COURT OF APPEALS
DECISION
DATED AND RELEASED

July 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 96-0152 & 96-0153

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE EX REL. JOHNNY LARRY,

PETITIONER-APPELLANT,

V.

DAVID W. SCHWARZ, ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,
STATE OF WISCONSIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Johnny Larry appeals from the trial court's order denying his petition for a writ of *certiorari* and affirming the decision of the Division of Hearings and Appeals, which revoked his parole and ordered his

incarceration. Larry asserts that: (1) the Department of Corrections no longer had jurisdiction to revoke his parole because he had already completed ten years of combined incarceration and parole; and (2) the Division of Hearings and Appeals improperly revoked him. We reject his assertions and affirm.

I. BACKGROUND

On October 7, 1981, Larry pleaded guilty to two counts of burglary, contrary to § 943.10(1)(a), STATS. The trial court sentenced him to ten years' imprisonment but stayed the sentence and placed him on probation for three years. On April 25, 1984, Larry was revoked for his involvement in a November 26, 1983 burglary. Larry was convicted of the November 1983 burglary on April 4, 1985, and was sentenced to eighteen months in prison, consecutive to the ten-year sentence.

On October 24, 1989, Larry was paroled. On October 12, 1994, Larry was charged with physical abuse of his live-in girlfriend's daughter and he subsequently pleaded guilty to a reduced charge. Thereafter, Larry received notice that his parole agent had filed a Notice of Violation with the Department of Corrections and had recommended revocation of his parole.

The Department of Corrections held a final parole revocation hearing on November 22, 1994. In a written decision dated December 6, 1994, the administrative law judge concluded that Larry had violated his conditions of parole. The ALJ found that Larry had: (1) changed his residence without prior approval or subsequent notification of his parole agent, in violation of Probation/Parole Rule No. 7; (2) violated his parole by hitting his girlfriend's daughter, in violation of Probation/Parole Rule No. 1; and (3) failed to provide truthful answers to his agent's inquiries, in violation of Probation/Parole Rule No.

13. Despite these findings, the ALJ determined that "an alternative to revocation would be appropriate" for Larry.

Larry's parole agent appealed the ALJ's decision to the Administrator of the Division of Hearings and Appeals. Concluding that incarceration was the only appropriate outcome for Larry's parole violations, the administrator reversed the ALJ's decision, revoked Larry's parole, and ordered that Larry's good time be forfeited. Larry then filed a petition for a writ of *certiorari* to review the Division of Hearings and Appeals' decision; the trial court denied his petition.

II. ANALYSIS

A. Jurisdiction

Larry first claims that the Department of Corrections no longer had jurisdiction to revoke his parole on the ten-year sentence because the revocation occurred after he had completed ten years of combined incarceration and parole. Larry argues that revocation could only have occurred on his consecutive eighteen-month sentence.[1] Therefore, Larry contends that the Department erroneously interpreted § 53.11, STATS., and, as a result, incorrectly determined that his two consecutive sentences were to be construed as one continuous sentence. We disagree.

[1] In 1984, the Wisconsin Legislature replaced "good time" with mandatory parole at two-thirds of the sentence served. *See* 1983 Wis. Act 528 § 2. However, good time credits continue to determine parole eligibility for prisoners serving sentences for crimes committed before June 1, 1984. *See* 1983 Wis. Act 528 § 29. Good time awards for such prisoners are governed by §§ 53.11 & 53.12, STATS. (1981-82). (Larry does not contend that he elected to have his parole eligibility governed by the new mandatory parole rules, as authorized by § 302.11(9), STATS.)

Statutory interpretation is a question of law which this court decides *de novo*, benefiting from the administrative agency's analysis. *See* ***State ex rel. Parker v. Sullivan***, 184 Wis.2d 668, 679, 517 N.W.2d 449, 452 (1994); *see also* ***Kozich v. Employe Trust Funds Bd.***, 203 Wis.2d 363, 369, 553 N.W.2d 830, 833 (Ct. App. 1996) (reviewing court may defer to agency's interpretation if legislature charges agency with administration and enforcement of the statute). The principal objective in statutory interpretation is to ascertain and give effect to the intent of the legislature. ***Parker***, 184 Wis.2d at 679, 517 N.W.2d at 452. "If a statute is clear and unambiguous, we must apply its plain meaning without resorting to rules of statutory construction." ***Ashford v. Division of Hearings & Appeals***, 177 Wis.2d 34, 42, 501 N.W.2d 824, 827 (Ct. App. 1993). "If a statute is ambiguous, we may look to the statute's context, subject matter, history, and objective to determine the intent of the legislation." ***Id.*** In addition to examining legislative history to determine legislative intent, we may also look to "the interpretation of the statute by the administrative agency charged with its enforcement." ***Parker***, 184 Wis.2d at 699, 517 N.W.2d at 460.

At the November hearing Larry claimed that he had served the entire ten-year sentence either in prison or on parole and, therefore, he was entitled to a discharge on that sentence. He argued that the two sentences cannot be construed as continuous under § 53.11(3), STATS., because it did not take effect until 1985, the year after he was sentenced. In response to Larry's argument, the ALJ explained:

> Section 53.11(3), STATS., was indeed not effective until 1985. However, section 53.11(3)(a), 1981-82, STATS., the predecessor to sec. 53.11(3), is applicable. It reads, in relevant part:

> > For the purpose of computing good time earned or forfeited ..., separate consecutive sentences shall be construed as one continuous sentence, regardless of when the convictions occurred and when the sentences were imposed, if the crimes for which the sentences were imposed occurred before the person was committed under any of the sentences.
>
> By virtue of this statute, Mr. Larry's consecutive sentences are to be construed as one continuous sentence.
>
> Section 53.11(2a), 1981-82, STATS., provides that the "department may upon proper notice and hearing forfeit **all or part** of the good time previously earned under this chapter, for violation of the conditions of parole." (Emphasis added). Current statutory language authorized reincarceration for the remainder of the sentence when a parole violation occurs. Section 302.11(3), STATS. Where consecutive sentences are involved, the remainder of the sentence must be the remainder of the aggregate sentence. ***Ashford v. Division of Hearings & Appeals***, 177 Wis.2d 34 (Ct. App. 1993). ***Ashford*** deals with "new law" sentences, and Mr. Larry's sentences are "old law" sentences, but the same logic applies, given that the statutory language is essentially unchanged. [Accordingly,] I reject his argument. He has earned a total of five years and four months good time on the continuous sentence, and it is all available for forfeiture.

We agree with the ALJ's analysis.

At the time Larry committed the November 1983 burglary, he was on probation. Thus, Larry was not committed to prison until after the second burglary–the offense giving rise to the eighteen-month sentence. Therefore, under § 53.11(3)(a), STATS., Larry's consecutive sentences are to be construed as one continuous sentence.

Pursuant to § 53.11(2a), STATS. (1981-82), the "department may upon proper notice and hearing forfeit all or part of the good time previously earned under this chapter, for violation of the conditions of parole." The current

statutory language authorizes reincarceration for the remainder of the sentence when a parole violation occurs. *See* § 302.11(7)(a), STATS. "The remainder of the sentence is equal to the total sentence minus the time spent in custody prior to parole." ***Ashford***, 177 Wis.2d at 42, 501 N.W.2d at 827. Where consecutive sentences are involved, the remainder of the sentence must be the remainder of the aggregate sentence. ***Id.***

Applying these statutory directives, we conclude that Larry's total prison sentence was eleven and one-half years, starting on April 25, 1984, with credit assigned for the fifty-seven days he served prior to sentence. Therefore, Larry was still on parole as of August 1, 1994, the date his parole violations began, and his parole release date would have been August 29, 1995. Thus, Larry's good-time credit on both sentences was available for forfeiture. The Department correctly determined that Larry's total of five years and four months' good time on the continuous sentence was available for forfeiture.

Larry contends that ***Ashford*** is not dispositive because it addresses "new law" sentences. We disagree. Although it is true that ***Ashford*** addresses "new law" sentences, i.e., those under §§ 53.11(3) and 302.11(7)(a), STATS., and Larry's sentences are "old law" sentences under §§ 53.11(3)(a) and 53.11(2a), STATS. (1981-82), ***Ashford***'s reasoning applies to avoid the absurd result of having a defendant serve time for one violation, followed by parole, and then serve time on a second violation, followed by parole. *See* ***Ashford***, 177 Wis.2d at 42, 501 N.W.2d at 827. Accordingly, we conclude that the Department correctly determined that Larry was still on parole and, thus, was still answerable for parole violations, when he was charged with physical abuse of a child.

B. Revocation

Larry next argues that the Division improperly revoked him because it overturned the ALJ's decision, which concluded that a satisfactory alternative to revocation existed. Larry bases his argument on the theory that the same deferential standard of review governing the trial court's review of the Division's decision on writ of *certiorari* also governs the Division's review of the ALJ's decision. Larry is wrong.

When reviewing probation revocation determinations, this court must defer to the Division's determinations. ***Von Arx v. Schwarz***, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). The judiciary's scope of review is limited to the following questions: (1) whether the Division kept within its jurisdiction; (2) whether the Division acted according to law; (3) whether the Division's actions were arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the Division might reasonably make the order or determination in question. ***Van Ermen v. DHSS***, 84 Wis.2d 57, 63-64, 267 N.W.2d 17, 20 (1978) (review by *certiorari* is not a *de novo* inquiry; on appeal, appellate court's standard of review is the same as the trial court's); *see also* ***Coleman v. Percy***, 96 Wis.2d 578, 588, 292 N.W.2d 615, 621 (1980) (discussing scope of review on *certiorari*).

By contrast, when the Division of Hearings and Appeals reviews a decision of an administrative law judge, it must abide by the relevant rules and regulations promulgated by the administrative agency. *See* § 301.035, STATS. The Rules relevant to the appeal of ALJ's decision are set forth in the administrative code. *See* WIS. ADM. CODE § HA 2.05. The rule governing the

administrator's review of an ALJ's decision regarding a parole revocation provides in part:

> **HA 2.05 Revocation hearing**....
>
> ....
>
> **(8)** APPEAL. (a) The client, the client's attorney, if any, or the department representative may appeal the administrative law judge's decision by filing a written appeal with arguments and supporting materials, if any, with the administrator within 10 days of the date of the administrative law judge's written decision.
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> ....
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> **(9)** ADMINISTRATOR'S DECISION. (a) The administrator may modify, sustain, reverse, or remand the administrative law judge's decision based upon the evidence presented at the hearing and the materials submitted for review.

WIS. ADM. CODE § HA 2.05(8) and (9).

The clear language of the administrative rule allows the administrator to review all the materials presented, including both the evidence at the hearing and the materials submitted for review, and to "modify, sustain, reverse or remand the decision of the administrative law judge's decision." WIS. ADM. CODE § HA 2.05(9). Nothing in this rule indicates that the administrator must defer to the decision of the administrative law judge. Rather, the administrator is given broad power to review and change the decision of the ALJ. Accordingly, we conclude that the administrator acted according to law.

Larry next claims that the administrator's reversal of the ALJ's decision was "arbitrary, capricious, and unreasonable." We disagree.

As enunciated in ***Van Ermen***, this court's review of a Division of Hearings and Appeals' decision is deferential. *See* ***Van Ermen***, 84 Wis.2d at 63-64, 267 N.W.2d at 20. On appeal challenging a revocation decision, the parolee bears the burden of proving that the decision was arbitrary and capricious. *See* ***State ex rel. Solie v. Schmidt***, 73 Wis.2d 76, 79-80, 242 N.W.2d 244, 246 (1976).

> An agency's decision is not arbitrary and capricious if it represents a proper exercise of discretion. A proper exercise of discretion contemplates a reasoning process based on the facts of the record "and a conclusion based on a logical rationale founded upon proper legal standards." We may not substitute our judgment for that of the division; we inquire only whether substantial evidence supports the division's decision. If substantial evidence supports the division's determination, it must be affirmed even though the evidence may support a contrary determination. "Substantial evidence is evidence that is relevant, credible, probative, and a quantum upon which a reasonable fact finder could base a conclusion."

Von Arx, 185 Wis.2d at 656, 517 N.W.2d at 544 (citations omitted).

Basing his decision on the revocation hearing record, the administrator concluded:

> [T]he findings made by the Administrative Law Judge with regard to the appropriateness of an alternative to revocation are not supported by the evidence and fail to adequately consider the seriousness of [Larry's] conduct. [Larry's] abusive and assaultive conduct towards the child amply demonstrates that he is dangerous to others…. That conduct cannot be condoned. Accordingly I find that there is no viable alternative at this time and that revocation of supervision and forfeiture of two years and six months' good time is both necessary and appropriate to emphasize the seriousness of the violations and to protect the public.

We conclude that substantial evidence supported the administrator's conclusion that revocation was necessary to protect the public and ensure that the seriousness of the violations would not be unduly depreciated. The uncontroverted evidence established that Larry violated parole rules by changing his residence without first notifying his agent, by failing to respond truthfully to his agent's questions, and by battering his girlfriend's daughter with a belt. The administrator exercised discretion on a rational basis; his decision to revoke Larry was neither arbitrary nor capricious. Accordingly, we conclude that the administrator complied with the regulatory rules in reversing the decision of the administrative law judge.

By the Court.–Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.