



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

December 21, 2015

To:

Hon. Frank D. Remington
Circuit Court Judge
215 South Hamilton, Br 8, Rm 4103
Madison, WI 53703

S. Michael Murphy
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Carlo Esqueda
Clerk of Circuit Court
215 South Hamilton, Room 1000
Madison, WI 53703

Jeffrey Burr 421447
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2014AP2210

State of Wisconsin ex rel. Jeffrey Burr v. Edward Wall
(L.C. # 2014CV106)

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

Jeffrey Burr appeals the circuit court's order affirming a decision by Edward Wall, the secretary of the Department of Corrections. Burr had sought certiorari review of the decision by prison officials to restrict his visitation privileges to no-contact. 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 affirm.

The facts are not disputed. Burr, an inmate at Green Bay Correctional Institution, was found guilty of attempted possession of intoxicants after a search of his cell revealed two bottles of liquid propped up against a heater and smelling of intoxicants. Burr told prison officials he

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

was “making soda pop with root beer barrels from the canteen” and the bottles were near the heater “to help the candy.” Burr received 270 days in disciplinary separation for the offense. Burr was released from separation on July 19, 2013. Subsequently, prison officials placed a “no-contact” restriction on Burr’s visitation privileges for one year.

Burr sought certiorari review of the restriction on his visitation privileges. Burr alleged that he had never been found guilty of violating any visitation-related regulation and that the restriction on his visitation violated his double jeopardy rights. The circuit court rejected Burr’s contentions both on the merits and as moot.² The circuit court also denied Burr’s motion for reconsideration. Burr appeals.

On certiorari review, this court’s standard of review is the same as that applied by the circuit court. *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Review is limited to determining whether the agency 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 (Ct. App. 1980). Whether the agency acted according to law includes the questions of whether due process was afforded and whether the agency followed its own rules.

Id.

² On appeal, the State contends that the one-year restriction on Burr’s visitation expired on July 19, 2014, making this case arguably moot. Because the record suggests that the restriction was extended by prison authorities, we choose to address the merits. We note, however, that any challenge to the extension is not within the scope of this certiorari review.

Burr did not seek certiorari review of the initial imposition of discipline for attempted possession of intoxicants. Thus, the correctness of that finding and the propriety of the discipline imposed are not reviewable in this proceeding. The only action under review is the subsequent restriction of Burr's visitation privileges.

The Department is empowered to regulate inmate visitation. *See* WIS. ADMIN. CODE §§ DOC 309.06 through 309.12 (Oct. 2015).³ Visitation regulation shall be undertaken "consistent with ... the department's responsibility for the secure and orderly operation of institutions, public safety, and the protection of visitors, staff and inmates." Section DOC 309.06. No-contact visitation is expressly authorized "upon subsequent review of the visiting status," and a security director may impose no-contact visitation upon a finding that an inmate has introduced contraband into the institution or has engaged in behavior that threatens institutional security. *See* WIS. ADMIN. CODE § DOC 309.11(1)(a) and (2)(a).

In this case, Burr had received four conduct reports, two of which were for violations of WIS. ADMIN. CODE § DOC 303.43, which prohibits the possession of intoxicants. Burr needed only yeast to complete the brewing process. One can easily foresee the possibility that Burr could obtain the needed yeast during a contact visitation. The restriction on visitation was explicitly permitted under WIS. ADMIN. CODE § DOC 309.11. The decision was reasonable and not arbitrary, and it was supported by the evidence. Therefore, this court must uphold the challenged determination. *See Meeks*, 95 Wis. 2d at 119.

³ All references to the Wisconsin Administrative Code are to the October 2015 version unless otherwise noted.

Burr's double jeopardy rights were not violated by the imposition of no-contact visitation. Prison disciplinary actions do not implicate double jeopardy. *See State v. Quiroz*, 149 Wis. 2d 691, 694, 439 N.W.2d 621 (Ct. App. 1989) (administrative disciplinary action by prison authorities is not punishment for purposes of the double jeopardy clause). The imposition of discipline does not preclude the restriction of privileges for the same conduct. *See* WIS. ADMIN. CODE § DOC 303.90 ("Notwithstanding any action taken under this chapter, the department may administratively ... restrict [an inmate's] privileges.").⁴

Burr's contention that his due process rights were violated because he did not receive prior written notice of the restriction is also meritless. An inmate does not have a due process right to unrestricted visitation. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). A state may create an enforceable liberty interest, however, by placing substantive limitations on official discretion. *Id.* at 461-62. However, because the imposition of no-contact visitation is entirely discretionary with prison officials under WIS. ADMIN. CODE § DOC 309.11, no liberty interest is created and Burr had no due process right to advance notice of the restriction.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Current WIS. ADMIN. CODE § DOC 303.90 was numbered WIS. ADMIN. CODE § DOC 303.92 when Burr's visitation was restricted.