COURT OF APPEALS
DECISION
DATED AND FILED

November 08, 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. 2004AP2314

Cir. Ct. No. 2002CV4529

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT 1

STATE OF WISCONSIN EX REL. LEONARD WHITE,

PETITIONER-APPELLANT,

V.

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

RESPONDENTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed*.

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

¶1 KESSLER, J. Leonard White appeals from an order affirming the revocation of his parole and probation, and from an order denying his motion for

reconsideration.[1] He claims that: (1) there was insufficient evidence to support a finding that his parole and probation should be revoked; (2) the decision of the Division of Hearings and Appeals ("Division") was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment; and (3) he was denied procedural due process because his counsel failed to investigate the matter. We affirm the revocation.

BACKGROUND

¶2 White was convicted of numerous crimes on November 21, 2000, including two felony counts of possession of burglarious tools, one misdemeanor count of entry into a locked coin box, misdemeanor criminal damage to property, and two counts of felony bail jumping. He was sentenced to a combination of probation, confinement and extended supervision. White completed the Challenge Incarceration Program and, on October 29, 2001, was released on probation and parole.[2]

¶3 White met with his probation/parole agent on October 31, 2001. He signed a two-page list of probation/parole rules and discussed the rules with his agent. This list included the requirement that White comply with an assigned electronic monitoring schedule.

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[1] The decision of the Division of Hearings and Appeals states that it is revoking White's "probation and parole," although with respect to some of the cases it is actually White's extended supervision that is being revoked. For purposes of this opinion we will use the Division's terminology.

[2] It is not clear from the record precisely for which cases White was released on probation, parole or extended supervision. White does not challenge the Division's calculations of his confinement and we will therefore not attempt to infer which cases resulted in which release.

¶4 On November 8, 2001, the agent put an electronic monitoring bracelet on White. The next day, White violated the rules of electronic monitoring by not returning home. He was arrested on November 11 and remained incarcerated until November 16; during this time his electronic monitoring bracelet was removed. After being released, White did not report to the agent to have the bracelet reattached. On November 25, he was arrested again after being found walking the streets at three-thirty in the morning, carrying a bag that contained a pager, screwdrivers, a pry bar, compact disks, a car stereo and broken glass.[3]

¶5 Although no new criminal charges were filed, the agent recommended that White's probation and parole be revoked. The agent alleged that White had broken five probation/parole rules: possessed burglarious tools, in violation of rule thirty-three; stayed out past curfew, in violation of rule thirty-four; failed to report for drug treatment, in violation of rules three and twenty-eight; and possessed a pager, in violation of rule twenty-three.

¶6 White contested the revocation and a hearing was held before an administrative law judge (ALJ). An arresting officer testified that on November 25, 2001, he and another officer stopped White, who was walking down the street. The officer asked him what he was doing out late with a bag in his hands, and White offered the officers the opportunity to search his bag. The officer testified that the bag contained a pager, screwdrivers, a pry bar, compact disks, a car stereo and broken glass.

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[3] White disputes that there was glass in the bag.

¶7 The officer said that he asked White about the stereo. He said White said that he had just purchased the car stereo for twenty dollars from a guy named Mike, and was on his way to install it in his cousin Kevin's Cadillac. The officers put White in the squad car and drove to the location where White said Kevin lived. The officers talked to a woman identified as White's aunt, who told officers that Kevin had not lived there for over a year and that Kevin had not owned a Cadillac for five years.

¶8 The agent also testified. The agent said that she contacted White's aunt, who put the agent in touch with Kevin. The agent said Kevin denied that he had set up a time to meet White or that Kevin asked White to find a car stereo for him.

¶9 With respect to treatment, the agent said that White was supposed to attend drug treatment five days a week, after attending intake on a Tuesday. The agent stated that White had failed to report to the day treatment program for intake on November 6, and again on November 20, even though she told him on October 31 and after his arrest on November 11 that he had to attend.

¶10 White testified to his version of events. With respect to failing to go to intake at the day treatment program, he alleged that his agent had failed to give him the address and that it was therefore not his fault that he failed to attend. He did admit twice, however, that he should have taken the initiative to contact the agent to get the address for the treatment program.

¶11 With respect to breaking his curfew, White testified that he believed that the curfew only applied when he was wearing the electronic monitoring bracelet, and because he had not had it reattached after his arrest on November 11, he believed he was not subject to the curfew.

¶12 With respect to the events of November 25, White admitted walking the street with the bag of items, but denied that the bag contained broken glass. He also offered explanations for the items: the car stereo had been purchased for his cousin Kevin, and he had the tools with him so he could install the car stereo. He said that when he was stopped he had just found the pager in the grass and had picked it up with the intention of selling it.

¶13 The ALJ issued a written decision finding that White had violated the five aforementioned probation/parole rules. The ALJ specifically found the testimony of the agent and the officer more credible than White's testimony, and relied on this testimony in support of its findings that each of the rules had been violated. The ALJ also specifically rejected White's testimony, finding, for instance, that White should have known it would violate his curfew to be out at three-thirty in the morning, even if his electronic monitoring bracelet had not yet been reattached. The ALJ also found that White's explanation for possessing the burglary tools on a street at three-thirty in the morning was unbelievable, especially in light of the fact that Kevin denied that there was any plan to install a car stereo in his vehicle.

¶14 White appealed the ALJ's decision. The Division affirmed the ALJ's findings and conclusions in a written decision. White then sought review in the trial court via a petition for writ of certiorari. The trial court affirmed the revocation and this appeal followed.

STANDARD OF REVIEW

¶15 On appeal, we review the Division's decision, applying the same standard as the trial court. ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527. Our review is limited to the following

questions: (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 rather than its judgment; and (4) whether the evidence was such that the Division might reasonably make the decision in question. ***Id.*** At the revocation hearing, the Division has the burden of proving the alleged violation or violations by a preponderance of the evidence. ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 585, 326 N.W.2d 768 (1982). On appeal, the burden switches to the probationer to prove by the same standard that the decision was arbitrary and capricious. ***State ex rel. Solie v. Schmidt***, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976).

DISCUSSION

¶16 White challenges the revocation on numerous grounds. We address each in turn.

A. Sufficiency of the evidence

¶17 White challenges the sufficiency of the evidence adduced at the revocation hearing. When the sufficiency of the evidence is challenged, we are limited to the question of whether substantial evidence supports the Division's decision. *See* ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994). "'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). "If substantial evidence supports the [D]ivision's determination, it must be affirmed even though the evidence may support a contrary determination." ***Id.***

¶18 White objects to the Division's reliance on the hearsay statements Kevin made to the agent. In Wisconsin, hearsay is admissible at revocation hearings as long as the evidence is reliable. *See* ***Riveland***, 109 Wis. 2d at 583; *see also* WIS. STAT. § 911.01(4)(c) (2003-04) (rules of evidence do not apply to revocation hearings).[4] However, a violation may not be proved entirely by unreliable hearsay. ***Riveland***, 109 Wis. 2d at 583. The ALJ was persuaded that the hearsay was reliable, and we conclude that its findings are supported by substantial evidence. The agent testified that she called White's aunt, who arranged for Kevin to call the agent, and that Kevin told the agent that he had not asked White to install a car stereo. This is certainly plausible, despite White's assertions that Kevin was lying to avoid becoming involved.

¶19 Moreover, even without the hearsay, there is sufficient evidence to support the ALJ's findings. A reasonable factfinder could conclude that a man walking the streets at three-thirty in the morning, in possession of burglar's tools and a used car stereo, was not actually intending to install a car stereo in the middle of the night. The fact that White was driven to the home he was supposed to be walking to and the homeowner said Kevin no longer lived there only bolsters such a finding.

¶20 White next argues that the agent lied when she said she met with White when he was arrested on November 11 and reminded him of the rules of probation and parole. White explains: "The ALJ relied on the information presented by [the agent] that Mr. White knew of the new rules of supervision.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

This information has been shown to be false and unreliable. The information should not have been relied upon to revoke Mr. White." Even if White were able to prove that the agent did not meet with him, we reject his argument because the revocation was not based on any "new rules of supervision." It is undisputed that White signed the rules on October 31, 2001. No rules changed after he was arrested, although his bracelet was removed while he was in jail for four days, and it was not reattached. The ALJ found that White had violated the October 31, 2001 rules—not any new rules. Therefore, the revocation may be upheld regardless of whether there was a November 11 meeting.

¶21 Finally, White contends that rule thirty-three, which prohibits him from possessing "burglarious tools," was unconstitutionally vague. He notes that when he was previously convicted of possessing burglarious tools, he possessed "a 20" black metal tire iron, a 6" black metal flashlight, a 12" black metal pry tool, a standard Allen wrench tool set, a knife, and a 4" flashlight." He contends that "[t]hese type[s] of materials differ greatly from those that [White] had in his possession on November 25, 2001" and that "[t]here is no reasonable way that the petitioner would have had notice that the tools in his possession on November 25, 2001 were burglarious."

¶22 The ALJ specifically found that the types of tools involved were "the same types of tools that originally resulted in two separate criminal convictions" and that it was "entirely unbelievable" that White did not realize the seriousness of walking the streets at three-thirty in the morning carrying those tools. There is substantial evidence to support the ALJ's finding, and we will not disturb it. The agent testified that she spoke with White in detail about when and how he could possess tools, and that she made it clear that "if he had a screwdriver on his counter at home that's understandable. Everybody has screwdrivers and hammers

and everything at home but if he was walking around the streets with tools on him, that I would consider that to be burglar's tools." This testimony, which the ALJ found reliable, supports the finding that White was on notice about the types of tools he was forbidden to possess.

B. Whether the Division's decision was arbitrary, oppressive or unreasonable

¶23 White argues that the Division's decision was arbitrary, oppressive or unreasonable and represented its will and not its judgment because the ALJ found that White should have known he could not carry the tools he carried, and because it imposed a duty on him to find the address to the treatment center.

¶24 We reject White's argument with respect to the burglar's tools for the reasons noted in section A above. The ALJ's finding that White had notice of the tools he was forbidden to possess is supported by substantial evidence. Moreover, we are unconvinced that the rule itself was vague or unconstitutional. Indeed, White was previously convicted for violating WIS. STAT. § 943.12 (1999-2000), which provided:

> Whoever has in personal possession any device or instrumentality intended, designed or adapted for use in breaking into any depository designed for the safekeeping of any valuables or into any building or room, with intent to use such device or instrumentality to break into a depository, building or room, and to steal therefrom, is guilty of a Class E felony.[[5]]

The probation/parole rule in place was consistent with this statute, and put White on adequate notice that he was not to possess burglar's tools.

[5] WISCONSIN STAT. § 943.12 remains the same in 2003-04, except that the crime is now a Class I felony.

¶25 White also contends that "the ALJ improperly placed the responsibility of obtaining the treatment facility's address on [White]." He argues that the agent "abandoned the rules and erroneously placed responsibility on" White to find the address of the treatment facility and go there. We conclude that the ALJ's finding that White failed to abide by the rule was based on substantial evidence.

¶26 The relevant written rules, which White was found to have violated were:

> 3. You shall make every effort to accept the opportunities and counseling offered by supervision….
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> ….
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> 28. You shall cooperate with drug/alcohol, anger management, domestic violence, or any other programming/assessment deemed necessary. You shall cooperate, pariticipate [sic] and successfully complete it. You shall not terminate without prior agent approval.

It was reasonable for the ALJ to find that White violated these rules by not only failing to report to the treatment center, but by not even attempting to contact his agent to get the address or request other assistance in getting to the treatment center. White himself admitted that he could have sought help, and that his agent had told him to contact her to get the address. He testified:

> [The agent] did not give me the address to the [treatment] program. She told me that she was going to contact me and give it to me. She never did contact me…. I should have took the initiative to call her and find out what the address was so I could have made it but I didn't…. And [November] 6th was when I was supposed to go to treatment and that's when I didn't go because I didn't have the address but on [November] 8th she came and hooked a bracelet up on the leg. She asked me if I went and I told her, at the time, no, I didn't go and ... I told her why. I said I didn't have the address. She told me to contact her by, I believe it was [November] 12th which was the following

> Monday to get the address so I could make it there that Tuesday and … [November] 11th I was arrested so I couldn't make it.

White added later in response to a question about whether he had attempted to call the agent to get an address: "I was at fault at that. I should have took the initiative to get in contact with [the agent]." This testimony, as well as that presented by the agent, supports the ALJ's finding that White had an obligation to find the address or seek assistance finding it.

C. Alleged ineffective assistance of counsel

¶27 White argues that he was denied procedural due process throughout the revocation procedure due to his "counsel's failure to investigate this matter." Claims of ineffective assistance of counsel concerning representation at revocation hearings must be brought in the circuit court by way of petition for writ of habeas corpus. ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502, 522-23, 563 N.W.2d 883 (1997); *see also* ***State ex rel. Reddin v. Galster***, 215 Wis. 2d 179, 186, 572 N.W.2d 505 (Ct. App. 1997); ***State v. Ramey***, 121 Wis. 2d 177, 182, 359 N.W.2d 402 (Ct. App. 1984). White himself acknowledged this in several *pro se* filings with the trial court. Because ineffective assistance of counsel claims must be raised via a writ of habeas corpus, we do not address this argument in this review of a petition for writ of certiorari.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.