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DISTRICT IV

June 2, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1112 State of Wisconsin ex rel. Kristofer Ashmore v. Judy P. Smith and Edward F. Wall (L.C. # 2013CV1593)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Kristofer Ashmore, pro se appellant, appeals an order of the circuit court denying his petition for certiorari relief from a prison disciplinary action. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

This case arises from a prison disciplinary action in which Ashmore was charged with battery after an altercation with another inmate. The conduct report alleged that a witness saw Ashmore throw hot water at another prisoner, causing him burns. Ashmore himself was hit in the head and required medical care. After a hearing, the prison disciplinary committee found

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Ashmore guilty of battery, contrary to WIS. ADMIN. CODE § DOC 303.12 (Dec. 2006).[2] Ashmore now seeks review of that decision.

Ashmore argues that there was insufficient evidence to support the committee's decision, that the committee committed procedural errors in violation of his due process rights, and that the certiorari record is incomplete. For the reasons discussed below, we reject these arguments.

We turn first to Ashmore's evidentiary argument. The test on certiorari review is the substantial evidence test, under which we determine whether reasonable minds could arrive at the same conclusion reached by the committee. ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). In order to find Ashmore guilty of battery, the disciplinary committee needed to find that he "caus[ed] bodily injury or harm to another[.]" WIS. ADMIN. CODE § DOC 303.12(1). The committee considered the conduct report and documents submitted with it, photographs of the victim, witness testimony, and Ashmore's own testimony.

The conduct report states that, by his own admission, Ashmore caused injury to the other prisoner by throwing hot water on him. The conduct report also states that Ashmore admitted he did not get burned during the incident, and that Ashmore did not appear to have any burns when he was strip searched upon being returned to the prison from the medical center approximately five hours after the incident occurred. At the disciplinary hearing, Ashmore stated that he did not throw the water, but that the other prisoner ran into him, causing water to be spilled on both of

[2] All references to the Wisconsin Administrative Code are to the December 2006 register unless otherwise noted.

them. At the hearing, Ashmore also denied that, as he had stated in a prior interview, he had rubbed his own chest until it became raw to make it look as if he had been burned to make his story "more believable."

It is undisputed that Ashmore was holding a cup of hot water that splashed onto another prisoner, causing the other prisoner to suffer burns. Ashmore demonstrated at the hearing how he was holding the cup when the incident happened. The two witnesses whom Ashmore produced for the hearing admitted that they did not see the entire incident and, therefore, the disciplinary committee found their testimony not to be pertinent.

The committee found the staff member who prepared the conduct report to be credible, based on the committee's experience of receiving accurate and truthful information from the staff member in the past. The disciplinary committee found Ashmore's version of the events to be inconsistent with the other evidence, including the location of the other prisoner's burns. When there are two conflicting views that may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. ***Samens v. LIRC***, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984). Given the evidence in the record, we are satisfied that reasonable minds could arrive at the same conclusion reached by the committee. *See* ***Whiting***, 158 Wis. 2d at 233.

We turn next to Ashmore's argument that the disciplinary committee did not afford him due process at the hearing. The State correctly points out that prison disciplinary proceedings are not equivalent to criminal trials, and that an inmate's due process rights are "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *See* ***Wolff v. McDonnell***, 418 U.S. 539, 556 (1974). The United States Supreme Court has held

that a prisoner's limited rights in prison disciplinary proceedings include written notice of the charges against him at least 24 hours in advance of the hearing, a written statement by the factfinders as to the evidence relied on and the reasoning, and an opportunity for the prisoner to call witnesses and present documentary evidence in his defense, provided that doing so will not be unduly harmful to the institution's safety or correctional goals. *See* ***id.*** at 563-66. The record demonstrates that the Department of Corrections provided Ashmore with more than 24 hours notice of the charge against him, that Ashmore called witnesses and presented evidence in his defense at the hearing, and that the disciplinary committee explained in its decision what evidence it relied upon and why. Ashmore fails to identify anything in the record suggesting that his limited due process rights were violated in the disciplinary proceedings.

Ashmore also argues that the committee withheld exculpatory evidence in the form of medical records of his own injuries. We note first, as a general matter, that there is no clearly established ***Brady*** rule for prison disciplinary actions. *See generally* ***Brady v. Maryland***, 373 U.S. 83 (1963); *see also* ***Jackson v. Buchler***, 2010 WI 135, ¶71, 330 Wis. 2d 279, 793 N.W.2d 826 ("we need not and should not decide … whether any version of ***Brady***—limited or otherwise—applies in the prison disciplinary setting"). However, assuming without deciding that ***Brady*** applies in this context, Ashmore fails to persuade us that the records would have made any difference to his defense. Ashmore asserts that the medical records would show that he was burned during the incident. However, as the State correctly points out in its brief, the certiorari record demonstrates that the disciplinary committee already had evidence before it describing the type of injuries Ashmore suffered in detail, including prescription records for medical treatment of burns on his chest and drawings showing where his head was injured. Thus, we agree with the State that additional records describing those injuries would have been

merely cumulative. Under WIS. ADMIN. CODE § 303.86(2)(b)3, a disciplinary committee is not required to consider cumulative evidence. Thus, we are not persuaded by Ashmore's argument that his lack of additional medical records denied him the ability to present his defense.

Finally, Ashmore argues that the certiorari record is incomplete and that it should have included certain temporary lockup documents and information/interview request forms. Regarding the temporary lockup documents, the State points out that Ashmore made no mention of these documents in his motion to amend the record in the circuit court. Because Ashmore did not raise the issue of their absence in the circuit court, we agree with the State that he has forfeited review of this issue on appeal. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). As to the two information/interview request forms Ashmore contends are missing, we note that, in response to a circuit court order to supplement the record, the department submitted letters from the institution complaint examiners at both Green Bay Correctional Institution and Oshkosh Correctional Institution, stating that they had searched their records for these forms, but could not locate them. The letters stated that information/interview request forms are informal communications designed to be returned to the inmate and that copies are typically not made of the forms. Ashmore fails to cite any authority that would require the department to retain copies of the forms and to provide such copies to him for purposes of his disciplinary proceedings, and we are not aware of any such authority.

Therefore,

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals