COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1637

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

STATE OF WISCONSIN EX REL. HERBERT E. DROSTE,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ, IN HIS CAPACITY AS ADMINISTRATOR, DEPARTMENT OF ADMINISTRATION, DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Herbert Droste appeals a circuit court order affirming the revocation of his parole by the Department of Administration, Division of Hearing and Appeals. He claims the Department acted arbitrarily and

violated his due process rights by adding additional allegations of parole violations after the preliminary hearing and by relying on hearsay and insufficient evidence. For the reasons discussed below, we reject Droste's contentions and affirm the order of the circuit court.

BACKGROUND

¶2 Droste was sentenced to prison in 1981 for second-degree murder and sexual assault. He was released on parole in March of 1997, after reaching his mandatory release date.[1] In December of that year, the Department of Corrections (DOC) recommended that Droste's parole be revoked for making a bomb threat and intimidating a relative of the victim.[2] The preliminary hearing on the allegations was held on December 22, 1997, and probable cause was found to believe that Droste had violated the conditions of his parole. The DOC subsequently notified Droste that it would be presenting at the final hearing evidence of additional violations: threatening a witness, threatening bodily harm to a parole officer, and planning with another inmate to escape and kill a parole agent. Following the final hearing on March 13, 1998, an administrative law judge found that Droste's parole should be revoked. The decision was affirmed on administrative appeal and again by the circuit court on certiorari review.

[1] His release was delayed by several months while a sexual predator petition was pending.

[2] The DOC had previously recommended that Droste's parole be revoked for intimidating a counselor on his first day of therapy at the Attic Center, but Droste prevailed in those proceedings.

STANDARD OF REVIEW

¶3 Our certiorari review is limited to whether: (1) the Department stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented the committee's will and not its judgment, and (4) the evidence was such that the Department might reasonably make the order or determination in question. *See* ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). "The facts found by the [administrative decision maker] are conclusive if supported by 'any reasonable view' of the evidence, and [the court] may not substitute [its] view of the evidence for that of the [administrative decision maker]." ***Id.*** (citations omitted).

ANALYSIS

Department's Response to Certiorari Petition

¶4 Droste first argues that several of the claims of error he sets forth in his certiorari petition should be accepted solely on the basis that the Department failed to specifically respond to each of them in the circuit court. We reject this contention for several reasons. First, our certiorari review is focused on the administrative proceedings rather than the circuit court proceedings. *See* ***Whiting*** at 233. Secondly, the respondent in a certiorari action must file a return to the writ consisting of the administrative record. There is no procedural requirement that the respondent file an answer such as that required in other civil actions, admitting or denying each allegation. *See* ***State ex rel. Casper v. Board of Trustees***, 30 Wis. 2d 170, 176, 140 N.W.2d 301 (1966).

Preliminary Hearing

¶5 Droste next contends that his due process rights were violated when the DOC added three new alleged grounds for revocation after the preliminary hearing. However, it is not necessary to make a probable cause determination as to each and every alleged ground for revocation. *See* ***State ex rel. Flowers v. DHSS***, 81 Wis. 2d 376, 392, 260 N.W.2d 727 (1978). The primary purpose of the preliminary hearing, which is to provide reasonable justification for detaining the parolee pending the final hearing, is satisfied so long as there is probable cause that any violation occurred. *See* ***id.*** at 391. The only test for adding additional allegations thereafter is whether the parolee has been provided sufficient notice that other violations will be introduced. *See* ***id.*** at 392. Contrary to Droste's assertion, we see nothing in the ***Flowers*** analysis which would distinguish transactionally-related parole violations from factually distinct violations, and note that the ***Flowers*** court explicitly rejected the notion that the additional charge at issue there had already been "considered in substance," as transactionally related. Here, the DOC notified Droste by letter approximately two months prior to the final hearing that it would be seeking to show additional violations, and counsel indicated at the hearing that he was prepared to go forward. We see no due process violation.

Cross-Examination

¶6 The State introduced written statements from Jason Burget, Jacqueline Judkins, George Schneider, Justin Phippen, Mike Powers, Brant Kienast and Christopher James, without calling them as witnesses. Droste claims the introduction of these hearsay statements violated his confrontation rights. However, it appears that the letter from Judkins was not offered as evidence of a

parole violation, but rather in support of the Department's position on revocation. In any event, it is well established that evidentiary rules are somewhat relaxed at a revocation hearing. *See* ***State ex rel. Henschel v. HSSD***, 91 Wis. 2d 268, 271, 282 N.W.2d 618 (Ct. App. 1979). We further conclude that Droste has waived any objection to the other statements, because he offered no objection to their admission either during the revocation proceeding or in the trial court. *See* ***Roseliep v. Herro***, 206 Wis. 256, 263-64, 239 N.W. 413 (1931).

¶7 Droste also complains that the ALJ limited his cross-examination of the investigating officer by disallowing testimony about whether the officer knew he could have searched Droste's apartment without a search warrant. However, the defense had already elicited the relevant fact that Droste's apartment had not been searched, from which Droste was able to argue that exculpatory evidence might have been found there. The additional information which Droste sought to elicit was of marginal relevance at best, and we see no error in its exclusion.

Sufficiency of the Evidence

¶8 Diane Deming was the sister of the murder victim. Her husband Alan received a bomb threat at his place of business. Attic inmate Ty Randazzo admitted making the bomb threat at Droste's request, using a phone number which Droste had provided to him. Droste nonetheless maintains there was no direct evidence that he knew the phone number was for the place of employment of a relative of the victim. However, that inference could reasonably be drawn from the fact that the Demings had stopped by the store where Droste and the murder victim both worked on more than one occasion, and had seen him there at least once. In addition, Diane Deming had submitted a letter in support of Droste's classification as a sexual predator. In sum, we are satisfied the evidence was

sufficient to conclude that Droste had committed each of the alleged violations of the conditions of his parole.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).