IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DENNIS GONZALEZ,

Petitioner,

v.

GERALD BERGE, Warden, Wisconsin Secure Program Facility,

Respondent.

REPORT AND RECOMMENDATION

03-C-499-C

REPORT

Before the court for report and recommendation is petitioner Dennis Gonzalez's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges an August 18, 2000 decision by a prison disciplinary committee finding him guilty of possessing intoxicants while an inmate at the Oshkosh Correctional Institution, in violation of Wis. Admin. Code § DOC 303.43. Petitioner contends that the committee violated the minimum due process guarantees prescribed by *Wolff v. McDonnell*, 418 U.S. 539 (1974), by 1) finding him guilty without adequate evidence and 2) refusing his request for a full due process hearing after the Secretary of the Department of Corrections had remanded his case.

Respondent has filed a motion to dismiss the petition for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because I conclude from the petition and its attachments that the state courts analyzed Gonzalez's claims under the proper legal standard and

reasonably applied the law to the facts, I am recommending that this court grant respondent's motion and dismiss the petition on the merits.

The following facts are drawn from the documents attached or referred to in the petition.

FACTS

On August 14, 2000, the security director at the Oshkosh Correctional Institution provided Gonzalez with a conduct report that stated in relevant part:

> On July 21, 2000, I received information from sources outside the institution indicating that Dennis Gonzalez may be actively dealing with drugs inside the institution and that the drugs he was dealing were coming to him from a staff source. An investigation was undertaken. Through the course of that investigation it has become evident that Dennis Gonzalez was in fact actively involved in drug dealing here at Oshkosh Correctional.
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> Numerous confidential informants identify Dennis Gonzalez as being actively involved in obtaining and selling drugs as well as using drugs inside the institution. Confidential informant #4 states that Gonzalez was being supplied drugs by a staff member at this institution in the recent past . . . Confidential informant #5 states that Mr. Gonzalez purchased one-half ounce of marijuana on one occasion and one-eighth ounce of marijuana on another, and was supposed to pay $100.00 to a staff member for delivery of these drugs to him. Informant states that Dennis did not pay for the drugs. This informant states that he and Dennis had talked about the drugs and that Dennis had shown him the drugs when they came into the institution. Confidential informant #6 states that Gonzalez was dealing drugs with two other inmates and that drugs were being purchased by means of a "send out." A "send out" means that the inmate purchaser would have money sent out to someone outside the institution for Gonzalez and then that person would send the money back in to Gonzalez . . . This informant states that Dennis Gonzalez approached him on at least two occasions during the month of June offering to sell drugs to him. He states that Dennis used his position in

> horticulture lab as a horticulture worker to move the drugs around the institution and that Dennis used to hide the drugs in horticulture somewhere. At one point while Dennis was in lockup, Dennis offered to sell drugs to this informant stating that he had a "big package" of drugs hidden. Confidential informant #7 states that Dennis Gonzalez was selling drugs on the unit and that he was selling marijuana sticks for $5.00 each.
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> Please note that the informants used in collecting this evidence are known to the writer and have provided reliable information in the past. In addition, each of these statements was taken independently of the others and the informants were never allowed to corroborate their statements with one another, but their statements in content do support one another. Also of note is the fact that packages of drugs were found hidden in an area where Dennis Gonzalez would have had access to them as a horticulture worker. Finally it is noteworthy to understand that Mr Gonzalez has recently completed a sanction for use of marijuana which would indicate that he has in fact been in contact with that drug in recent past.

The report alleged that Gonzalez had possessed intoxicants in violation of Wis. Admin. Code § DOC 303.43. Violation of that provision is characterized as a "major offense" under Wis. Admin. Code § DOC 303.68(3). An inmate accused of a major offense is entitled to a formal due process disciplinary hearing, at which the inmate has the right to a staff advocate and to question or confront witnesses. Wis. Admin. Code § DOC 303.76(c), (e). If the inmate waives his right to a formal hearing, the institution has a hearing of the type used for minor offenses. Wis. Admin. Code § DOC 303.76(2). In a hearing for a minor offense, the inmate is entitled to respond to the conduct report and make a statement about the alleged violation. Wis. Admin. Code § DOC 303.75(4). The inmate has no right to a staff advocate, to confront witnesses or to have witnesses testify on the inmate's behalf. *Id*.

Shortly after receiving the conduct report, Gonzalez received a form entitled "Notice of Major Disciplinary Hearing Rights and Waiver of Major Hearing and Waiver of Time."[1] The form instructed Gonzalez that he could waive his right to a formal due process hearing and explained the consequences of such a waiver. Gonzalez signed the form and acknowledged that he had read and understood the rights he was waiving.

In accordance with Gonzalez's waiver, the prison disciplinary committee conducted an informal hearing. At the hearing, Gonzalez entered a plea of not guilty and made the following statement: "I did not possess drugs. Deringer told me the drugs were found in an area where a lot of people have access[.] I never had drugs or tried to sell them." The prison disciplinary committee found him guilty. Its hearing decision read as follows:

> Accused waived hearing and called no witnesses.
>
> > [Committee] reviewed CI statement. [Committee] reviewed accused statement that provided no evidence only testimony to dispute charge. [Committee] believes that CI should remain confidential for safety. [Committee] notes that the CIs all describe very similar or the same information and were in a position to have the information. This along with drugs found in Accused work site support the charge of 303.43.

As discipline, the committee imposed eight days of adjustment segregation and 360 days of program segregation.

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[1] Although respondent states that a copy of this form is attached to its motion at Exhibit B, I have not found Exhibit B or a copy of the form. However, Gonzalez does not dispute that he initially waived his right to a formal due process hearing.

Gonzalez complained to the warden and to the Institution Complaint Examiner about the decision, arguing that the committee found him guilty without adequate evidence, he had not received proper notice of the hearing and he should have been allowed to call witnesses. The warden and the Institution Complaint Examiner rejected Gonzalez's complaints. However, at the next tier of administrative review, the Corrections Complaint Examiner found "procedural errors." Specifically, the Corrections Complaint Examiner found that the committee had failed in its decision to establish the elements necessary to a finding of guilt for possession of intoxicants, namely, that Gonzalez knowingly had in his possession and without authorization an intoxicating substance. The examiner recommended that the disciplinary hearing report be returned to the committee so it could correct the errors. In addition, the examiner specified that returning the report to the committee would not entitle Gonzalez to a new hearing. The Secretary of the Department of Corrections affirmed the Correction Complaint Examiner's decision.

On July 11, 2001, the prison disciplinary committee issued a second, amended disciplinary decision. The committee's amended decision read as follows:

> Accused waived hearing and called no witnesses.
>
> [Committee] reviewed CI statement. [Committee] reviewed accused statement that provided no evidence only testimony to dispute charge. [Committee] believes that CI should remain confidential for safety. [Committee] notes that the CIs all describe very similar or the same information and were in a position to have the information. This information, along with the drugs found in the area convinced the [Committee] by preponderance of evidence that Accused did knowingly and intentionally possess marijuana . . . in violation of 303.43.

Gonzalez appealed this decision to the warden. On September 18, 2001, the deputy warden remanded the entire matter for a rehearing. In subsequent correspondence and complaints to the warden, Gonzalez requested a "full due process hearing with a staff advocate" and witnesses. The warden declined. She informed Gonzalez that the "purposes of the remand of [the] conduct report . . . by the Corrections Complaint Examiner and by [the] Deputy Warden were the same," and that "any defects that may have been present in the record have been addressed."

Gonzalez then complained to the Institution Complaint Examiner. The examiner dismissed the complaint, stating that the rehearing concerning Gonzalez's conduct report "has been held" and that no further action on the conduct report was necessary. Gonzalez then appealed to the Corrections Complaint Examiner, complaining again that a full due process hearing had not been held. On February 26, 2002, the Corrections Complaint Examiner issued a report in which she concluded that the rehearing ordered by the deputy warden had not taken place. According to the report, the Institution Complaint Examiner at Oshkosh Correctional Institution had spoken to the deputy warden, who indicated that he did not intend for a rehearing, but only for a record correction to be completed. However, the Corrections Complaint Examiner found no evidence that the record correction ordered by the deputy warden had occurred. Accordingly, she recommended that the complaint be affirmed and the record returned to the adjustment committee for record

correction. The secretary of the Department of Corrections adopted the examiner's recommendation.

Apparently, a rehearing was held on April 15, 2002. After the hearing, Gonzalez filed an appeal to the warden, who found no procedural errors. Gonzalez then filed an inmate complaint, contending that the adjustment committee did not have sufficient evidence before it to find him guilty of the charge and that it had still failed to correct the record. The Institution Complaint Examiner, Corrections Complaint Examiner and secretary all found no grounds to disturb the adjustment committee's decision.

Having exhausted his administrative remedies, Gonzalez filed a petition for a writ of certiorari in the Circuit Court for Dane County. After allowing Gonzalez the opportunity to supplement his petition, the court on its own motion dismissed the petition for failure to state a claim upon which relief may be granted. The court found that there was sufficient evidence to support the disciplinary committee's decision that Gonzalez had possessed marijuana. As for Gonzalez's claim that he was wrongfully denied a full due process hearing after the conduct report was remanded, the court wrote:

> Petitioner waived his right to a full due process hearing in August of 2000, a fact that he does not deny. He feels, however, that when the hearing was remanded for clarification, he had the opportunity to then request a full hearing. He is incorrect. Once petitioner waived his due process hearing rights, he cannot ask for it back simply because the disciplinary decision was remanded by the CCE on procedural grounds for clarification.

Mem. Dec. and Order, Sept. 27, 2002, at 5, attached to Pet. at Exh. H.

After the circuit court denied his motion to reconsider, Gonzalez appealed to the Wisconsin Court of Appeals. In an opinion and order issued May 2, 2003, the court affirmed the circuit court's decision. It applied Wisconsin's certiorari standard, thereby limiting its analysis to: 1) whether the prison disciplinary committee acted within its jurisdiction and according to law; 2) whether the decision was arbitrary or oppressive; and 3) whether the evidence of record substantiated the decision. *See State ex rel. Jones v. Franklin*, 151 Wis. 2d 419, 425, 444 N.W. 2d 738, 741 (Ct. App. 1989). The court held that the disciplinary committee had sufficient evidence to find Gonzalez guilty of possessing intoxicants because it relied on statements "made independently by reliable informants." The court noted that although the committee's decision was support additionally by the drugs that were found in the horticulture area where one of the informants said Gonzalez had them, the physical evidence "was not necessary to substantiate" the committee's decision. *State ex rel. Gonzalez v. Smith*, 02-3311, Op. and Order, May 2, 2003, at 3, attached to Pet. at Exh I. The court made short shrift of Gonzalez's claim that he should have been afforded a full due process hearing after remand, finding "no authority for Gonzalez's argument that he is entitled to more rights on remand than he had during his first hearing." *Id*.

The Wisconsin Supreme Court denied Gonzalez's petition for review on August 13, 2003. Shortly thereafter, Gonzalez filed the instant habeas petition in which he reasserts the claims he raised in the state courts.

ANALYSIS

I. Standard of Review

Because the state courts adjudicated Gonzalez's claims on their merits, this court must evaluate the claims under 28 U.S.C. § 2254(d). Specifically, this court may not grant Gonzalez's application for a writ of habeas corpus unless the state court's adjudication of his claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The "contrary to" clause of § 2254(d)(1) pertains to pure questions of law. *Lindh v. Murphy*, 96 F.3d 856, 868-69 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The "unreasonable application" clause of § 2254(d)(1) pertains to mixed questions of law and fact. *Lindh*, 96 F.3d at 870. A state court decision is an unreasonable application

of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411. In a case involving a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh*, 96 F.2d at 871 ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored.").

II. Sufficiency of Evidence

Gonzalez contends that the evidence was insufficient to support the disciplinary committee's finding that he was guilty of possessing intoxicants. To withstand a due process challenge, the decision of the prison disciplinary board must only be supported by "a modicum of evidence." *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 455-56 (1985). In determining whether a decision of a prison disciplinary board had some evidence to support it, courts are not required to examine the entire record, make an independent assessment of the credibility of witnesses, or weigh the evidence. *Hill*, 472 U.S. at 455.

"Instead the relevant question is whether there is *any* evidence in the record that could support the conclusion reached by the disciplinary board." *Id*. at 455-56 (emphasis supplied).

The Wisconsin Court of Appeals did not cite *Hill*, reviewing the disciplinary committee's action under state law criteria governing certiorari review. However, by reviewing the record to ensure that the committee's decision was supported by the record and the law and was not arbitrary, the court conducted essentially the same review required by *Hill*. *See Franklin*, 151 Wis. 2d at 425("The facts found by the committee are conclusive if supported by 'any reasonable view' of the evidence, and we may not substitute our view of the evidence for that of the committee."). Accordingly, because the state court's decision was not "contrary to" clearly established federal law, this court would have to find that the court "unreasonably applied" federal law in order to grant Gonzalez's petition.

Under Wis. Admin. Code § DOC 303.02(16), an inmate is guilty of possessing an intoxicant if he has an intoxicating substance on his person, in his locker or under his physical control. Gonzalez argues that the committee could not have found him guilty of violating this code section because the marijuana discovered in the horticulture area was not on his person, in his locker or under his physical control. He contends that the evidence before the committee was insufficient because he was confined in administrative segregation when the drugs were found and no one actually saw him "physically place the marijuana on the rafters in the horticultural area."

There are two flaws in this argument. First, insofar as Gonzalez is contending that there had to be some direct evidence showing that he had control over the drugs found in the horticulture area, he is wrong. As respondent points out, "circumstantial evidence may be and often is stronger and as convincing as direct evidence." *State v. Johnson*, 11 Wis. 2d 130, 134, 104 N.W. 2d 379 (1960). The fact that the drugs found were of the type the informants said Gonzalez was selling and were located in an area where one of the informants said Gonzalez hid his stash was "some evidence" to support the committee's finding that Gonzlez had possessed marijuana.

Second, Gonzalez overestimates the importance of the physical evidence to his finding of guilt. As the state's court of appeals noted, even without the physical evidence, the statements of the various confidential informants provided the committee with evidence from which it could find that Gonzalez had possessed marijuana. One of the confidential informants stated that Gonzalez had shown drugs to him and two of the informants stated that Gonzalez had offered to sell drugs to them. Each of the informant's statements corroborated the others. From this, the committee had enough evidence to conclude that Gonzalez had physical control over marijuana in the institution, even if it did not have enough evidence to connect him to the stash found in the horticulture area.

Contrary to Gonzalez's contention, the committee's written statement was sufficient to demonstrate that its decision was not arbitrary. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that inmates disciplined for misconduct were entitled to "a written

statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id*. at 563. One of the functions of the written requirement is allow reviewers, including the courts, to determine whether the committee's decision is supported by "some evidence" as required by *Hill*. *See Culbert v. Young*, 834 F.2d 624, 630 (7th Cir. 1987). Gonzalez argues that the committee in his case did little more than adopt the conduct report as written without explanation. While it is true that courts have found rote phrases such as "based on all available evidence" or "we accept the reporting officer's charges" to be constitutionally insufficient, *see, e.g., Hayes v. Walker*, 555 F.2d 625, 631-32 (7th Cir. 1977) and *Chavis v. Rowe*, 643 F.2d 1281, 1286-87 (7th Cir. 1981), the committee in this case did more. The committee noted that Gonzalez had waived his right to hearing, called no witnesses and presented only testimony to dispute the charge; the information provided by the confidential informants was "very similar or the same" and the informants "were in a position to have the information;" and drugs were found in the area where one of the informants said Gonzalez had hid them. The committee explained that all of this evidence convinced it "by preponderance of evidence that [Gonzalez] did knowingly and intentionally possess marijuana . . .".

Unlike the cases cited by Gonzalez, the committee here left "no mystery about its reasoning process." *Culbert*, 834 F.2d at 631 (citing *Saenz v. Young*, 811 F.2d 1172, 1174 (7th Cir. 1987)). The committee's statement makes clear that it did not merely accept the conduct report as written, but made a reasoned determination that the informants'

statements in the report were credible. In addition, the committee's decision shows that it considered the only evidence contradicting the informants' statements–Gonzalez's testimony–but did not find it sufficiently credible to outweigh the evidence provided by the informants and the discovery of the drugs in the horticulture area. Because the committee's decision shows that it reviewed the proof submitted by both sides and identifies the essential facts on which inferences were based, it is constitutionally sufficient. *See generally Culbert*, 834 F.2d at 630-631. As noted previously, under *Hill*, courts reviewing disciplinary committee decisions are not to decide questions of credibility or weigh the evidence. It follows that the state court of appeals did not unreasonably apply federal law when it concluded that the committee's decision finding Gonzalez guilty of violating § DOC 303.02(16) was not arbitrary or unreasonable.

Finally, Gonzalez argues that the committee violated Wis. Admin. Code § DOC 303.86 when it considered the informant's statements. Under that section, "[i]f the institution finds that testifying would pose a risk of harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identify or a signed statement from a staff member getting the statement from that witness." Gonzalez argues that the informants' statements were not corroborated or made under oath and therefore the committee should not have considered them as evidence.

There are numerous defects in this argument. First, it appears that Gonzalez did not present this claim to the state courts, meaning that he has forfeited his right to have this

court decide the claim on the merits. Second, it is unclear whether § DOC 303.86 applies when the inmate has waived his right to call or confront witnesses, as Gonzalez did in this case. Third, even if the rule applies to minor hearings, each informant's statement was corroborated by the statements of the other informants, who each reported that Gonzalez was either buying or selling drugs at the institution. Finally, even assuming the committee violated § DOC 303.86 when it relied on the informants' statements, that alone would not be grounds for federal habeas relief. At most, Gonzalez's challenge to the use of the informants' statements asserts a violation of state law, which is not cognizable in a federal habeas action. *Kurzawa v. Jordan*, 146 F.3d 435, 440 (7th Cir. 1998) ("We are authorized to grant habeas relief only where there is a violation of federal statutory or constitutional law, not in those instances where an error under state law is present.").

In sum, the documents attached or referred to in the petition fail to show that the state court of appeals decided Gonzalez's challenge to the disciplinary committee's decision in a way that contravened or unreasonably applied clearly established Supreme Court precedent. Accordingly, respondent's motion with respect to this claim should be granted.

III. Due Process After Remand

Next, Gonzalez contends the state courts erred in concluding that he was not entitled to a full due process hearing after the conduct report was remanded to the disciplinary committee for clarification. Gonzalez argues that the state courts' determination was

contrary to *Wolff*, wherein the Supreme Court held that prisoners facing a loss of good time as a disciplinary sanction are entitled to "the minimum requirements of procedural due process appropriate for the circumstances," including the right to call witnesses and present documentary evidence. 418 U.S. at 558. Gonzalez asserts that "these procedures are not repudiated on remanded hearings."

I agree with respondent that Gonzalez reads *Wolff* too broadly. Nothing in that case repudiates the notion that even fundamental constitutional protections may be waived if done so knowingly and voluntarily. *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). This includes the right to a due process hearing. *See Craig v. Franke*, 478 F. Supp. 19, 21 (E. D. Wis. 1979). Gonzalez does not dispute that he knowingly and voluntarily waived his right to a due process hearing on the "Notice of Major Disciplinary Hearing Rights and Waiver of Major Hearing and Waiver of Time" form.

The essence of his claim appears to be that when the deputy warden remanded his case for a "rehearing," the deputy warden meant that Gonzalez was entitled to a full-blown due process hearing, notwithstanding his earlier waiver. However, the documents attached to the petition show that the Corrections Complaint Examiner concluded from her investigation that the deputy warden had intended only that the conduct report be sent back to the committee for correction. Furthermore, there is nothing in any of the orders for remand to suggest that its purpose was to restore Gonzalez's right to a full due process hearing. As respondent points out, the remand order from which all others stemmed stated

that the purpose of remand was "for correction of the record" and that Gonzalez was not entitled to a new hearing. Although the administrative record is not crystal clear, it reasonably supports the conclusion of the state circuit court that the last administrative remand order was "for procedural error clarification." Gonzalez has not pointed to anything in the administrative record, much less evidence that is clear and convincing, to suggest that the state court's determination of this fact was unreasonable. Therefore, this court must presume it is correct.

There is nothing in *Wolff* or any other decision of the Supreme Court which suggests that an inmate who waives his right to a due process hearing is entitled to have that right restored when his conduct report is remanded administratively for reasons having nothing to do with the validity of the waiver. Absent Supreme Court precedent to support his claim, Gonzalez cannot show that the Wisconsin Court of Appeals' decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the motion of respondent Gerald Berge for an order dismissing the petition of Dennis Gonzalez be GRANTED.

Dated this 5th day of December, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge