madison address on the form.[4] This document is in the record and is date stamped April 6, 2001. There is nothing in the record to show that the CCE notified Elkins that this complaint had been received or that it informed him that he needed to file a Step 1 complaint first.[5]

¶13 Elkins is correct in arguing that WIS. ADMIN. CODE § DOC 310.09(6) gives the ICE discretion to accept a Step-1 complaint after the fourteen-day period "for good cause." No "good cause" determination was made before Elkins's May 11, 2001 ICE complaint was rejected as untimely. The circuit court did not address Elkins's good cause argument below, nor is it addressed by the DOC in this appeal. Certainly an inmate in segregation who wants to appeal a disciplinary decision may be subject to restrictions in obtaining the proper forms

[4] A Step 1 complaint would have been reviewed by the ICE at WCI.

[5] This would appear to be a violation of WIS. ADMIN. CODE § DOC 310.13(4), which provides that "[t]he CCE shall, within 5 working days after receiving an appeal, issue a written receipt of the appeal to the inmate."

and materials that could constitute good cause for extending the § DOC 310.09(6) deadline in a particular case. However, Elkins's failure to raise his good cause argument in the administrative proceedings precludes consideration of this issue on appeal. ***State ex rel. Peckham v. Krenke***, 229 Wis. 2d 778, 795, 601 N.W.2d 287 (Ct. App. 1999). Whether good cause existed in April and May of 2001 to allow Elkins to submit an ICE complaint after the § DOC 310.09(6) deadline requires factual determinations regarding Elkins's access to the correct forms and writing materials. But Elkins did not raise this issue in his May 11, 2001 Step 1 complaint, nor was it mentioned when that complaint was rejected as untimely and he appealed to the CCE. His failure to raise good cause in the administrative proceedings, when the error he claims now could have been most easily reviewed and, if appropriate, corrected, bars him from asserting that issue now. ***Santiago v. Ware***, 205 Wis. 2d 295, 326-27, 556 N.W.2d 356 (Ct. App. 1996).

¶14 Because WIS. ADMIN. CODE § DOC 310.9(6) requires that an inmate commence the administrative appeal proceedings by filing an ICE complaint within fourteen days of the warden's decision, and Elkins's ICE complaint was not received until May 11, 2001, over one month after the fourteen-day time period for appeals had expired, his complaint was properly dismissed as untimely. Further, by not raising his good cause argument at the administrative level, Elkins has waived that issue on appeal. The trial court did not err in dismissing Elkins's petition for failure to exhaust administrative remedies.

***Filing Fees***

¶15 Elkins also claims that the trial court erroneously exercised its discretion when it declined to find GBCI staff in contempt of court for their refusal to use funds from his release account to pay filing and service process fees. A

court may hold a person in contempt "if he or she has the ability, but refuses, to comply with a circuit court order." ***Benn v. Benn***, 230 Wis. 2d 301, 309, 602 N.W.2d 65 (Ct. App. 1999). We review the trial court's use of its contempt power for an erroneous exercise of discretion. ***State ex rel. N.A. v. G.S.***, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990). We conclude that the trial court properly denied Elkins's motion.

¶16 WISCONSIN STAT. § 814.29(1m)(d) provides:

> If the court determines that the prisoner who made the affidavit [of indigency] does have assets in a trust fund account, whether accessible to the prisoner only upon release or before release, the court shall order an initial partial filing fee to be paid from that trust fund account before allowing the prisoner to commence or defend an action, special proceeding, writ of error or appeal. The initial filing fee shall be the current balance of the prisoner's trust fund account or the required filing fee, whichever is less.

¶17 Under WIS. STAT. § 814.29(1m)(d), a prisoner's trust account, which includes his release account, is accessible for purposes of paying litigation costs. ***Spence v. Cook***, 222 Wis. 2d 530, 538, 587 N.W.2d 904 (Ct. App. 1998). While ***Spence*** concerned payment of court filing fees from an inmate's release account, we observed that there was "no reason why other litigation fees and costs within the meaning of § 814.29, Stats., would not be payable with release account funds." ***Id***. at 538 n.9.

¶18 The record includes a number of letters from Elkins to the trial court concerning the difficulties he was having with GBCI staff regarding payment of his filing and process server fees. Elkins wrote that he did not have sufficient funds in his general account, and therefore wanted to pay the rest of his process server fee from his release account. At least one memorandum from the GBCI

business office asserts that funds in a release account could only be used at an inmate's release or to pay PLRA filing fees but were not available for service process fees. This is clearly incorrect under ***Spence***.

¶19 On January 4, 2002, the trial court, citing ***Spence***, ordered GBCI to allow Elkins to deduct his service process fees from his release account. On that date, Elkins had less than $14.00 in his regular account and $78.13 in his release account. Accordingly, GBCI staff should have taken funds from Elkins's release account to pay the $30.84 fee because Elkins did not have sufficient funds in his general account to cover it. Instead, GBCI waited until after Elkins's wages ($50.03) were deposited on January 9, 2002, and then paid the fee on January 11 out of his general account.

¶20 In the meantime, Elkins filed a motion to show cause on January 8, 2002, requesting the trial court to find GBCI business office staff in contempt for their refusal to allow him to pay his filing and process server fees with funds in his release account.[6] The trial court denied his request, stating "[t]his Court's January 4, 2002, Order was implicitly premised on the fact or belief that your regular account had insufficient funds to pay the service fee," and therefore GBCI's "minor deviation" from the terms of the order was not serious enough to warrant contempt sanctions.

¶21 On appeal, Elkins contends that the trial court should have held the GBCI business office staff in contempt of court because, rather than a "minor

[6] In a letter dated October 26, 2001, Elkins mentions a September 10, 2001 order that "ordered Gre[e]n Bay to allow me to pay the filing fee in the above case." But this order is not in the record and Elkins's contempt motion only seeks sanctions for noncompliance with the trial court's January 4, 2002 order. Therefore we confine our analysis to the later order.

deviation," staff's refusal to use his release account to pay the service fees caused months of delay in obtaining service. In addition, his repeated attempts to have the fees paid required him to spend a substantial amount of money on postage and copies.

¶22 The correspondence in the record does not explain why it was so difficult for Elkins to obtain payment of his court fees. Although we agree that the institution has discretion to refuse to withdraw funds from an inmate's release account when there are sufficient funds in his general account, it is evident that GBCI staff was not aware that service fees, as well as filing fees, could properly be taken from a release account under ***Spence***.

¶23 Nevertheless, we conclude that the trial court properly exercised its discretion when it denied Elkins's motion for contempt. Elkins's motion was filed on January 8, 2002. The process server fees were paid three days later, on January 11, 2002.[7] Thus the services fees were paid within one week of the circuit court's order. And, in its January 15, 2002 letter, the trial court stated that it would not grant Elkins's motion for contempt because "[t]his Court's January 4, 2002, Order was implicitly premised on the fact or belief that your regular account had insufficient funds to pay the service fee." According to the record before us, Elkins's motion for contempt did not provide the court with a copy of his prison trust fund account statement to demonstrate that the balance of the service fees had to come from his release account because he did not have enough money in his

[7] We agree that GBCI has the discretion to require that inmates deplete their general account before withdrawing funds from their release account to pay filing fees. However, we note that the issue of whether it is within GBCI's discretion to postpone compliance with a court order until an inmate's bi-weekly pay is deposited is not before us.

general account. For these reasons we conclude that the court properly exercised its discretion when it denied Elkins's motion for contempt.

***Substitution of Judge***

¶24 Under WIS. STAT. § 801.58(1), a motion for substitution of judge must be filed no later than sixty days after the filing of the petition for certiorari review. Elkins's petition was received by the clerk of court on June 25, 2001. After the filing fees were paid, Elkins's petition was stamped "filed" on September 21, 2001. Thus under the statute, any motion for substitution should have been filed by November 21, 2001. The motion for substitution was not filed until November 30, 2001, nine days past the § 801.58(1) deadline.

¶25 Elkins claims error on the ground that his motion for substitution of judge was in fact granted, but the original judge continued to issue rulings in his case. He asserts that there was a judicial transfer moving this action to another judge, but that document is missing from the record. He concludes that because of the alleged transfer, Judge Wolfe had no authority to rule on any matters in this action as of November 30, 2001.

¶26 Our review of the record failed to produce either an order denying Elkins's motion or an order assigning a new judge. However, the docket statement contains an entry acknowledging receipt of Elkins's motion on November 30, 2001, and that "Judge Storck is now Judge of Record." A second entry for that same day states simply "judicial transfer."

¶27 Even if we assume that Elkins's untimely motion for substitution was granted, the actions of which he complains are not before us in this appeal. The specific actions by Judge Wolfe that Elkins finds objectionable are her letters

responding to his motion to set aside the verdict and his motion to correct the record. Judge Wolfe informed Elkins that his motion to set aside the verdict post-dated the notice of appeal and therefore "the circuit court no longer has authority to make any decisions in the case." Although there are a number of motions that the circuit court may hear pending appeal under WIS. STAT. § 808.075, and a motion to set aside the verdict is one of them,[8] Judge Wolfe's refusal to consider that motion is not before us. Elkins filed a notice of appeal from the final order dismissing his petition for certiorari review, but he never filed a notice of appeal from Judge Wolfe's subsequent rejection of his motion to set aside the verdict. Therefore, we lack jurisdiction to address this issue. ***Chicago & N.W. R.R. v. LIRC***, 91 Wis. 2d 462, 473, 283 N.W.2d 603 (Ct. App. 1979) (stating "[a]n appeal from a judgment does not embrace an order entered after the judgment" and therefore is not reviewable). Further, it was appropriate for Judge Wolfe to decline to act on Elkins's motion to correct the record, because that motion was filed in circuit court after the record had been sent to the court of appeals.

*By the Court*.—Order affirmed.

Not recommended for publication in the official reports.

[8] A party may move to set aside the verdict under WIS. STAT. § 805.15. WISCONSIN STAT. § 808.075(1) provides that "[i]n any case, whether or not an appeal is pending, the circuit court may act under ss. 804.02(2), 805.15, 805.16, 805.17(3), 806.07, 806.08, 806.15(2), 806.24, 808.07(1) and (2) and 809.12." Of course, a motion to set aside the verdict is not a valid response to the trial court's order dismissing Elkins's petition for certiorari review.