COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2912 **Cir. Ct. No. 01-CV-2913**

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

STATE OF WISCONSIN EX REL. TONY G. MERRIWEATHER,

PETITIONER-APPELLANT,

V.

GERALD BERGE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Tony Merriweather appeals an order of the circuit court dismissing his petition for certiorari review of an Administrative Confinement Review Committee (ACRC) decision. The circuit court dismissed the petition based on its factual finding that Merriweather filed his petition late.

We conclude that we need not address the timeliness of Merriweather's petition because, even if timely, the petition was properly dismissed.

Background

¶2 The procedural history is complicated and need not be recited in detail here. This appeal involves a March 1, 2001, decision of the ACRC to keep Merriweather in administrative confinement. With respect to this decision, Merriweather exhausted his administrative remedies and then filed a petition for a writ of certiorari in the circuit court. The circuit court dismissed the petition based on its finding that the petition, filed on October 24, 2001, was filed more than forty-five days after August 13, 2001, the date of the decision of the Secretary of the Department of Corrections.

¶3 We note that Merriweather filed two petitions challenging two separate agency decisions. The petition at issue here was given trial court designation No. 01-CV-2913. The other petition filed the same day was given trial court designation No. 01-CV-2914. We mention this fact because certain arguments made in the petitions overlap and the circuit court disposed of both petitions in the same order.

Discussion

¶4 Merriweather argues that the circuit court erred when it dismissed his petition for a writ of certiorari based on the ground that the petition was filed late. We question whether the circuit court's finding that the petition was filed late is supported by the record. It appears the circuit court made factual assumptions about how and how quickly mail is normally processed in the prison system and then further assumed that this normal process must have occurred in

this particular case. However, we need not address the timeliness of the petition because we conclude that the circuit court's decision should be affirmed on other grounds, namely, that arguments made in Merriweather's petition lack merit.

¶5 First, Merriweather asserts that his March 1, 2001, administrative confinement hearing was invalid because, prior to that hearing, the ACRC failed to conduct a hearing every six months, as required by WIS. ADMIN. CODE § DOC 308.04(10). Merriweather claims the ACRC thereby lost jurisdiction over his continued placement in administrative confinement. Assuming, for the sake of argument, that the ACRC failed to abide by the six-month requirement prior to Merriweather's March 1, 2001, hearing, we nonetheless reject Merriweather's argument.

¶6 WISCONSIN ADMIN. CODE § DOC 308.04(10) states:

> **(10)** An inmate's progress in administrative confinement shall be reviewed by the ACRC at least every 6 months following the procedures for review under this section. Monthly progress will be reviewed consistent with the segregation review process as outlined in s. DOC 303.70(12).

Merriweather asserts, without explanation, that once the ACRC fails to hold a hearing "at least every 6 months," all subsequent hearings are invalid for want of jurisdiction. That is, Merriweather argues that a defect in one proceeding invalidates all subsequent proceedings. However, the case Merriweather relies on, ***State ex rel. Curtis v. Litscher***, 2002 WI App 172, 256 Wis. 2d 787, 650 N.W.2d 43, *review denied*, 2002 WI 121, 257 Wis. 2d 118, 653 N.W.2d 890 (Sept. 26, 2002) (No. 01-1804), does not support his argument. ***Curtis*** concerns a defective disciplinary hearing, and addresses the ramifications of invalidating that defective hearing when findings made in the course of the defective proceeding were relied

on in future disciplinary hearings. ***Id***., ¶¶22-27. In contrast, Merriweather's challenge is directed at an administrative confinement hearing that did not involve reliance on defective findings from any previous hearing. Merriweather does not explain why ***Curtis*** applies here, and we see no apparent connection.

¶7 Second, Merriweather argues that WIS. ADMIN. CODE § DOC 308.04(10) is unconstitutionally vague because it leaves a person to guess regarding the effect of the ACRC's failure to follow its own rules. Here again, Merriweather is referring to his allegation that the ACRC failed to abide by the "every 6 months" requirement. This vagueness argument lacks merit on its face.

¶8 The vagueness doctrine was explained in ***State v. Curiel***, 227 Wis. 2d 389, 597 N.W.2d 697 (1999):

> The "principles underlying the void for vagueness doctrine ... stem from concepts of procedural due process." "Due process requires that the law set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication." Based upon these concepts of due process, a statute is void for vagueness if it fails to give notice to those wishing to obey the law that their conduct falls within the proscribed area, or if it fails to provide those who must enforce and apply the law objective standards with which to do so.

Id. at 414-15 (quoting and citing ***State v. Popanz***, 112 Wis. 2d 166, 172, 172-73, 332 N.W.2d 750 (1983)). Merriweather confuses an alleged ambiguity regarding the appropriate remedy when the ACRC fails to follow a required procedure with constitutional due process rights that protect citizens from being penalized under a law that fails to give sufficient notice of the prohibited conduct or fails to provide an objective standard for enforcement. Thus, the ambiguity alleged by Merriweather is not a constitutional vagueness issue.

¶9 Third, Merriweather asserts that in 2000, when his release from administrative confinement was targeted for September 22, 2000, that target date was irrevocable. He argues that the State lost jurisdiction over him, and therefore was required to release him from administrative confinement, because he was not released by the target date. The State's response is that neither the record nor other authority supports Merriweather's assertions. We agree.

¶10 In the reports documenting the monthly reviews conducted in May, June, and July of 2000, a date of "9/22/00" appears in the box headed "Maximum Release from Status Date." Merriweather argues that this constituted a mandatory release date from administrative confinement. However, we find nothing in these documents to support this factual interpretation. Merriweather also relies on WIS. ADMIN. CODE §§ DOC 308.04(10) and 303.70(12) and ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821. But none of these sources support Merriweather's argument. Section DOC 308.04(10) requires monthly review of an inmate's status in administrative confinement, consistent with the provisions of § DOC 303.70(12). Section DOC 303.70(12) states that "[t]he warden may review an inmate's status in program segregation and disciplinary separation at any time and may place the inmate in the general population at any time." ***Anderson-El*** concerns an inmate's challenge to prison disciplinary decisions based on lack of a second written notice of disciplinary hearings. ***Anderson-El***, 234 Wis. 2d 626, ¶15.

¶11 Fourth, Merriweather argues that the ACRC decision should be reversed and he should be released from administrative confinement because the State failed to follow a 1998 court order directing it to strike the 1994 "shake-down-for-cigarettes" incident from the record in Merriweather's administrative confinement proceedings. However, the 1998 court order did not strike the

incident from the record; rather, it struck certain statements made by confidential informants alleging Merriweather's role in the "shakedown-for-cigarettes" incident. Furthermore, with respect to a separate case before Judge Foust, No. 01-CV-2914, Merriweather made the same argument. We conclude that Judge Foust correctly decided this argument and we adopt by reference pages 2-3 of the memorandum decision in No. 01-CV-2914.

¶12 Fifth, Merriweather argues that the State lost competency to proceed when it failed to hold a hearing after remand from the warden within twenty-one days of Merriweather's receipt of notice. Merriweather made this same factual and legal argument in No. 01-CV-2914. We conclude that Judge Foust correctly resolved this issue, albeit in the context of No. 01-CV-2914, and we adopt his reasoning:

> Mr. Merriweather argues that the ACRC lost competency to proceed when it failed to conduct a hearing within 21 days after the remand from the warden. He cites Wis. Adm. Code DOC 308.04(6) and ***State ex rel. Jones v. Franklin***, 141 Wis. 2d 419, 414 N.W.2d 738 (CA 1989) in support of his argument. The Administrative Code provision simply requires that the review hearing be held between 2 and 21 days after an inmate receive the notice required under § 308.04(4). It sets no time limit for action following a remand. ***Jones*** involved Wis. Adm. Code 303.76(3). That section sets time limits for hearings on conduct reports. Following the ***Jones*** decision that rule was rewritten to make it clear the time limits were not jurisdictional. Nothing in the record here suggests why the ACRC could not act on the November 8, 2000 remand until May 25, 2001. I conclude that any error was harmless. The remand was not for the purpose of further deliberation or hearing on the part of the ACRC. Nothing in the remand suggested any different outcome was possible. Rather, the purpose of the remand was "for rehearing for the purpose of inclusion of the Behavioral Log entries used as part of the rationale for the ACRC decision." R. 14.

¶13 Finally, Merriweather contends that the circuit court lacked jurisdiction over the certiorari proceeding because the record before the court was not responsive to the writ because it did not contain four groups of documents that were part of the record. Merriweather moved the circuit court to strike the return and dismiss the case on the ground that the record was not responsive to the writ. The circuit court denied that motion, stating:

> With the exception of one item, it appears that the Petitioner is claiming about the absence of certain materials that he thought the ACRC should have reviewed, not the absence from the Return of materials that the ACRC did review. On *Certiorari* I review the record that was before the committee. The committee's failure to include original materials relating to incidents that may have been mentioned in the Return materials is a matter for the parties to argue in their briefs, not cause to strike the entire Return. One item mentioned by Petitioner, a court decision in ***Hatch v. McCaughtry***, apparently was an exhibit to a document that is included in the Return. Once we deal with the merits of this case, Petitioner is free to send me legal authority he believes supports his position, including the ***Hatch*** decision. Its absence from the Return is no reason to strike the entire pleading.

Once again, we agree with the circuit court and adopt its reasoning.

¶14 For the above reasons, we affirm the circuit court's order dismissing Merriweather's petition for a writ of certiorari.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.