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**DISTRICT IV**

June 25, 2019

To:

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

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2018AP854

State of Wisconsin ex rel. Donald R. Wield v. Jon E. Litscher  
(L.C. # 2017CV7)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Donald Wield appeals a circuit court order denying his motion for reconsideration of the court's prior decision to remand the certiorari record in this inmate complaint matter to the Department of Corrections. 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 (2017-18).<sup>1</sup> We summarily affirm.

Wield filed a petition for writ of certiorari in the circuit court, seeking review of a DOC decision denying his inmate complaint regarding DOC's failure to deliver a fan and a bucket hat to him after the items were ordered from Wal-Mart. The circuit court entered an order on June 1, 2017, remanding the matter to DOC for further "limited proceedings to address the concerns raised by the Court in its oral ruling." The order contained specific questions to be answered by DOC on remand, and stated that it was a final order for purposes of appeal. Wield did not file a notice of appeal as to the June 1, 2017 order. He filed a motion in the circuit court for reconsideration of the order, and the circuit court denied the motion. Wield now appeals the order denying reconsideration.

Wield argues on appeal that DOC failed to properly answer the questions posed by the circuit court on remand, and failed to follow its own policies and procedures. In response, the State argues that none of DOC's actions following remand are properly before this court on appeal because the circuit court lost jurisdiction of the case upon remand, leaving nothing for this court to review in the certiorari action. The State asserts that, while the writ of certiorari issued in this case gave the circuit court the authority to review DOC's initial decision, where an agency issues a second order following remand, the circuit court needs "a new writ of certiorari to review that separate order." *State ex rel. Iushewitz v. Milwaukee Cty. Pers. Review Bd.*, 176 Wis. 2d 706, 710, 500 N.W.2d 634 (1993).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

It is undisputed that Wield did not file a new certiorari petition in the circuit court. Wield also did not file a reply brief in this appeal. Therefore, the State's assertion that DOC's actions after remand are not properly before us is deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (where an issue is not addressed in a reply brief, we assume the point is conceded). Accordingly, we will not address Wield's arguments regarding any action taken by DOC after remand.

The only issue raised by Wield that is properly before us on appeal is whether the circuit court erred in denying Wield's motion for reconsideration. "To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. We review the circuit court's decision on a motion for reconsideration for an erroneous exercise of discretion. *Id.*, ¶6. A circuit court properly exercised its discretion "if it employed a logical rationale based on the correct legal principles and the facts of record." *Kohl v. Zeitlin*, 2005 WI App 196, ¶28, 287 Wis. 2d 289, 704 N.W.2d 586.

The record reflects that the circuit court properly exercised its discretion when it remanded the certiorari record to DOC. The court identified the correct legal principles for certiorari review, stating:

I am, of course, limited to determining whether the agency kept within its jurisdiction, whether it acted according to law, whether the decision 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 order or determination in question.

*See, e.g., Hansen v. Circuit Ct. for Dane Cty.*, 181 Wis. 2d 993, 998-99, 513 N.W.2d 139 (Ct. App. 1994) (stating the scope of review in a certiorari action). The court then concluded that remand was appropriate because it could not “determine on the basis of this limited record whether DOC actually complied with its own policies in force at the time of Mr. Wield’s complaint.”

Wield argues that, by remanding the certiorari case, the circuit court permitted DOC a “second ‘kick at the cat’” in contradiction of considerations of due process and fair play, as discussed in *Snajder v. State*, 74 Wis. 2d 303, 312-13, 246 N.W.2d 665 (1976). In *Snajder*, the Wisconsin Supreme Court held that the State could not get a second chance to establish grounds for parole revocation on remand of the certiorari record, after it had failed to meet its burden at the first hearing. *Id.* However, *Snajder* is distinguishable because it was a parole revocation case in which the State had the burden of establishing the grounds for the parolee’s revocation.

The instant case involves an inmate complaint, which is distinct from a revocation hearing and is governed by different procedures. An inmate filing a complaint under ICRS has the burden of providing relevant supporting documentation and sufficient information for the department to investigate and decide the complaint. *See* WIS. ADMIN. CODE § DOC 310.07(3)(f) and (6) (March 2018).

In this case it was Wield, and not DOC, who had the burden of proving that his right to receive and possess the items ordered from Wal-Mart was violated. The circuit court concluded that the certiorari record did not contain sufficient information for it to decide the issue, so it remanded the case to DOC. There is precedent for such an action. The circuit court cited *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 454 N.W.2d 18 (Ct. App. 1990), in its oral ruling. In

*Lomax*, an inmate filed a certiorari petition challenging the program review committee’s failure to comply with the agency’s own procedural rules with respect to the inmate’s transfer from one institution to another. *Id.* at 737, 740. This court upheld the circuit court’s decision to remand the certiorari record for the taking of additional evidence and, referencing the considerations of due process and fair play, concluded, “A remand to permit taking additional evidence regarding compliance with procedural rules does not offend those considerations.” *Id.* at 741.

We agree with the State that this case is more analogous to *Lomax* than to *Snajder*, and that the circuit court properly exercised its discretion in denying Wield’s motion for reconsideration of its decision to remand the certiorari record.

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*