

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 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 No. 2003AP2520

Cir. Ct. No. 2003CV111

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. DANIEL J. COWICK,

PETITIONER-APPELLANT,

V.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
MICHAEL S. FISHER, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Daniel J. Cowick appeals from an order affirming the revocation of probation. He argues that there was not sufficient evidence that he violated a probation rule and that it was improper and unfair to admit at the

revocation hearing a tape-recorded police interview of the alleged victim of a domestic battery by Cowick. We affirm the order dismissing the certiorari petition and affirming the revocation of probation.

¶2 Our review on certiorari is independent of the circuit court's decision and we look directly to the record created in the administrative proceeding. See *Town of Cedarburg v. Shewczyk*, 2003 WI App 10, ¶18, 259 Wis. 2d 818, 656 N.W.2d 491; *State ex rel. Staples v. DHSS*, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Our review of the determination by the Division of Hearings and Appeals is limited to: “(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.” *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994).

¶3 The Division found that on July 12, 2002, Cowick grabbed Debra Wincek by the arm without her permission to prevent her from using the phone and punched her in the face several times.¹ Our inquiry here is whether substantial evidence supports the findings. *Id.* at 656. “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 of a quantum upon which a reasonable fact finder could base a conclusion.’” *Id.* (citation omitted).

¹ The Division rejected charges that Cowick possessed a knife while at Wincek's residence and threatened Wincek with the knife.

¶4 At the revocation hearing, a police officer testified that a 911 hang-up call was received from Wincek's residence and he responded to the residence. Wincek told the officer that the 911 call had been a mistake and that everything was fine because Cowick had left and that was all she wanted. The officer observed that Wincek appeared scared and shaky. She had swelling and a red mark on the right side of her face. The officer asked Wincek if Cowick had struck her. She claimed she had no injury. When the officer had her look in the mirror, she broke down crying and indicated that Cowick had struck her at least a couple of times. Wincek said she would not sign a statement and would not press charges. Photographs of the injury and the developing bruise were taken. After his initial interview of Wincek and after Cowick was discovered and taken into custody, the officer activated a video and audio recording system and recorded a conversation with Wincek. The officer described the conversation as re-creating the prior interview. On the audio recording Wincek indicated that Cowick grabbed the phone from her, grabbed her arm, hit her a couple of times, and that she was scared he was going to seriously hurt or kill her. She also said Cowick held the knife and waved it about as he tried to stop her from making a phone call. She revealed that Cowick had struck her on other occasions and she had not called the police. She also said she would lie if required to testify about the incident.

¶5 At the revocation hearing, Wincek denied that Cowick struck her and wielded a knife.² She explained that on July 12, 2002, she was very sick with a cold and sore throat and had stayed home from work. Cowick showed up at her

² At a preliminary hearing on criminal charges against Cowick, in an interview with Cowick's probation agent, and in letters to the Division and the circuit court, Wincek also denied that Cowick struck her or possessed a knife.

house and she wanted him to leave so she could return to bed. She threatened to call 911 if Cowick would not leave. When the officer came to her door, she wanted the police officer to leave her alone but the officer refused. She said she admitted that Cowick struck her just to get the officer to leave her alone. She indicated that Cowick had merely placed his hand on her arm requesting her not to call 911. She further explained that she had injured her right cheek the day before when she tripped climbing over a baby gate in a doorway and fell to the floor.

¶6 Wincek's daughter also testified at the revocation hearing. She indicated that a couple days before July 12, 2002, she observed a bruise on Wincek's cheek. Wincek had told her daughter that she had tripped over the baby gate. The daughter explained that she had been using the knife the officer found on the couch to cut and eat some pepperoni.

¶7 Cowick testified that on the afternoon of July 12, 2002, he went to Wincek's residence and was invited in. He noticed that Wincek had a bruise on her cheek. When he chastised Wincek about her drug use and threatened to tell her boyfriend's probation agent about the boyfriend's drug use, Wincek told him to get out of her house and threatened to call the police. He asked her not to call the police because there were drugs in the house and he did not want to be caught there. He said he never hit Wincek and never would.

¶8 There is substantial evidence to support the Division's finding that Cowick used force to prevent Wincek's 911 call and struck Wincek. Although contrary evidence exists, the police officer's testimony was found more credible. Wincek's statements to the police officer within minutes of the 911 call were also found more truthful and reliable than her hearing testimony. Wincek's statements about Cowick's possession of the knife were rejected as unreliable because not

corroborated by the physical evidence. As the finder of fact, the Division was free to accept some portions of a witness's account and reject other portions. *See O'Connell v. Schrader*, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). The Division's determination specifically addressed the competing accounts of what happened. The required credibility determination is for the Division to make and this court may not substitute a contrary view of the evidence. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978).

¶9 Cowick argues that the admission of the audio recording of the conversation with Wincek violated constitutional notions of fair play. He contends there was no foundation or established chain of evidence for the recording, that it was of such poor audible quality that it should not have been used, that it was surprise evidence, and that it was a re-enactment based on leading questions. He also contends that the recording constituted unlawful surveillance since Wincek was not informed that she was being recorded.

¶10 At the hearing, Cowick, through counsel, stipulated that Wincek's statements were on the recording. The only objection to the admission of the recording was that it was cumulative to the statements Wincek made before the recording was started and testified to by the police officer. The recording was played for Cowick and counsel before it was placed in the record so there was no element of surprise.³ After hearing the recording, no other objection was made.

³ Cowick complains about the lack of disclosure of the audio recording. He does not explain how things would have been different if he had earlier access to the recording. More than a month passed between the first hearing when the recording was put in the record and the second hearing when Wincek testified and the revocation hearing finished. Cowick had an opportunity to respond to the recording. He was not prejudiced by the failure to disclose the recording prior to the hearing.

Challenges to admission of the recording on constitutional grounds were waived.⁴ *See Santiago v. Ware*, 205 Wis. 2d 295, 324, 556 N.W.2d 356 (Ct. App. 1996). Additionally, the officer explained how the recording was made and that it captured a conversation with Wincek. The authenticity of the recording was never in doubt.⁵

¶11 Cowick suggests that the administrative law judge was not a neutral and detached decision maker because the ALJ looked at other “breaks” Cowick received regarding previous probation violations. The decision to revoke probation is not arbitrary and capricious if it represents a proper exercise of discretion. *Von Arx*, 185 Wis. 2d at 656. “A proper exercise of discretion contemplates a reasoning process based on the facts of record ‘and a conclusion based on a logical rationale founded upon proper legal standards.’” *Id.* (citation omitted).

¶12 The determination reflects consideration of the lengthy sentence Cowick would serve upon revocation of probation. Previous probation violations of drug use and absconding, neither of which resulted in revocation, were noted.⁶

⁴ To the extent Cowick raises nonconstitutional evidentiary objections, we observe that the rules of evidence do not apply at revocation hearings. *See* WIS. STAT. § 911.01(4)(c) (2003-04).

⁵ Cowick argues for the first time in his reply brief that there was no foundation for the photographs of Wincek admitted into evidence because the police officer who took the photographs did not testify. No objection was made to the photographs and, like the audio recording, the authenticity of the photographs was never questioned.

⁶ In the final paragraph of his appellant’s brief, Cowick asserts that there was incorrect information at the revocation hearing about a 1985 revocation for battery. The misinformation was corrected at the hearing and the ALJ accepted Cowick’s contention that he had only been revoked for using marijuana. The 1985 revocation was not a factor in the ultimate determination to revoke Cowick’s probation in this case. The ALJ recognized that Cowick had not been convicted of a violent offense for more than seventeen years.

Revocation was deemed necessary so as to not unduly depreciate the seriousness of Cowick's violent conduct. Cowick was found to be a poor risk for continued supervision. The determination reflects consideration of the proper factors and facts of record; it is a proper exercise of discretion. There is nothing to suggest that the ALJ was not neutral.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

