

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-1699**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN EX REL. ROBERT L. WORTHON, JR.,**

**Petitioner-Appellant,**

**v.**

**GERALD A. BERGE, SUPERINTENDENT,**

**Respondent-Respondent.**

APPEAL from an order of the circuit court for Dodge County:  
THOMAS W. WELLS, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Robert L. Worthon, Jr. appeals from an order affirming the decision of the Fox Lake Correctional Institution Adjustment Committee. The committee determined that Worthon battered another inmate in violation of WIS. ADM. CODE § DOC 303.12 (Battery) and imposed a punishment of eight days of adjustment segregation and 360 days of program segregation. Worthon challenges the committee's decision on the ground that

there was insufficient evidence to support the determination and on the ground that the punishment was excessive. We affirm.

Worthon is an inmate confined to the custody of the Columbia Correctional Institution. He was formerly an inmate at Fox Lake Correctional Institution (FLCI). While at FLCI, Worthon was given a conduct report alleging violations of WIS. ADM. CODE §§ DOC 303.12 (Battery)<sup>1</sup> and 303.17 (Fighting).<sup>2</sup> The conduct report was signed by staff member James Verfuert. It provides that on October 27, 1993, Verfuert observed Worthon holding inmate Johnson from behind with his arm around Johnson's neck. As Johnson was being held by Worthon and pushed about the cell, Johnson was yelling "Look what he's doing to me." Verfuert ordered the two men to stop the fight and called for help. Sergeant Lefevers and two other officers arrived to help break up the fight. When Sgt. Lefevers ordered the two men to stop fighting, Worthon released his hold on Johnson. Both inmates were removed from the cell. Johnson was treated for a laceration.

The matter was scheduled for a major offense hearing on November 11, 1993. Worthon was provided with a staff advocate to assist him in the preparation of his defense. Worthon was found guilty of battery, but not the lesser included offense of fighting.<sup>3</sup> Worthon appealed the decision to the warden, who affirmed the decision of the committee.

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<sup>1</sup> WIS. ADM. CODE § DOC 303.12 provides:

**Battery.** Any inmate who intentionally causes bodily injury to another is guilty of an offense.

<sup>2</sup> WIS. ADM. CODE § DOC 303.17 provides:

**Fighting.** Any inmate who intentionally participates in a fight is guilty of an offense. "Fight" means any situation where 2 or more people are trying to injure each other by any physical means, to include hitting, biting, kicking, scratching, throwing or swinging objects, or using weapons.

<sup>3</sup> Fighting is a lesser included offense of battery. WIS. ADM. CODE § DOC 303.03(4). An inmate charged with the greater offense is deemed to be charged with the lesser included offense as well, WIS. ADM. CODE § DOC 303.03(1), but an inmate may not be found guilty

Worthon contends that the evidence was not such that the committee might reasonably make the determination that he committed battery in violation of WIS. ADM. CODE § DOC 303.12.

On certiorari, this court's standard of review is the same as that applied by the trial court. *State ex rel. Staples v. DHSS*, 136 Wis.2d 487, 493, 402 N.W.2d 369, 373 (Ct. App. 1987). Review is limited to determining whether the committee kept within its jurisdiction, whether it acted according to law, whether the action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that it might reasonably make the determination in question. *State ex rel. Meeks v. Gagnon*, 95 Wis.2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980). In deciding whether the evidence is such that a committee might reasonably have made the decision it did, the court does not conduct a de novo review. *Van Ermen v. DHSS*, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978). The court does not weigh the evidence, nor may it substitute its view of the evidence for that of the committee. *Id.*

We conclude that there is sufficient evidence to support the committee's decision. Worthon did not request the appearance of any witnesses and he presented no written statement. Worthon made this statement at the hearing:

We were locked together for 10 to 14 days. Had no prior incident. I did tell him to please stop saying my name. He rushed me. I just restrained him. I could not tell if he was yelling.

The conduct report prepared by staff member Verfuert was also evidence before the committee. A conduct report may be relied on as evidence at a disciplinary hearing. *Culbert v. Young*, 834 F.2d 624, 631 (7th Cir. 1987), *cert. denied*, 485 U.S. 990 (1988). Verfuert's statements in the conduct report contradict Worthon's statement.

(. . .continued)

of two offenses based on a single incident if one offense is a lesser included offense of the other. WIS. ADM. CODE § DOC 303.03(3).

The statement of reasons provided by the committee explains that the committee relied on staff member Verfuert's statements in the conduct report that he observed Worthon with his arm wrapped around Johnson and that he did not observe Johnson doing anything other than defending himself.

The staff advocate's report states that the staff advocate interviewed Johnson and Johnson gave conflicting statements, first saying that Worthon attacked him from behind and then saying he, Johnson, was a man and took Worthon head on. The staff advocate's report also stated that the staff advocate interviewed Sergeant Lefevers, who said that when he arrived on the scene, Worthon and Johnson had their arms locked and were both wrestling. Worthon argues the staff advocate's report contradicts Verfuert's report.

Worthon did not call Johnson or Lefevers as witnesses. Assuming the staff advocate's report was presented to the committee, Lefevers's reported statement is not inconsistent with the more detailed statement of Verfuert, who saw more of the incident. Neither of the statements attributed to Johnson are necessarily inconsistent with Verfuert's observations that indicate Worthon was the aggressor.

Given the contradiction between Worthon's statement and Verfuert's statements in the conduct report, the committee had to determine which testimony to credit and which to reject. The committee chose to believe staff member Verfuert, and to reject Worthon's testimony. It was within the committee's authority to make this credibility assessment. It was also within its authority to credit Verfuert's report rather than the staff advocate's interpretation of the staff advocate's interviews with Johnson, to the extent there was any inconsistency. The evidence the committee found credible provides a reasonable basis for the determination that Worthon was guilty of battery by intentionally causing bodily injury to Johnson. The same evidence provides a reasonable basis for rejecting Worthon's claim of self-defense.

Worthon argues that the punishment was excessive. The committee imposed the maximum sentence permissible under WIS. ADM. CODE § DOC 303.84. It gave as its reason that Johnson received injuries requiring thirteen stitches. This is supported by the evidence. The punishment imposed was within the law and was not arbitrary, unreasonable or oppressive.

*By the Court.* – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.