



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

May 27, 2021

To:

Hon. Peter Anderson
Circuit Court Judge
Br. 17, Rm. 6103
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Clayton Patrick Kawski
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Michael J. Queensland
Wisconsin Legislative Council
P.O. Box 2536
Madison, WI 53701-2536

Mark Girtler 412949
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

Special Litigation & Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

The Joint Committee for Review of
Administrative Rules
Room 10
State Capitol
Madison, WI 53707-7882

Wisconsin Secure Program Facility
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

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

2020AP1308

Mark Girtler v. G. Boughton (L.C. # 2019CV2395)

Before Fitzpatrick, P.J., Graham, and Nashold, 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).

Mark Girtler, pro se, appeals a circuit court order that dismissed Girtler's action challenging the constitutionality of a prison disciplinary rule. 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 (2019-20).¹ We summarily affirm.

Girtler received a prison disciplinary conduct report for violating WIS. ADMIN. CODE § DOC 303.45(3) (through April 2021),² which prohibits the possession, manufacture, or use of weapons. The conduct report alleged that Girtler had concealed a disposable razor in a pair of pants in his cell. Following a disciplinary hearing, the committee found Girtler guilty of the violation and imposed terms of room confinement and disciplinary separation. Girtler pursued administrative remedies, and then filed this declaratory judgment action challenging the constitutionality of § DOC 303.45(3). The circuit court dismissed the petition for failure to state a claim on which relief could be granted.

Whether a petition states a claim for relief is a question of law, which we review de novo. *See State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶9, 252 Wis. 2d 404, 643 N.W.2d 515. On our review, we accept the facts pleaded as true. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). A petition is legally insufficient only if there are no conditions under which the petitioner can prevail. *See State ex rel. Adell v. Smith*, 2001 WI App 168, ¶5, 247 Wis. 2d 260, 633 N.W.2d 231. A constitutional challenge to a regulation also presents a question of law, which we review independently. *See State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² All references to the Wisconsin Administrative Code are to the April 2021 registry.

WISCONSIN ADMIN. CODE § DOC 303.45(3) prohibits an inmate from possessing “an item which could be used in the manufacture of a weapon.” Girtler contends that the rule is unconstitutionally vague by failing to give sufficient notice for a person of reasonable intelligence to understand what conduct is prohibited and failing to provide sufficient standards for its application.³ He contends that the phrase “an item which could be used in the manufacture of a weapon” could include almost any item, even authorized items such as a toothbrush or a pen, so that inmates have no way to know which items are prohibited and prison staff have no standard to apply the rule. He argues that the rule is vague both on its face and as applied in this case, contending that he did not have sufficient notice that possessing a disposable razor would violate the rule and that the rule provided no standards for prison staff to decide whether a razor fell within the realm of prohibited items.

“Vagueness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication.” See *Bell v. DCF*, 2015 WI App 47, ¶17, 363 Wis. 2d 527, 867 N.W.2d 430 (quoted source omitted). There are two prongs of the vagueness test: “(1) does the language sufficiently warn those trying to obey the law that their conduct violates the regulation; and (2) ‘whether those who must enforce and apply the law may do so without creating or applying their own standards.’” *Id.* (quoted source omitted).

³ Girtler also contends that WIS. ADMIN. CODE § DOC 303.45(3) is unconstitutionally overbroad. See *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶52, 363 Wis. 2d 1, 866 N.W.2d 165 (“A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate.” (quoted source omitted)). However, Girtler fails to develop any argument that the rule is overbroad. Rather, the only argument that Girtler develops in his briefs is a challenge to § DOC 303.45(3) based on vagueness. Because Girtler does not sufficiently develop an argument that the rule is overbroad, we do not address that argument. See *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (declining to address issues “so lacking in organization and substance that for us to decide [the] issues, we would first have to develop them”).

We conclude that Girtler has not shown that WIS. ADMIN. CODE § DOC 303.45(3) is unconstitutionally vague either on its face or as applied in this case. “A regulation does not have to ‘define with absolute clarity and precision what is and what is not’ a violation and it is not vague simply because violations under a particular set of circumstances ‘may not be ascertainable with ease.’” *Bell*, 363 Wis. 2d 527, ¶21 (quoted source omitted). Moreover, a constitutional vagueness challenge may not be asserted when, as here, the alleged conduct plainly falls within the rule’s prohibition, *see State v. Burris*, 2004 WI 91, ¶53, 273 Wis. 2d 294, 682 N.W.2d 812, and a constitutional vagueness challenge may not be premised on hypothetical facts, *Pittman*, 174 Wis. 2d at 277. Girtler does not dispute that he concealed an unauthorized disposable razor in his cell. A common sense interpretation of the phrase “an item which could be used in the manufacture of a weapon” plainly includes the razor blade in a contraband disposable razor. Because Girtler failed to assert a valid constitutional challenge to § DOC 303.45(3), the circuit court properly dismissed Girtler’s petition for failure to state a claim.

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals