

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2011

A. John Voelker
Acting 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. 2010AP1420

Cir. Ct. No. 2009CV4979

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. SCOTT R. SCHMIDT,

PETITIONER-APPELLANT,

V.

RICHARD RAEMISCH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: SHELLY J. GAYLORD, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. Scott Schmidt appeals an order dismissing his petition for certiorari review of an administrative decision on an inmate complaint in which Schmidt sought to obtain a photocopy of material from his confidential

prison file. In addition to the administrative decision, Schmidt also challenges the circuit court's ruling that he was a "prisoner" subject to the requirements of the Wisconsin Prisoner Litigation Reform Act, and its refusal to appoint counsel on his behalf. We agree that Schmidt should not have been categorized as a prisoner while he was being detained subject to WIS. STAT. ch. 980 (2009-10),¹ but we conclude that Schmidt was not entitled to counsel or relief on his certiorari claim. Accordingly, we affirm in part and reverse in part.

BACKGROUND

¶2 The administrative decision at issue on this appeal arose from an Inmate Complaint Review System (ICRS)² complaint that Schmidt filed with officials at the Oshkosh Correctional Institution. Schmidt alleged that, after being allowed to review his social services file—including the confidential portions—in the prison records office, he asked for a photocopy of his confidential Alcohol and Other Drug Abuse (AODA) treatment summary and progress reports. The record custodian refused Schmidt's request, informing him that he would first need to obtain permission from any or all treatment providers.

¶3 The Inmate Complaint Examiner (ICE) determined that the prison record custodian routinely tells inmates that materials in their confidential files cannot be photocopied and also tells them that they have the option of writing to the initial provider. The ICE further determined that the record custodian's

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² ICRS affords inmates a procedure for raising certain "significant issues regarding rules, living conditions, staff actions affecting institution environment, and civil rights complaints." *See* WIS. ADMIN. CODE § DOC 310.08(1).

actions were in accordance with unspecified prison policy³ and therefore recommended dismissal of the complaint. The reviewer accepted the ICE's recommendation and dismissed the complaint.

¶4 Schmidt appealed the dismissal of his complaint to the Corrections Complaint Examiner (CCE), complaining that the ICE had not specified what policy he was talking about and asserting that there was nothing in the administrative code, the materials posted in the prison living units, or the inmate institution handbook that would allow prison officials to refuse to provide an inmate with a photocopy of his AODA treatment summary. Schmidt further asserted that any such policy would be contrary to unspecified provisions in the United States Constitution, federal statutes, and Wisconsin statutes and caselaw. Finally, he complained that the records custodian had not provided him with any contact information for his treatment providers, at least one of whom no longer worked at the prison.

¶5 The CCE noted that the policy at issue was OSCI Treatment Policy 717.5 and recommended that the Office of the Secretary of the Department of Corrections dismiss the appeal. After the Office of the Secretary accepted the CCE's recommendation, Schmidt sought judicial review by certiorari.

¶6 Schmidt sought to waive prepayment of the filing fee for his certiorari action and objected when the circuit court required him to follow the procedures applicable to prisoners since, by that time, he had been transferred to the Wisconsin Resource Center pursuant to WIS. STAT. ch. 980 proceedings. He

³ The ICE's report refers to the "above listed OSCI policy," but does not actually include a citation to the policy.

also filed a motion for the appointment of counsel, which the circuit court denied. The circuit court ultimately denied Schmidt's certiorari action, and he appeals that decision, as well as the court's rulings on his status as a prisoner and his request for counsel.

STANDARD OF REVIEW

¶7 Our certiorari review is limited to considering whether administrative officials: (1) kept within their jurisdiction; (2) proceeded on a correct theory of law; (3) did not act arbitrarily; and (4) reasonably made the determination in question based upon the evidence before them. *State v. Waushara Cnty. Bd. of Adjustment*, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514. We presume an administrative decision to be correct and valid, and we will not set aside an agency's factual findings if they are supported by any reasonable view of the evidence or substitute our discretion for that of the agency. *Id.*, ¶13. Because we review the administrative decision directly, we need not address any of Schmidt's allegations of error regarding the circuit court's review of the decision.

DISCUSSION

¶8 We begin with Schmidt's complaint that the circuit court refused to appoint counsel on his behalf. We agree with the circuit court that there is no constitutional or statutory right to counsel on a certiorari action such as this one. While a court has the authority to make a discretionary appointment where there is no right to counsel, it may properly base such a discretionary appointment on its own interests, rather than those of the litigant. *See Roberta Jo W. v. Leroy W.*, 218 Wis. 2d 225, 240, 578 N.W.2d 185 (1998). Here, the circuit court properly declined to make a discretionary appointment for several reasons, including that

the claim appeared “relatively straightforward” and that Schmidt had adequate legal resources at the Wisconsin Resource Center.

¶9 Moving to the merits of the certiorari claim, we conclude that the ICRS decision upholding the record custodian’s refusal to photocopy Schmidt’s AODA treatment summary was in accordance with law, not arbitrary, and reasonably based upon the evidence. Under OSCI Treatment Policy and Procedure 717.5(1)(E), “materials filed in the confidential envelope [of an inmate’s social services file] are not available to the inmate or anyone not authorized to have access.” Section 717.5(2)(A) further provides that “[r]equests to review the inmate’s clinical services record shall be sent directly to the Clinical Services Department, using the DOC-761.” Since Schmidt did not utilize the DOC-761 form to obtain authorization to access his treatment records,⁴ the record custodian properly refused to make a copy the AODA treatment summary.

¶10 Schmidt points out that the record custodian had already violated the prison policy by allowing him to see the confidential portion of his social services file in the records office. While that may be true, the record custodian was not required to compound his error. Because Schmidt had no right to see his AODA treatment summary in the first place, he certainly had no right to obtain a photocopy of it.

¶11 Schmidt complains that the ICE report does not contain an interview with the record custodian. However, given the ICE’s discussion of the record

⁴ Schmidt’s argument that it would be improper for him to directly contact a staff member or treatment provider at their home address is completely irrelevant, since that is not what the policy required him to do.

custodian's general practice, it is apparent that the ICE did, in fact, contact the record custodian in some manner. We need not address whether the ICE properly documented the contact because the record custodian confirmed rather than disputed Schmidt's version of events. In other words, any error in this regard was harmless because the complaint would have been decided as a question of law based upon the same facts alleged by Schmidt whether the ICE had interviewed the custodian or not.

¶12 Schmidt similarly complains that the ICE report did not cite the policy on which the record custodian relied. However, the ICE's recommendation was an intermediary step in the ICRS process. The apparent oversight in failing to provide the policy citation had already been cured by the time the Office of the Secretary rendered the final administrative decision that is the subject of this certiorari action.

¶13 Schmidt next challenges the CCE's failure to consider the Wisconsin statutes, the open records law, or the Federal Health Insurance Portability and Accountability Act (HIPAA). However, Schmidt's appeal to the CCE did not cite any specific provision of the laws that he was alleging had been violated. To the extent that he made a general claim that any policy precluding him from obtaining access to his own health care records would be contrary to law, we are not persuaded that is the case. Both the open records law and HIPAA contain provisions excluding access to health records when disclosure might endanger the health, safety, security, or rehabilitation of the individual, other inmates, or staff. *See* WIS. STAT. § 19.35(1)(am)2.c. & d.; 45 C.F.R. 164.524(a)(2)(ii); *see also State ex rel. Bergmann v. Faust*, 226 Wis. 2d 273, 283-84, 595 N.W.2d 75 (Ct. App. 1999) (discussing balancing test for denying open records requests). Treatment providers in a prison context must feel free to provide candid

assessments without fearing for their safety. It is therefore appropriate to require their permission before disclosing a particular treatment report to an inmate. In sum, we see no basis to set aside the administrative decision.

¶14 Finally, Schmidt argues that the circuit court erred in determining that he was a “prisoner” within the meaning of WIS. STAT. § 801.02(7)(a)2. for purposes of considering whether to waive his filing fee and whether he could recover costs for the action. Both parties agree that, at the time Schmidt filed his fee waiver petition in the circuit court, he was being detained at the Wisconsin Resource Center while ch. 980 proceedings were pending but he had not yet been committed under that statute. We understand the respondent’s position to be that a person being detained pursuant to § 980.04(3) based upon probable cause to believe that he or she is eligible for a ch. 980 commitment meets the definition of a “prisoner” as someone who is detained in a “correctional institution,” and does not come within the exclusion for persons who have been committed under ch. 980. *See* § 801.02(7)(a)2. We disagree with the first proposition.

¶15 The statute defines a “correctional institution” as any state or local facility that “incarcerates or detains any adult accused of, charged with, convicted of, or sentenced for any crime.” *See* WIS. STAT. § 801.02(7)(a)1. We are not persuaded that a person who is being detained pursuant to pending ch. 980 proceedings, after the period of initial confinement, is being held as the result of being “accused of, charged with, convicted of, or sentenced for any crime,” even if the same facility might be detaining others in that situation. Rather, the detention of a person subject to a ch. 980 petition is civil, not criminal, in nature and is outside the intended scope of the law imposing additional filing requirements on prison inmates. Thus, a facility in which a ch. 980 subject is being detained is not a “correctional institution” with respect to the ch. 980 subject.

¶16 We therefore conclude that the circuit court erred in applying the filing requirements for prisoners to Schmidt. Accordingly, we remand with directions for the circuit court to consider whether Schmidt would have been eligible for a fee waiver if his petition had not been subjected to the filing requirements for prisoners, and if so, to issue him a refund of his filing fee. Because Schmidt has not prevailed on the merits of his certiorari action, it is not necessary to consider his argument that he would have been entitled to costs against the State if he had not been categorized a prisoner.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

