

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2004

Cornelia G. Clark
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. 04-0131
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000558

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. MICHAEL S. ELKINS,

PETITIONER-APPELLANT,

V.

PAM WALLACE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Michael Elkins appeals an order which dismissed his petition for certiorari review of three prison disciplinary decisions and quashed the writ which had previously been issued. Because Elkins concedes in his reply brief that his certiorari action was not timely with respect to conduct report no. 1362025, we will address only conduct report nos. 1423496 and 1361555 in this

opinion. For the reasons discussed below, we conclude that the certiorari petition was untimely for conduct report no. 1423496 and that Elkins failed to properly exhaust his administrative remedies for conduct report no. 1361555.

¶2 With respect to conduct report no. 1423496, on May 15, 2003, the adjustment committee found Elkins guilty of three rule violations and the warden affirmed the resulting disciplinary decision with a minor modification on June 3, 2003. Elkins filed an Inmate Complaint Review System (ICRS) complaint which the Inmate Complaint Examiner (ICE) rejected for attempting to raise more than one issue. Elkins then filed a second ICRS complaint, which the ICE rejected on June 24, 2003, as outside the scope of the ICRS system. *See* WIS. ADMIN. CODE § DOC 310.11(5)(h). Elkins appealed the ICE's decision to the warden, who affirmed it on July 18, 2003.

¶3 Elkins alleges that he attempted to appeal the warden's decision to the Correction Complaint Examiner (CCE), but was unable to do so because he lacked money for postage and institution officials would not permit him to exceed his legal loan amount. We note, however, that WIS. ADMIN. CODE § DOC 310.13(3) prohibits the CCE from reviewing complaints that have been rejected on any of the procedural grounds specified in WIS. ADMIN. CODE § DOC 310.11(5). Therefore, the warden's decision was the final administrative document for conduct report no. 1423496, and the time for Elkins to seek certiorari review of the warden's decision began to run on July 18, 2003. The deadline for appeal expired forty-five days later, on September 1, 2003. WIS. STAT. § 893.735(2). Because Elkins did not file his certiorari action until September 15, 2003, judicial review of conduct report no. 1423496 is time-barred. *See State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶5, 235 Wis. 2d 63, 611 N.W.2d 774.

¶4 With respect to conduct report no. 1361555, the adjustment committee found Elkins guilty of two rule violations on June 6, 2003, and the warden affirmed that decision on June 19, 2003. Elkins filed two additional ICRS complaints. The ICE found no procedural errors in the disciplinary proceeding and recommended the complaints be dismissed. The warden adopted the ICE's recommendations on July 1, 2003 and July 28, 2003.

¶5 Unlike the warden's decision on conduct report no. 1423496, the warden's decisions on conduct report no. 1361555 were based on recommendations from the ICE on the merits, and were therefore appealable to the CCE under WIS. ADMIN. CODE § DOC 310.13. Elkins again alleges that he was unable to appeal the warden's decisions to the CCE because he lacked money for postage and had exceeded his legal loan limit. He further claims that his actions were sufficient to comply with the "mailbox rule."

¶6 We first note that the mailbox rule to which Elkins refers operates to toll the time to file a certiorari action once an inmate has mailed to the circuit court all the necessary documents within his control. *See State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶¶17-18, 238 Wis. 2d 393, 617 N.W.2d 201. Here, however, Elkins is not complaining that prison officials refused to give him postage to mail his certiorari action to the court, but, rather, that they refused to give him postage to mail his administrative appeal to the CCE. The time for Elkins to seek certiorari review had not even begun to run at that point. Therefore, the case law on tolling the forty-five-day deadline set forth in WIS. STAT. § 893.735(2) is not directly applicable.

¶7 Instead, the problem here is that Elkins never actually completed the administrative review process for conduct report no. 1361555 by obtaining a

decision from the Secretary of the Department of Corrections. *See* WIS. ADMIN. CODE §§ DOC 310.13(6) and 310.14 (providing that the Secretary shall review the CCE's recommendation and make a final determination). WISCONSIN STAT. § 801.02(7)(b) and WIS. ADMIN. CODE § DOC 310.05 both require an inmate to exhaust all administrative remedies before commencing a civil action against prison employees. *State ex rel. Hensely v. Endicott*, 2001 WI 105, ¶¶1, 9, and 22, 245 Wis. 2d 607, 629 N.W.2d 686.

¶8 We could liberally construe Elkins' arguments as a contention that his attempts to mail an appeal to the CCE for conduct report no. 1361555 were sufficient to exhaust his administrative remedies, notwithstanding the fact that he never actually obtained a decision from the Secretary, because there was nothing more Elkins himself could have done to complete his administrative review. Such a contention would rest on the premise that Elkins had no control over the refusal of prison authorities to extend his legal loan for postage. We deem that premise flawed, however.

¶9 WISCONSIN ADMIN. CODE § DOC 309.51(1) permits inmates without sufficient funds to borrow up to \$200 per year to pay for paper, photocopies or postage for correspondence to the courts. This provision would have allowed Elkins to borrow the money to pay for the postage to mail his appeals to the CCE if he had not already exceeded his \$200 legal loan limit for the year. The fact that Elkins had exceeded his annual legal loan amount was directly attributable to his own litigation choices. *See Lindell v. McCallum*, 352 F.3d 1107, 1111 (7th Cir. 2003) (holding that a prisoner has no constitutional right to a subsidy to prosecute a civil suit; like any other civil litigant, he must decide which of his legal actions is important enough to fund); *see also Spence v. Cook*, 222 Wis. 2d 530, 538, 587 N.W.2d 904 (Ct. App. 1998) (noting that the reduction of

the prisoner's trust account under account freezing provisions of the PLRA "is solely a function of the prisoner's decision to litigate and seek a fee waiver"). Therefore, we are not persuaded that Elkins' financial situation excused his failure to exhaust his administrative remedies.

¶10 In sum, although we rely on somewhat different reasoning than the trial court did, we conclude that the certiorari petition was properly dismissed.

By the Court.—Order affirmed.

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

