COURT OF APPEALS
DECISION
DATED AND RELEASED

September 2, 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.

No. 96-1329

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

STATE OF WISCONSIN EX REL. JAMES LEE HARRIS,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS, STATE OF WISCONSIN AND DEPARTMENT OF CORRECTIONS,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded.*

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

PER CURIAM. James Lee Harris, *pro se*, appeals from an order dismissing his petition for a writ of certiorari challenging his parole revocation. Harris claims that: (1) he was not given proper notice of the violations that were

the basis of the revocation proceeding; (2) he was denied due process by virtue of drug-screen tests that were not done in compliance with testing procedures; (3) he was denied his right of confrontation at the final revocation hearing; (4) a letter brief submitted by a parole agent violated his due-process rights; (5) the Department of Corrections failed to consider the feasibility of alternatives to revocation; (6) his earlier release on habeas corpus when he was first held pending revocation should have been considered during the revocation proceeding; (7) the evidence was insufficient to support revocation; and (8) all the errors amounted to a violation of due process. We reverse and remand.

Harris was convicted of first-degree murder and armed robbery in 1973 and was sentenced to life plus 25 years, to be served consecutively. In 1985, his life sentence was commuted to 50 years and he was granted parole. In December 1993, Harris was arrested on charges of cocaine possession. He was thereafter served with a notice of violation of his parole. In February 1994, Harris was released from custody pursuant to a writ of habeas corpus issued because a preliminary hearing on his revocation had not taken place within the required time. One month later, as a result of random urinalysis, Harris tested positive for cocaine and again was taken into custody. A new notice of parole violation was served. At the preliminary hearing, probable cause to proceed with final revocation was found. Harris's parole was revoked at the final revocation hearing. That decision was affirmed on appeal to the administrator of the Division of Hearings and Appeals. Harris then filed a petition for a writ of certiorari in the circuit court for Milwaukee County. The circuit court dismissed the petition.

A reviewing court can overturn a parole revocation only if the prisoner demonstrates by a preponderance of the evidence that the Department's action was arbitrary and capricious. *See* ***State ex rel. Johnson v. Cady***, 50 Wis.2d

540, 550, 185 N.W.2d 306, 311 (1971). A reviewing court must consider whether there was substantial evidence to warrant revocation. *See* ***Van Ermen v. DHSS***, 84 Wis.2d 57, 64, 267 N.W.2d 17, 20 (1978).

Harris's first contention is that the Department's revocation order was invalid because it was based upon inadmissible hearsay allegations of prior conduct not contained in the notices of violation. He states that he should have received notice of all the information being considered by the administrative law judge during the revocation hearing. The United States Supreme Court has established a bipartite procedure for parole revocation procedures. *See* ***Morrissey v. Brewer***, 408 U.S. 471, 486–489 (1972). Specifically, the process revoking parole requires a "probable cause" hearing and a subsequent final revocation hearing. ***Id.*** At the preliminary hearing, the sole inquiry is whether the parolee has in fact violated the terms of parole. ***Id.*** Once it is determined that the conditions of parole have been violated, a second proceeding is held to determine whether parole should be revoked. ***Id.***

The notice of violation contained the following allegations:

> 1) On or about 12/2/93, in the City of Madison, James Harris was in possession of cocaine base and cocaine hydrochloride. This is a violation of rule #1 and 15D of the Rules of Probation and Parole signed by him on 11/9/93.
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> 2) On or about 12/2/93, James Harris consumed cocaine in violation of rule #1 and 15D of the Rules of Probation and Parole signed by him on 11/9/93.
>
> 3) On or about 3/30/94, James Harris consumed cocaine in violation of rule #1 and 15D of the Rules of Probation and Parole signed by him on 2/2/94.
>
> 4) On or about 4/7/94, James Harris refused to give his agents a statement after being issued a [] warning in

> violation of rule #13 of the Rules of Probation and Parole signed by him on 2/2/94.

The administrative law judge made the following findings with respect to these alleged violations:

> **Alleged Violations 1 and 2**
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> On December 2, 1993, Mr. Harris was detained after he was arrested on charges of possessing a controlled substance without a prescription. His conduct that day also gave rise to allegations 1 and 2 in this proceeding.
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> On December 2, 1993, Madison police officers made a traffic stop of a car being driven by Mr. Harris. A search of the vehicle revealed a film canister under the driver's seat. Testing by the state crime laboratory showed that offwhite residue in the canister was cocaine base (Ex. 6). The state crime laboratory also tested a sample of blood drawn from Mr. Harris on December 2, 1993. That test was positive for the presence of cocaine metabolite (benzoylecgnine) (Ex. 20). There was evidence to the effect that it was likely that Mr. Harris's companion might have placed the film canister under his seat before the police searched the vehicle, but I discount this evidence as speculative. On a preponderance of the credible evidence I find that Mr. Harris violated probation as alleged by allegations 1 and 2.
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> **Alleged Violations 3 and 4**
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> Mr. Harris was released from jail on February 1, 1994, pursuant to a writ of habeas corpus. On routine visits to his agent's office thereafter, Mr. Harris submitted [a] urine specimen. On testing, a urine specimen submitted by him on March 30, 1994, was positive for the presence of cocaine metabolite (Ex. 27). On a preponderance of the credible evidence, I find that Mr. Harris violated probation as alleged by allegation 3.
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> Mr. Harris was detained again on April 6, 1994, and has been continuously in custody since then. On April 7, 1994, his agents asked him for a statement concerning allegations 1-3. He refused to provide them with one. His refusal violated rule 13 of the parole agreement which he signed on February 2, 1994.

As noted, the administrative law judge found that the four allegations of violation were proven. The record clearly reflects that Harris received notice of all the allegations on which the revocation was based. Harris fails to understand the difference between violations which are the basis of the first stage of the revocation proceeding and information that goes to the second stage—whether parole should be revoked. In making the latter determination, the Department can consider anything that is pertinent to that decision. *See* WIS. ADM. CODE § DOC 331.03(4); *see also* ***State ex rel. Plotkin v. DHSS***, 63 Wis.2d 535, 546–548, 217 N.W.2d 641, 646–647 (1974). Here, the administrative law judge considered Harris's background and other circumstances of his life. We conclude, therefore, that this allegation regarding insufficient notice is without merit.

Harris next challenges the validity of the test results of his urinalysis and the methods used to confirm them. He claims that WIS. ADM. CODE § DOC 303.59(2)(c) should have been followed.[1] That section, however, is applicable only to "adult inmates in [the Department's] legal custody." *See* WIS. ADM. CODE § DOC 303.01. We agree with the State that the word "inmates" refers to persons in prison and not on parole. *See* WIS. ADM. CODE § DOC 303.01 app. Harris was not incarcerated and involved in a prison disciplinary matter when the urinalysis was performed. WIS. ADM. CODE § DOC 303.59(2)(c) did not apply to him.

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[1] WIS. ADM. CODE § DOC 303.59(2)(c) provides:

> Any confirmatory test shall be conducted in accordance with department procedures and shall be a separate test approved by the state laboratory of hygiene using a chemical method different from the first test.

After submission of briefs by both sides in this matter, Harris asked us to take judicial notice of Department of Corrections policy numbers 06.29.05–.07, which subject to the confirmation process drug testing of those on parole. "Judicial notice may be taken at any stage of the proceeding." RULE 902.01(6), STATS. Harris has supplied us with the necessary information, *see* RULE 902.01(4), STATS., and the State's response brief represents that it does not object, *see* RULE 902.01(5), STATS.

Policy number 06.29.07 provides:

> If a positive urine test is to be used as the only basis for revocation and the client contests the results, a confirmation test must be ordered using an alternative test method. An EMIT test is not sufficient proof of violation in revocation proceedings. Confirmation by thin layer chromatography (TLC) or gas chromatography/mass spectrometry (GC/MS) is required. TLC is the recommended test for confirmation, and must be requested within 30 days of submitting the original specimen.

As Harris points out and as the State concedes, the records of the confirmation tests do not reveal the test method. The State argues that we should, nevertheless, accept the decision of the administrative law judge, even though he did not make a finding on this issue, because, in essence, there was no evidence that the confirmation test was not one of the ones required. We disagree. The Department has the burden to show that it complied with its rules, regulations, and policies. We must, therefore, remand to the Department for supplementation of the evidence on the issue of whether the confirmation test complied with policy number 06.29.07, and, if not, for a reexamination of Harris's revocation. *See* ***State ex rel. Lewis v. Department of Health and Social Services***, 89 Wis.2d 220, 225–

226, 278 N.W.2d 232, 234–235 (Ct. App. 1979) (remand to agency appropriate when further fact-finding required in connection with parole revocation).[2]

Although we are remanding for further evidence on the test-confirmation issue, we discuss the other issues raised by Harris.

Harris claims that he was deprived of his constitutional right to confrontation because a parole agent offered hearsay testimony at the final revocation proceeding. Hearsay evidence, however, is permissible at final revocation proceedings. *See* ***Morrissey***, 408 U.S. at 489 ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial").

Harris also contends that a letter brief filed by a parole agent with the administrative law judge was an *ex parte* communication and, thus, in violation of his right to due process. At the conclusion of the revocation proceeding, the administrative law judge dispensed with closing arguments and offered the parties the opportunity to submit briefs. The parole agent did; Harris

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[2] Harris also argues that the federal certification of the laboratory that did the test confirmation was suspended, and has submitted an excerpt from the Federal Register in support of that contention. The suspension, however, was effective June 14, 1995, which was after the laboratory ran the tests at issue here.

Harris's supplementary submission makes additional arguments that we believe are also without merit. First, he submits a document purporting to show that the laboratory that ran the test confirmations at issue was certified by Wisconsin "for alcohol testing." (Upper casing omitted.) He argues that this proves that the laboratory was not certified to test for cocaine. We disagree. As the State points out, this document is not relevant as to whether the laboratory was also certified to test for cocaine. Second, he has submitted to us the summary reversal by this court of his conviction of criminal charges for the conduct that underlies the revocation of his parole. That reversal is also not material to this proceeding. The reversal was the result of evidentiary error by the trial court. Third, he has attached an affidavit submitted to the trial court in that criminal case. The affidavit is not of record in this case, is not a proper subject for judicial notice, and, accordingly, may not be considered by us.

did not. The parole agent's brief, therefore, was not an *ex parte* communication and, accordingly, did not violate Harris's right to due process.

Harris next claims that the Department of Corrections failed to consider alternatives to revocation. The record indicates that the administrative law judge appropriately considered alternatives to revocation:

> There are no reasonable alternatives to revocation. Mr. Harris is on parole from sentences for crimes of great violence, an armed robbery and a first-degree murder. His record on parole is shot through with allegations of violence and threatening behavior toward others. They demonstrate that Mr. Harris presents a continuing danger to the physical safety of others. The other principal [sic] running theme in Mr. Harris's parole supervision has been his drug use. This not only increases the risk of harm to others, but presents a threat to Mr. Harris's own health and his chances for rehabilitation. The department has time and again offered Mr. Harris opportunities for drug treatment. The department's efforts have proved futile. It is noteworthy that the most recent incidents of drug use occurred at a time when Mr. Harris was on community-based supervision during a revocation proceeding; his drug use on March 30, 1994, serves to emphasize his unwillingness or inability to conform his conduct to the law and to what is expected of a parolee. I conclude, on the basis of the violations of parole proved in this proceeding and on consideration of Mr. Harris's entire parole history, that the seriousness of his conduct would be unduly depreciated if his parole were not revoked, and I further conclude on the same basis that for the protection of others he can best receive continuing correctional treatment while he is securely confined.

Therefore, we reject this argument as well.

Harris next contends that because his petition for a writ of habeas corpus following his initial detention was successful, the violations which constituted the basis of that detention should have been dismissed. The record contains an order by the circuit judge in Madison dated February 1, 1994, ordering

that Harris be released from custody. After that ruling, the Department received confirmation of Harris's positive urinalysis results for cocaine usage taken by a random drug test on December 2, 1993. There were other positive drug test reports from specimens taken subsequent to his habeas corpus release. An amended petition was issued and a preliminary hearing was held in April 1994. Harris did not object to these proceedings. Therefore, he has waived the right to raise this objection for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443–444, 287 N.W.2d 140, 145 (1980).

Harris next contends that the evidence was insufficient to support the determination by the administrative law judge that he violated parole. Our standard of review is as follows. At a revocation hearing, the Department has the burden to prove the allegation of the violation by a preponderance of the evidence. ***State ex rel. Flowers v. H&SS Dep't***, 81 Wis. 2d 376, 388, 260 N.W.2d 727, 734 (1978). Our inquiry on review is limited to whether there is substantial evidence to support the Department's decision. ***Van Ermen***, 84 Wis. 2d at 64, 267 N.W.2d at 20. Based on our review of the record, we conclude that there was substantial evidence to support the Department's decision to revoke Harris's parole, subject to what may be developed following remand. The laboratory reports and the parole agent's testimony constitute substantial evidence of the Department's finding that Harris violated conditions of his parole, that he failed to abstain from the use of controlled substances and that he failed to give his parole agent a statement regarding his drug use.

Finally, Harris claims that all the alleged errors amounted to a violation of due process. As noted, there were no errors and, therefore, no violation of due process.

By the Court.—Order reversed and cause remanded.

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