

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2005AP1577

Cir. Ct. No. 2004CV5653

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**STATE OF WISCONSIN EX REL.
DALE MAREK,**

PETITIONER-APPELLANT,

v.

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

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. KREMERS, Judge. *Affirmed.*

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

¶1 FINE, J. Dale Marek appeals an order affirming the revocation of his probation. Marek claims that the Division of Hearings and Appeals: (1) did

not consider alternatives to revocation, and (2) based the revocation decision on uncharged allegations. We affirm.

I.

¶2 A jury found Marek guilty of three counts of sexually assaulting an unconscious sixteen-year-old boy in 1994. *See* WIS. STAT. § 940.225(2)(d) (1993–94) (second-degree sexual assault). On the first two counts, the trial court sentenced Marek to four and three years, respectively, of imprisonment, and made the sentences consecutive. On the third count, the trial court sentenced Marek to four years of imprisonment, stayed the sentence, and placed Marek on four years of probation, consecutive to the prison terms. Marek was paroled in July of 1999. He began to serve his probationary term in October of 2001.

¶3 In January of 2004, James Pinkos, one of Marek’s acquaintances, told Marek’s probation agent that Marek had violated his probation. Pinkos claimed that he had known Marek since the ninth grade, and that when he was seventeen years old, which we conclude from the Record was a decade and one-half ago, he woke up one night to find that Marek was performing oral sex on him. Pinkos further claimed that in late 2001 Marek stayed overnight with Pinkos at Pinkos’s wife’s apartment. According to Pinkos, he and Marek drank alcohol until Pinkos “passed out on the couch.” Pinkos told Marek’s agent that the next morning his wife told him that she saw Marek kissing Pinkos on the mouth and that Pinkos’s pants were partially down on one side.

¶4 In February of 2004, Marek admitted to his agent that he had stayed overnight at Pinkos’s wife’s apartment in the fall of 2001, but claimed that he did not “have sexual contact” with Pinkos, and denied kissing him.

¶5 Pinkos's estranged wife, Jean Becker, told Marek's agent that several times between January and May of 2001 she came home from work around 5:00 a.m. to find Marek and Pinkos asleep in the living room and Pinkos's underwear pulled down "enough to have access to his privates." Becker also claimed that in October of 2001, she saw Marek and Pinkos kissing.

¶6 Marek's agent filed an amended notice of probation violations on February 23, 2004, notifying Marek that he had committed ten violations:

1. On 10-21-2001, in Germantown, WI [Marek] did have police contact and failed to report the contact to his agent.
2. On 10-21-2001, Germantown WI, [Marek] did leave the confines of Milwaukee County without prior approval from his agent.
3. On 10-21-2001, [at] 9746 W. Metcalf, Milwaukee WI [Marek] admitted to consuming alcohol.
4. On 10-21-2001, at N 111 W 15831 Vienna Ct. Germantown WI [Marek] did stay overnight at residence other than his designated residence without prior approval of his agent.
5. On 10-21-2001, at N 111 W 15831 Vienna Ct, Germantown WI [Marek] did have unsupervised contact with persons under 18 without prior approval of his agent.
6. In June 2003, at 9746 W. Metcalf Milwaukee, WI [Marek] admitted to consuming alcohol.
7. In June 2003, at 9746 W. Metcalf [Marek] did have unsupervised contact with persons under the age of 18 without prior approval of his agent.
8. On or about December 12, 2002, [Marek] admitted to leaving the State of Wisconsin without approval or a travel permit.
9. On or about December 12, 2002, at 3753 South Sunset, Milwaukee, WI [Marek] did permit another person to stay at his residence without prior agent approval.

10. On or about December 12, 2002, at 3763 South Sunset, Milwaukee, WI, [Marek] failed to notify his agent of any involvement in any intimate relationship at its beginning and to introduce that person to his agent to disclose his past sexual offense prior to engaging in any sexual activity.

(Rules cited omitted.)

¶7 A probation revocation hearing was held on March 30, 2004. Marek did not testify. Pinkos's January of 2004 statement to Marek's probation agent was received in evidence, and Marek's agent asked Pinkos supplementary questions. Regarding the tenth allegation, Pinkos testified that on December 12, 2002, he fell asleep in Marek's living room after drinking, but woke up because he was "being fondled [by Marek]. My pants were not on me correctly anymore." On cross-examination, Marek's lawyer asked Pinkos about the allegation in his statement that Marek had sexually assaulted him when he was sixteen or seventeen years old. Pinkos told the lawyer that this statement was "correct."

¶8 Becker's statement to the probation agent was also received in evidence. On cross-examination, Marek's lawyer asked Becker about it and she repeated that she "often" found Marek and Pinkos asleep while Pinkos's underwear "were either down on the ground or they were pulled down enough for someone to have access to him," and that one night she saw Marek and Pinkos kissing.

¶9 In a written decision, the administrative law judge determined that Marek had committed the first five allegations, ruling that although they were "somewhat remote [in] time," they revealed what he found was Marek's "pattern of concealing his violations." The administrative law judge also determined that Marek had committed the seventh, eighth, and tenth violations, but found that there was insufficient evidence to support the ninth allegation. Marek admitted

that he had committed the sixth violation. In connection with the tenth alleged violation, the administrative law judge wrote that Marek:

has taken advantage of Mr. Pinkos sexually while Pinkos is asleep, usually after Pinkos consumed too much alcohol. This fixation with Pinkos has lasted for at least 16 years. [Marek] sexually assaulted Pinkos when Pinkos was 16 years old. He was seen kissing Pinkos by Becker in the Pinkos/Becker household when Pinkos lay sleeping on the couch. Finally, [Marek] groped Pinkos in [Marek's] own household when Pinkos fell asleep on a recliner after [a] day ... that included drinking alcohol.

¶10 Marek appealed to the Division of Hearings and Appeals, which upheld the administrative law judge's findings of fact and legal conclusions.

II.

¶11 On appeal, we review the decision of the Division of Hearings and Appeals, applying the same standard as the trial court. *See Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994). 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. *Ibid.* We address Marek's contentions in turn.

A. *Alternatives to Revocation.*

¶12 Marek claims that the Division acted capriciously and contrary to the law when it revoked Marek's probation, claiming that the alternatives to revocation were not considered. *See State ex rel. Plotkin v. Department of Health & Soc. Servs.*, 63 Wis. 2d 535, 217 N.W.2d 641 (1974). *Plotkin* held:

Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id., 63 Wis. 2d at 544, 217 N.W.2d at 645 (internal quotation marks omitted); *see also* WIS. ADMIN. CODE § HA 2.05(7)(b)3 (codification of *Plotkin* factors). We disagree.

¶13 The administrative law judge's written decision shows that he considered the *Plotkin* factors:

[Marek] has shown he is untrustworthy of community based supervision and is still a risk to others. I find [Marek] is a poor risk on supervision. I find it would unduly depreciate the seriousness of the violations if probation were not revoked. I find [Marek] is in need of correctional treatment that can best be provided in a confined setting. After [Marek] served several years in prison for other sexual assault counts he should have been more compliant with the rules of supervision than he has proven to be. ... While [Marek] was better in reporting things to his agent after his three week hold in 2002 and completing his electronic monitoring, I find there are no alternatives to revocation that would not unduly depreciate the seriousness of the violations.

The hearing record supports the administrative law judge's decision. Indeed, it shows that alternatives to revocation were tried twice before for earlier violations:

- in August of 2000, after Marek admitted to drinking alcohol, “[h]e was given an [Alternative to Revocation], Electronic Monitoring, [Alcohol

and Other Drug Abuse] assessment, ROPE, completion of Sex Offender Treatment, amend [*sic*] rules, not to leave the Milwaukee County,” and

- in December of 2001, after Marek allegedly failed to report to his agent that he was twice stopped by the police for speeding, left Milwaukee County without his agent’s approval, and stayed overnight at a non-designated residence, he was “given an [Alternative to Revocation], placed on Electronic Monitoring Program.”

Marek’s agent also considered alternatives to revocation and conducted an extensive *Plotkin* analysis before recommending revocation.

¶14 Marek contends, however, that revocation is not warranted because the first five violations are “remote in time and effect,” and the last five violations “even taken together ... do not rise to the level required for revocation.” Specifically, he claims that the tenth violation—that he failed to notify his agent of any involvement in an intimate relationship—is *de minimis* because the reason for the rule, to insure that the other person is informed of his past offenses, was satisfied in this case. We disagree.

¶15 The purpose underlying the rule that Marek notify his agent of any intimate relationship is not only to ensure that the person is aware of Marek’s crimes before getting involved with him, but is also designed to: (1) facilitate a probationer’s rehabilitation and prevent a relapse, and (2) ensure that the “probationer’s potential partner ... can make an informed decision about who they are becoming involved with.” *Krebs v. Schwarz*, 212 Wis. 2d 127, 131–132, 568 N.W.2d 26, 28–29 (Ct. App. 1997); *see also State v. Beiersdorf*, 208 Wis. 2d 492, 502, 561 N.W.2d 749, 754 (Ct. App. 1997) (goals of probation are the rehabilitation of the offender and the protection of the community).

¶16 Moreover, as the administrative law judge noted, Marek’s violations show a “pattern of concealing his violations.” Marek was given many chances to comply with the conditions of parole and probation. See *Plotkin*, 63 Wis. 2d at 544–545, 217 N.W.2d at 645–646 (intermediate steps as possible alternatives to revocation). The Division based its revocation decision on the correct law and facts of record, and Marek has not shown otherwise. See *State ex rel. Foshey v. Department of Health & Soc. Servs.*, 102 Wis. 2d 505, 519–520, 307 N.W.2d 315, 321–322 (Ct. App. 1981); *Von Arx*, 185 Wis. 2d at 655, 517 N.W.2d at 544 (on appeal, probationer has burden to show the decision was arbitrary and capricious).

B. *Notice of Allegations.*

¶17 Marek claims that the Division violated his due-process rights by basing its revocation decision in part on the uncharged allegations in the tenth violation, which, as we have seen, asserted that:

[o]n or about December 12, 2002, at 3763 South Sunset, Milwaukee, WI, [Marek] failed to notify his agent of any involvement in any intimate relationship at its beginning and to introduce that person to his agent to disclose his past sexual offense prior to engaging in any sexual activity.

(Rule citation omitted.) We disagree.

¶18 The minimum requirements of due process include “proper notice” of the claimed probation violations. *State v. VanBronkhorst*, 2001 WI App 190, ¶14, 247 Wis. 2d 247, 255, 633 N.W.2d 236, 240. “The purpose of the petition for revocation is to inform the person on supervised release of the alleged violations so he or she can prepare a defense.” *Id.*, 2001 WI App 190, ¶15, 247 Wis. 2d at 255, 633 N.W.2d at 240. “In the absence of formal notice, actual notice generally

satisfies due process requirements.” *State v. Burris*, 2002 WI App 262, ¶8, 258 Wis. 2d 454, 464, 654 N.W.2d 866, 871.

¶19 Marek had actual notice that the allegations in the tenth violation went beyond a consensual “intimate relationship”:

- before the revocation hearing, Marek told his agent that he had stayed overnight at Pinkos’s house in the fall of 2001, but denied that he ever had sexual contact with Pinkos;
- the “Final Revocation Hearing Notice” sent to Marek before the revocation hearing notified Marek that a “Chronological History,” which summarized Pinkos’s and Becker’s statements, was available for Marek to review; and
- the questions asked by Marek’s lawyer at the revocation hearing revealed that Marek was aware of Pinkos’s and Becker’s assertions that Marek had sexual contact with Pinkos when Pinkos was drunk or asleep.

Marek was thus able to prepare his defense against them.¹ There was no due-process violation.

¹ In a footnote to his brief-in-chief, Marek claims that it is his “personal belief” that Pinkos’s and Becker’s testimony is “incredible[,] uncorroborated[,] and motivated by something other than the truth.” The determination of witness credibility, however, is left to the agency. See *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 455–456, 620 N.W.2d 414, 421.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

