COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

Nos. 97-3092
97-3093
97-3094

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

STATE OF WISCONSIN
EX REL. JAMES S. COOK,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,
ADMINISTRATOR HEARINGS & APPEALS,

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. James S. Cook appeals *pro se* from an order denying his petition for writ of certiorari following the revocation of his parole. We affirm.

I. BACKGROUND.

Cook was convicted of attempted first-degree murder, party to a crime and armed robbery on June 6, 1969, and was sentenced to life in prison. He was paroled on March 20, 1992. In September 1996, while on parole, Cook became employed as a counselor at a boys' division of a juvenile treatment center. During his short tenure there, Cook began a sexual relationship with Q.S., a seventeen-year-old female resident of the girls' division. This sexual relationship, a violation of Cook's parole, was first brought to light by another resident at the treatment facility. After learning of this violation, his parole officer began revocation proceedings.

At the revocation hearing, Cook called as witnesses his neighbor, his girlfriend, and a private detective. Cook also testified. The Department called an administrator from the treatment facility, Q.S., and parole agent Geraldine Kellen.[1]

The ALJ found, and later the Division of Hearings and Appeals Administrator relied upon the finding, that Q.S.'s testimony was credible and it weighed heavily in the determination to revoke Cook's parole. At the hearing, Q.S. testified that Cook would pick her up in a gray Mercedes Benz and drive her to his apartment, which she described in significant detail, where they engaged in

[1] Agent Kellen did not supervise Cook, but testified at trial that she reviewed Department files and interviewed people to prepare for the revocation hearing. Agent Tracy Covert, Cook's most recent agent of record, did not testify at the hearing.

sexual intercourse six to seven times a week. Contradicting this evidence, Cook called his neighbor, Vanessa Conway, who testified that she sits home all day and sees everyone who comes to Cook's apartment and that during the time period in question, she never saw anyone enter Cook's apartment except Cook and Cook's girlfriend, Jacqueline Caradine. The ALJ, in finding Conway's testimony incredible, stated that this conclusion was reached because of "her description of her daily activities and because her testimony is contradicted," and finally, because the "examiner does not believe Ms. Conway."

Caradine also testified on Cook's behalf. The ALJ determined that Caradine's testimony was suspect because she had reason to "color her testimony to obtain his release." In addition, Caradine's testimony was different from that of Conway's testimony. As a result, the ALJ stated that he believed neither.

Finally, Cook testified on his own behalf. His testimony greatly contradicted that of the victim's in many respects. Not only did he deny any sexual contact with the victim, but also he testified differently than the victim concerning time periods, and even details of his first contact with her. His testimony was also inconsistent with that given by Conway, his own witness. The ALJ found Cook's testimony unbelievable. On the basis of the credible evidence, the ALJ revoked his parole.

Cook first appealed his parole revocation to the Administrator of the Division of Hearings and Appeals which sustained the ALJ's decision. Cook then petitioned the trial court through a certiorari action seeking reversal of the revocation. Certiorari was denied and this appeal followed.

Cook now argues that: (1) the ALJ acted arbitrarily and capriciously when weighing the sufficiency of the evidence; (2) he was denied effective assistance of counsel; (3) he was denied his right to confront the witnesses against him; and (4) the hearing examiner failed to consider the alternatives to revocation.

There are two significant procedural errors on Cook's part that warrant mention. First, the issues raised in the trial court are not the same issues raised here, and second, Cook's brief is totally improper in form and number. Nevertheless, in the interest of judicial economy, we will address the four issues raised in Cook's brief.

II. ANALYSIS.

The first issue raised by Cook is whether the evidence presented at his parole revocation hearing was sufficient to support the conclusions of the Division of Hearings and Appeals. We agree with the ALJ that it was.

On appeal, "[w]e owe no deference to the circuit court's ruling as we directly review the department's decision." ***State ex rel. Macemon v. McReynolds***, 208 Wis.2d 594, 596, 561 N.W.2d 779, 780 (Ct. App. 1997). This court will look to see whether the evidence reasonably supports the ALJ's decision. *See* ***id***.

The trier of fact, not the appellate court, decides the credibility of witnesses and the weight to be given to their testimony. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990). The fact finder also resolves any conflicts in the evidence. *See* ***id.*** If the fact finder could have drawn more than one reasonable inference, reviewing courts must accept the inference that supports the decision. *See* ***State v. Alles***, 106 Wis.2d 368, 377, 316 N.W.2d 378,

382 (1982). As the State points out in its brief, "[t]here can be no dispute that the hearing examiner, as the fact finder, has the authority to determine credibility and accept or reject the testimony of any witnesses."

In the present case, the ALJ properly utilized its authority in determining that Q.S. was a credible witness and Cook, Conway and Caradine were not. Q.S. testified to Cook's sexual relationship with her. Her recollections of Cook's home and car were sufficiently detailed to allow the ALJ to believe that she had visited Cook's home a number of times. While Cook adamantly denied that Q.S. had ever been to his home, he provided no explanation for her detailed knowledge of his apartment. Cook argues that Q.S. lied because she claimed to have been in Cook's car several times a week, yet she could not recall the color of the interior. Her failure to recall the car's interior color was outweighed by the rest of her testimony, which provided ample details of Cook's apartment.

The test to determine whether evidence is sufficient to revoke parole involves a burden of proof that only requires the state to prove the evidence is of the quality and quantity that a "reasonable [person] could accept as adequate to support a conclusion." *See* ***State ex rel. Eckmann v. DHSS***, 114 Wis.2d 35, 43, 337 N.W.2d 840, 844 (Ct. App. 1983) (citation and internal quotation marks omitted). When a case involves two contrary views, and both are sustained by substantial evidence, "it is for the agency to determine which view of the evidence it wishes to accept." ***Robertson Transp. Co. v. Public Serv. Comm'n***, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968). The ALJ is the arbiter of the facts, and here, the conclusions reached by the ALJ are supported by Q.S's testimony.

We thus reject Cook's argument that there was not sufficient evidence adduced at trial that was of the quality and quantity that would allow a

reasonable person to accept as adequate the conclusion of the ALJ. The state met the burden of proof.

Cook next argues that he was denied effective assistance of counsel because of counsel's failure to call certain witnesses. We disagree. At the outset, we note that Cook has raised this argument in a procedurally inappropriate manner.[2] Even if Cook had properly raised the issue, however, his claims would not support the necessity for a hearing to test them.

The familiar two-pronged test for ineffective assistance of counsel claims requires proof that the attorney engaged in deficient performance and that the attorney's conduct resulted in prejudice to the client. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50, 53 (1996); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986). To prove deficient performance, one must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. The claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as

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[2] The proper way to bring a claim of ineffective assistance of counsel in a parole revocation proceeding is by way of a petition for a writ of habeas corpus. Cook brought his claim in a writ of certiorari to the circuit court. *See* ***State v. Ramey***, 121 Wis.2d 177, 182, 359 N.W.2d 402, 405 (Ct. App. 1984). As we stated in ***Ramey***, the scope of review on certiorari is stringently confined to determining:

> (1) Whether the board kept within it jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

Id. (citations and internal quotation marks omitted). It is apparent that an argument claiming ineffective assistance of counsel does not come under any of the above. *See* ***id.***

of the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.*** If this court concludes that one prong has not been proven, we need not address the other prong. ***Strickland***, 466 U.S. at 697. The proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 715 (1985).

Cook argues that his counsel was ineffective for failing to call as witnesses Cook's parole agent (Agent Covert) and the person who brought Cook and Q.S.'s relationship to light. However, Cook does not specifically state how the failure to call them constituted deficient performance. Further, even if this was deficient performance by Cook's attorney, Cook fails to show how he was prejudiced. Neither the party who informed Cook's supervisor of the parole violations, nor Agent Covert had any first hand knowledge of the allegations against Cook. Consequently, their testimony would have added little to the relevant facts. Thus, we reject Cook's claim that his attorney's failure to call these witnesses was both "outside the wide range of professionally competent assistance" and resulted in prejudice to him.

Cook next argues that he was denied his constitutional right to confront witnesses. We disagree.

There are "procedural guarantees which are constitutionally required in revocation hearings." ***State ex rel. R.R. v. Schmidt***, 63 Wis.2d 82, 90, 216 N.W.2d 18, 21 (1974). One of these guarantees is "the right to present and cross-examine witnesses." ***Id.*** Compulsory process is also available for the production of witnesses and thus, the defendant continues to retain the ability to ensure that

justice is done. *See* ***State v. Migliorino***, 170 Wis.2d 576, 587, 489 N.W.2d 678, 682 (Ct. App. 1992) (citation omitted).

Cook argues that he should have been able to confront the party who brought the sexual relationship to light, as well as Agent Covert. As noted, neither witness could offer any relevant testimony. Further, Cook had the right to subpoena these witnesses, but he failed to do so. Nevertheless, had he called these witnesses, the result would have been the same, as they could not have shed any light on the disputed issues.

Further, the ALJ's decision does not rely on the credibility of the party who first reported the illicit relationship. The decision only mentions that the matter first came to light after a complaint to the directors of the treatment facility by this person. Consequently, calling this person as a witness would not have changed the outcome of the case. In regard to Agent Covert, even if Cook had subpoenaed his parole agent, we fail to see any advantage Cook would have gained. Cook claims that had Agent Covert testified, Cook could have challenged a statement signed by Covert which incorporates Q.S's allegations against Cook. But the statement was also signed by Q.S., who testified at the revocation hearing and who was cross-examined. Thus, nothing more would have been gained by calling the agent.

Cook's final argument is that the hearing examiner failed to consider the alternatives to revocation. We disagree.

State ex rel. Plotkin v. DHSS, 63 Wis.2d 535, 217 N.W.2d 641 (1974), discusses the requirement that alternatives to incarceration be considered when the administrative body is exercising its discretion concerning the possibility

of revoking parole. The steps that were approved and adopted by the ***Plotkin*** Court, as pertinent here, are as follows:

> [T]he following intermediate steps should be considered in every case as possible alternatives to revocation:
>
> (i) a review of conditions, followed by changes where necessary or desirable;
>
> (ii) a formal or informal conference with the probationer to re-emphasize the necessity for compliance with the conditions;
>
> (iii) a formal or informal warning that further violations could result in revocation.

Id. at 545, 217 N.W.2d at 645-46 (citation and internal quotation marks omitted).

In the instant case, Cook argues that the department failed to properly consider the alternatives to revocation pursuant to the requirements stated above. The record, however, does not support Cook's argument that the hearing examiner did not consider the alternatives to revocation. In fact, the ALJ stated in his opinion that "[r]evocation is warranted and necessary to impress upon the client the seriousness of his conduct and protect the community from further crime by the client. *Alternatives to revocation are not appropriate*." (emphasis added). Thus, it is explicitly clear that the alternatives to revocation were considered and rejected. As noted, the ALJ found that the serious nature of the violation and the fact that "[Cook] takes no responsibility for his conduct" were sufficient reasons to find the alternatives to revocation inappropriate.

For the reasons stated above, we affirm.

By the Court.—Order affirmed.

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