COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2534 **Cir. Ct. No. 2010CV2415**

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

STATE OF WISCONSIN EX REL. JULIAN LOPEZ,

PETITIONER-APPELLANT,

V.

MICHAEL THURMER AND RICK RAEMISCH,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Julian Lopez appeals a circuit court order dismissing his petition for certiorari review of a prison disciplinary decision. Lopez contends that: (1) he was denied access to information sufficient to prepare a defense, in violation of his Due Process rights; (2) the Department of

Corrections' (DOC) finding that Lopez violated DOC rules was arbitrary and capricious; (3) the DOC improperly relied on confidential informant (CI) statements; and (4) Lopez's staff advocate refused to obtain evidence in violation of Due Process and DOC rules. We disagree, and affirm.

BACKGROUND

¶2 In March 2009, Lopez received a conduct report alleging he violated WIS. ADMIN. CODE §§ DOC 303.18, inciting a riot, and 303.20, group resistance and petitions. The conduct report stated that, in February and March 2009, information was received regarding Lopez's involvement in a conflict between two inmate gangs at Waupun Correctional Institution, the Spanish Cobras and the Latin Kings. That information was: (1) the gangs were acting together to sell and distribute marijuana in the prison; (2) a ranking member of the Latin Kings used his subordinates to distribute marijuana to members of the Spanish Cobras; and (3) tensions were rising between the gangs in connection with drugs not being delivered after payments were made.

¶3 The conduct report also stated that two inmates had been located with known gang affiliations who claimed knowledge of the activities and Lopez's involvement. Both inmates submitted signed notarized statements, but requested their identities be kept confidential based on fear of gang retaliation. Confidential Informant #1 stated that he knew Lopez to hold the number two seat in the Spanish Cobras in Waupun. He also said that, on several occasions, he heard Lopez talking with other Spanish Cobras members about "structuring up the Spanish Cobras to go to war with the Latin Kings." Confidential Informant #2 stated that he knew Lopez to hold the number two seat in the Spanish Cobras at Waupun. Confidential Informant #2 stated that he is an affiliate of the Spanish

Cobras, and knew the Spanish Cobras were having problems with the Latin Kings. The author of the conduct report stated he found the CI statements to be credible, as they were consistent and corroborated each other, neither inmate was promised anything or threatened in obtaining the statements, and Lopez was known to associate exclusively with Spanish Cobras members. The author also stated he relied on his twenty-two years of experience in monitoring gang activity within the DOC and his certification as a gang specialist.

¶4 Lopez was appointed a staff advocate to assist him in his defense. He defended against the report by claiming he did not hold a rank or any membership in the Spanish Cobras, and denying all allegations in the conduct report. In April 2009, a hearing officer found Lopez not guilty of inciting a riot under WIS. ADMIN. CODE § DOC 303.18, but guilty of group resistance and petitions under WIS. ADMIN. CODE § DOC 303.20. The hearing examiner stated that after reviewing the report, the evidence and testimony, he found it was more likely than not Lopez was part of an inmate gang. Lopez appealed to the warden, who affirmed but returned the record to the hearing officer to better document the reasons for his decision.

¶5 In August 2009, the hearing officer issued a corrected decision. The hearing officer supplemented his earlier reasoning by stating that he found it was more likely than not that Lopez held a rank within the Spanish Cobras; that the CIs corroborated each other by both stating Lopez is a ranking member of the Spanish Cobras; and both CIs identified the same inmates as recruiting members of the Spanish Cobras. Lopez appealed the hearing officer's corrected decision to the

warden, and the warden affirmed the corrected decision.[1] Lopez petitioned for certiorari review in the circuit court, and the court dismissed the petition. Lopez appeals.

STANDARD OF REVIEW

¶6 On appeal from an order dismissing a petition for certiorari review of a prison disciplinary decision, we examine only whether the DOC's decision was within its jurisdiction, according to law, arbitrary or unreasonable, and supported by substantial evidence. *See* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, ¶15, 234 Wis. 2d 626, 610 N.W.2d 821. Part of this analysis is whether the DOC followed its own rules and complied with Due Process requirements. *See* ***Curtis v. Litscher***, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43. We owe no deference to the circuit court's decision on our certiorari review of the DOC's disciplinary decision. *See* ***Anderson-El***, 234 Wis. 2d 626, ¶15.

DISCUSSION

¶7 Lopez contends that he was denied access to information necessary to prepare his defense, specifically: (1) the original CI statements; and (2) dates, times and locations of alleged incidents involving the Latin Kings and sale and

[1] In July 2009, Lopez filed a complaint with the Inmate Complaint Review System, claiming errors in his disciplinary hearing. The inmate complaint examiner (ICE) recommended dismissing the complaint. After the hearing officer issued his corrected decision in August, Lopez attempted to file an amendment to his complaint, which was rejected by the ICE because the recommendation to dismiss had already been submitted to the warden. After the complaint was dismissed, Lopez requested review by the corrections complaint examiner (CCE). On the CCE's recommendation, Lopez's complaint was returned to the ICE; on the ICE's recommendation, Lopez's complaint was dismissed with a modification allowing Lopez to appeal the hearing officer's corrected decision to the warden. After the warden affirmed the hearing officer's corrected decision, Lopez filed another complaint with ICRS, which was rejected for failing to make a procedural claim.

distribution of marijuana. Lopez acknowledges that he received summaries of the CI statements, but asserts that he needed to review the originals to ensure the summaries accurately represented the originals. He also contends that he needed information as to the specific dates, times and locations of the alleged meetings and conversations, because that information was missing in the CI statement summaries. The State responds that a review of the original CI statements, which are part of the record on appeal, reveals that the summaries provided to Lopez accurately represented the statements. Thus, it contends, the summaries were sufficient for Lopez to prepare his defense.

¶8 We conclude that the information provided to Lopez was sufficient to prepare his defense. The contents of the CI statements are accurately reflected in the summaries. Additionally, because the hearing officer found Lopez violated WIS. ADMIN. CODE § DOC 303.20(1) and (3) by occupying the "second seat" in the Spanish Cobras, any information related to conversations the CIs overheard about marijuana distribution was not relevant to Lopez's defense.

¶9 Next, Lopez contends that the finding that he violated WIS. ADMIN. CODE § DOC 303.20 was arbitrary and capricious, and not supported by substantial evidence. He points out that the hearing officer found only that Lopez held rank within the Spanish Cobras, not that he participated in any activity. Lopez argues that merely holding rank in a gang is not in itself a violation of the

rules.[2] Thus, Lopez contends, he was found guilty of violating § DOC 303.20(1) and (3) without any supporting evidence.

¶10 Under WIS. ADMIN. CODE § DOC 303.20(1): "Any inmate who participates in any group activity which is not approved … or is contrary to provisions of this chapter is guilty of an offense." Under § DOC 303.20(3):

> Any inmate who participates in any activity with an inmate gang, as defined in [WIS. ADMIN. CODE §] DOC 303.02 (11), or possesses any gang literature, creed, symbols or symbolisms is guilty of an offense. An inmate's possession of gang literature, creed symbols or symbolism is an act which shows that the inmate violates the rule. Institution staff may determine on a case by case basis what constitutes an unsanctioned group activity.

Lopez points out that §§ DOC 303.20(1) and (3) both require evidence that an inmate has *participated* in an *activity*; thus, Lopez asserts, the rules are clear that holding rank in a gang, by itself, is not a violation. We disagree.

¶11 We conclude that evidence that an inmate holds a seat of authority in an inmate gang is sufficient to establish that the inmate has actively participated in the gang. That is, holding a seat of authority in a gang necessarily involves active participation. Thus, we conclude that holding the second seat in an inmate gang is participating in an inmate gang and unapproved group activity, which is a

[2] Lopez moves this court to take judicial notice of the circuit court decision on a petition for certiorari by Edgardo Rivera, who was identified in the same CI statements used in this case as holding the number one seat in the Spanish Cobras at Waupun. Lopez points out that, on the same facts and evidence, the circuit court in Rivera's case found that mere membership in a gang is not enough to constitute a violation of WIS. ADMIN. CODE § DOC 303.20. Assuming without deciding it is appropriate to take judicial notice, *see* WIS. STAT. § 902.01, we are not bound by the circuit court decision and we disagree with it.

violation of the rules. Accordingly, the DOC decision was supported by substantial evidence, and was not arbitrary and capricious.

¶12 Lopez also argues that the DOC violated its own rules and Lopez's Due Process rights by relying on the CI statements. Lopez contends that: (1) the CI statements were not sufficiently reliable; and (2) the DOC failed to find cause for the informants not to testify. We disagree.

¶13 Under WIS. ADMIN. CODE § DOC 303.86(4): "If the institution finds that testifying would pose a risk of harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity…." The rule provides that "[t]wo anonymous statements by different persons may be used to corroborate each other." ***Id.***

¶14 Here, the CI statements were signed and taken under oath. They corroborated each other by each identifying Lopez as the second seat in the Spanish Cobras. Thus, the statements were sufficiently reliable.

¶15 Additionally, the CI statements indicate that Lopez is a ranking member of the Spanish Cobras, supporting a determination that revealing the informants' identity would pose a risk to their safety. One of the CIs also stated that he is a member of the Spanish Cobras, which further supports a finding that testifying would pose a risk of harm to that witness. The DOC completed a standard confidential informant form, which indicates it is for use when the DOC finds that testifying would pose a significant risk of bodily harm to the witness, for each confidential statement. We conclude that the record reveals the DOC did find that testifying would pose a risk of harm to each witness, based on the information provided by the informants.

¶16 Finally, Lopez contends that the DOC violated its own rules and Lopez's Due Process rights when his staff advocate failed to fulfill his duties of assisting Lopez in his defense. Lopez asserts that he was entitled to a staff advocate because he was in segregation and due to the complexity of his case. Lopez then asserts the staff advocate improperly refused Lopez's requests for the staff advocate to: (1) obtain the dates, times and locations of the conversations CI #1 claimed to have overheard; and (2) interview the author of the conduct report to obtain details regarding the alleged drug operation. We disagree.

¶17 In ***Wolff v. McDonnell***, 418 U.S. 539, 570 (1974), the United States Supreme Court held that an inmate is entitled to assistance from staff during disciplinary proceedings when the inmate is illiterate or the complexity of the case makes it unlikely the inmate will be able to collect and present the necessary evidence. Lopez contends that, under ***Wolff***, his placement in segregation entitled him to a staff advocate. In support, Lopez cites ***Eng v. Coughlin***, 858 F.2d 889, 897 (2nd Cir. 1988), where the Second Circuit stated: "Confinement in [segregation] is a factor which, like illiteracy or complexity of charges, makes it nearly impossible for an inmate to formulate a defense, collect statements, interview witnesses, compile documentary evidence, and otherwise prepare for a disciplinary hearing." The court then said: "We think that for inmates disabled by confinement in [segregation], or transferred to another facility, the right to substantive assistance is an obligation imposed by the Due Process Clause of the Fourteenth Amendment." ***Id.*** at 898. Lopez argues that Wisconsin adopted this reasoning in ***Anderson-El***, 234 Wis. 2d 626, ¶25, when the court noted that Anderson-El was in temporary lockup between receiving a conduct report and the disciplinary hearing, and stated: "In that capacity, his ability to engage in pre-trial preparation was greatly limited. An inmate does not have the flexibility of

movement or independence to prepare witnesses and discuss the case with a staff advocate with ease."

¶18 However, as the State points out, the ***Anderson-El*** court was addressing hearing notice requirements, not the right to a staff advocate. In addition, the Seventh Circuit has rejected the argument that circumstances other than an inmate's illiteracy or the complexity of the case require staff advocate assistance. In ***Miller v. Duckworth***, 963 F.2d 1002, 1004 (7th Cir. 1992), the court said:

> ***Wolff***'s provision for lay assistance is plainly contingent on the inmate's illiteracy or the complexity of the case, and Miller does not cite—nor can we find—any authority suggesting otherwise. Simply put, there is no basis for expanding the limited role of lay advocate assistance for prison inmates beyond that recognized in ***Wolff***.

We recognized the limited holding in ***Wolff*** in ***Ortega v. McCaughtry***, 221 Wis. 2d 376, 392, 585 N.W.2d 640 (Ct. App. 1998), where we said the "constitutional due process right to a staff advocate arises only where an inmate is illiterate or where 'the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case.'" (Citation omitted.) Thus, in Wisconsin, an inmate has the constitutional right to a staff advocate only where the inmate is illiterate or the case is too complex for the inmate to prepare a defense.

¶19 Here, Lopez does not contend that he is illiterate, but does contend that the issue in his disciplinary proceedings was so complex that he was unable to adequately prepare his defense without assistance. Lopez argues that he was unable to understand that he could be found guilty based on mere membership in a gang, and thus prepared to defend against allegations of specific activity. Thus,

Lopez asserts, he required the assistance of a staff advocate to help him understand the meaning of the rule and prepare an adequate defense. The State points out that Lopez was able to defend against the conduct report by submitting: (1) his own statement denying that he held rank in the Spanish Cobras; and (2) an affidavit from one of the other inmates identified as a Spanish Cobra in the CI statements, asserting that the inmate had never met Lopez. We agree that the record reveals that Lopez was able to understand the allegations against him and mount an appropriate defense. We have no basis to conclude that Lopez required a staff advocate based on the complexity of the charges.

¶20 We turn, then, to whether the assistance provided by Lopez's staff advocate violated DOC's rules. WISCONSIN ADMIN. CODE § DOC 303.78(2) provides that "[w]hen the warden assigns an advocate, the advocate's purpose is to help the accused inmate to understand the charges against the inmate and to help in the preparation and presentation of any defense the inmate has, including gathering evidence and testimony, and preparing the inmate's own statement." We have said that § DOC 303.78(2) establishes only "'limited' and 'general'" duties of a staff advocate, and that the rule "'afford[s] the advocate a great deal of discretion in carrying out those duties.'" ***Ortega***, 221 Wis. 2d at 398 (citation omitted). We do not agree with Lopez that his staff advocate's refusal to obtain further details about the allegations in the CI statements or the drug operation alleged in the conduct report violated the limited and general duties of the staff advocate set forth in § DOC 303.78(2). As explained above, Lopez was provided information relevant to the allegations against him, and the additional information Lopez sought was not necessary to his defense. Accordingly, we affirm.

By the Court.—Order affirmed.

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