

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 18, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal Nos. 2004AP1466  
2004AP1467**

**Cir. Ct. Nos. 2000CM994  
2001CM18**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN THE MATTER OF STATE OF WISCONSIN v. DANTE R. VOSS:**

**STATE OF WISCONSIN EX REL. DANTE R. VOSS,**

**PETITIONER-APPELLANT,**

**v.**

**DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF  
HEARINGS AND APPEALS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from orders of the circuit court for Wood County:  
EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Dante Voss appeals circuit court orders denying a certiorari petition for review of the revocation of his probation and a habeas corpus petition for review of a sentence credit issue. We affirm both orders for the reasons discussed below.

## **BACKGROUND**

¶2 On January 11, 2001, Voss was convicted in companion cases of two counts of disorderly conduct, criminal damage to property, resisting or obstructing an officer, and misdemeanor bailjumping, each as a repeat offender. The trial court imposed and stayed a total four-year prison term, subject to four-year terms of probation. Among the rules of Voss's community supervision were requirements that he maintain absolute sobriety; that he not possess or view any "sexually explicit material"; that he not purchase any items on credit or by mail without prior approval of his agent; and that he avoid all conduct "not in the best interest of the public welfare or [his] rehabilitation." On August 4, 2003, Voss was served with notice of revocation proceedings based on several alleged violations of his probation conditions, including: consumption of alcohol; possession of four photographs of "a lingerie-clad female in a sexually explicit pose"; purchase of a DVD by mail and on credit; and loss of employment.

¶3 A revocation hearing was held on September 15, 2003, and continued on October 31, 2003. At the hearing, Voss did not dispute that he had consumed alcohol, possessed the photographs, obtained the DVD, and lost his job. However, he maintained that the photographs, while erotic, were not sexually explicit because the women depicted were not nude or engaging in sexual acts, and that the purchase of the DVD was unintentional because he had not understood that he was enrolling in a club and agreeing to make purchases by accepting a free

DVD in a promotional offer. Voss further argued that his consumption of alcohol and related failure to maintain a job should be taken in the context of his family history of alcoholism, and that he should be given another opportunity to obtain community-based treatment as an alternative to revocation.

¶4 The administrative law judge found that Voss had violated the terms of his probation in all four of the ways alleged, and revoked his probation. The ALJ's decision was affirmed on administrative appeal and by certiorari review in the circuit court. Voss also subsequently filed a habeas corpus petition seeking sentence credit for the time he spent under electronic monitoring, which was denied.

#### STANDARD OF REVIEW

¶5 Our certiorari review is limited to the record created before the committee. *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). With regard to the substance of the administrative decision, we will consider only whether: (1) the committee 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 committee might reasonably make the order or determination in question. *Id.* This inquiry includes whether an inmate was afforded due process during administrative proceedings. *State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶15, 256 Wis. 2d 787, 650 N.W.2d 43.

¶6 We will independently review the application of the sentence credit statute to an undisputed set of facts. *State v. Abbott*, 207 Wis. 2d 624, 628, 558 N.W.2d 927 (Ct. App. 1996).

## DISCUSSION

### *Probation Revocation*

¶7 Voss first claims that he is entitled to a new revocation hearing because a recorder malfunction precluded production of a complete transcript of the revocation hearing, omitting his testimony and that of his father. The ALJ, however, prepared a written synopsis summarizing all of the testimony from the missing portion of the transcript. The synopsis gives a sentence-by-sentence account of the testimony given by Voss and his father, merely omitting the questions asked, in a format often used in administrative proceedings that are unrecorded. Voss has not identified any specific statements in that synopsis which he believes to be inaccurate and has not identified any omitted statements. We therefore see no prejudice to Voss from the use of a synopsis, rather than a transcript.

¶8 Voss next claims that his probation agent should not have been allowed to supplement her testimony from the original hearing at the continued hearing to discuss why alternatives to revocation were not feasible. We note, however, that the continuance was granted at Voss's own request to allow him to address the issue of alternatives to revocation. Thus, it was not improper to allow additional testimony, in rebuttal, from a department witness on that topic. In any event, Voss waived any objection to the supplemental testimony by failing to object to it at the continued hearing.

¶9 Voss next asserts that there was insufficient evidence to show that he had knowingly ordered a DVD by mail and on credit, notwithstanding an invoice from Columbia House showing that it had sent Voss an introductory DVD package and billed him \$9.95 for shipping and handling. In support of his claim

that he didn't understand the nature of the promotional offer, Voss relies on his own written response to his probation agent's question about why he had sent for a DVD from Columbia House, in which he claimed:

Never sent for it. I called some number and they said they were sending me some free DVD for calling but when I got it I saw they wanted money so I was supposed to send it back in 10 days because I knew I wasn't supposed to have any mail order stuff.

The ALJ was not required to accept Voss's suspicious account of how he had come to join the DVD club. *See* WIS. ADMIN. CODE § HA 2.05(6)(b) (Sept. 2001) (an ALJ shall weigh the credibility of witnesses). Voss's claim that he was going to send the DVD back within ten days was belied by the fact that the DVD was found in his closet on July 29, 2003, more than ten days after the date of July 7, 2003, listed on the invoice. The ALJ reasonably rejected Voss's claim that he had ordered the DVD by mistake and properly found a violation based on the presence of the DVD and invoice in Voss's apartment.

¶10 Voss also claims that there was insufficient evidence to show that he had possessed sexually explicit materials because, Voss argues, the pictures he had would not qualify as contraband under the Department of Corrections administrative rules. Voss's argument is flawed in several respects. First, Voss was alleged to have violated a probation rule against possessing "sexually explicit materials," not the DOC rules which use the terms "human sexual behavior" and "nudity." *See* WIS. ADMIN. CODE § DOC 309.02(9) and (14) (Aug. 2001). Furthermore, the DOC definition of nudity expressly includes "the showing of the ... buttocks with less than a fully opaque covering." WIS. ADMIN. CODE § DOC 309.02(14). Since all four of the pictures at issue here prominently displayed female buttocks, Voss should have realized the pictures were forbidden even under

the definition he claims to have been relying upon. Finally, at least one of the pictures showed glimpses of a women's anus and the outer lips of her vagina around the edges of the thong she was wearing. We are satisfied that that picture was "sexually explicit" by any reasonable definition of the term, and that, based on a prior revocation Voss had for possession of sexually explicit materials, he should have been aware of the need to check with his agent if he had any questions about whether certain material was prohibited. Again, we conclude the evidence was sufficient to support the ALJ's finding of a violation.

¶11 Finally, Voss contends that the ALJ acted arbitrarily, imposing his will rather than his judgment, by revoking Voss instead of ordering some alternative to revocation. We disagree. After setting out factual findings that were clearly supported by the record, the ALJ emphasized that Voss had been warned repeatedly about ongoing violations, placed in custody on numerous occasions, and even revoked more than once, but that Voss continued to violate his probation rules with impunity. Consequently, the court concluded that failure to revoke Voss's probation would unduly depreciate the seriousness of his violations. The court further concluded that, because Voss presented a risk to reoffend, the public would be best protected by having Voss's treatment needs addressed in a correctional setting. These were all rational considerations demonstrating that the ALJ was exercising his judgment, not merely imposing his will. It is not this court's function to reweigh the factors in the case or substitute our own view of the evidence for that of the ALJ on certiorari review.

*Sentence Credit*

¶12 Voss complains that he was not given sentence credit for time he spent on an electronic monitoring device. Voss was not entitled to sentence credit, however, because he was not placed on electronic monitoring by the court pursuant to the intensive sanction program, but rather by his probation agent as a condition of his supervision. Because Voss was not subject to an escape charge while on probation, he was not “in custody” for the purpose of calculating sentence credit. See WIS. STAT. § 973.155(1)(a) (2003-04)<sup>1</sup> and *State v. Magnuson*, 2000 WI 19, ¶25, 233 Wis. 2d 40, 606 N.W.2d 536.

*By the Court.*—Orders affirmed.

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

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

