

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2007

David R. Schanker
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. 2007AP249

Cir. Ct. No. 2006CV2729

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. JOHN DUEWELL,

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:
DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. John Duewell appeals from the order affirming the revocation of his probation. He argues that the record does not support the decision to revoke his probation. Because we conclude that the Department of Corrections properly revoked Duewell's probation, we affirm.

¶2 In June 2005, Duewell pled guilty to using a computer to facilitate a child sex crime. Duewell had used a computer to contact someone he believed to be a fourteen-year-old girl, and attempted to entice her to meet him and engage in sexual contact. The “girl” he contacted was actually a police officer. The court imposed and stayed a sentence of two years of initial confinement and three years of extended supervision, and placed him on three years of probation.

¶3 The Department of Corrections charged Duewell with probation violations in January 2006. The violations alleged were that he had threatened to kill both his wife and his mother, and he had inhaled chemicals. At the hearing, Duewell did not initially contest the alleged violations. He later testified that he did not threaten his wife, and then contradicted that again by testifying that he told his wife, “I should kill you....” The Department offered Duewell, as an alternative to revocation, treatment for 90 to 120 days in the Milwaukee Secure Detention Facility. Duewell declined and requested instead that he receive non-secure treatment in a community-based facility. The Administrative Law Judge ordered that Duewell’s probation be revoked, concluding that confinement was necessary to protect the public from future criminal activity by Duewell, Duewell’s rehabilitative needs would best be addressed in the prison setting, and it would unduly depreciate the seriousness of the violation if his supervision were not revoked.

¶4 Duewell appealed this decision to the Division of Hearings and Appeals, and the Administrator affirmed the decision. Duewell then petitioned the circuit court for a writ of certiorari. The circuit court again affirmed the decision of the Administrative Law Judge. Duewell now argues that the Administrative Law Judge’s decision was not supported by the evidence, and that he was improperly denied an alternative to revocation.

¶5 In *State ex rel. Plotkin v. DHSS*, 63 Wis. 2d 535, 544-45, 217 N.W.2d 641 (1974), the court adopted the ABA guidelines establishing the duty of an administrative body when exercising its discretion to revoke probation. These guidelines state that the violation of a condition of probation “is both a necessary and a sufficient ground for the revocation of probation.” *Id.* at 544. The court should not follow revocation with imprisonment unless the court finds, based on both the offender’s original conduct and the offender’s conduct while on probation, 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. at 545.

¶6 And in *Van Ermen v. DHSS*, 84 Wis. 2d 57, 67, 267 N.W.2d 17 (1978), the court considered whether the *Plotkin* standards required that alternatives to revocation be considered. The court stated that the Department does not have to try the alternatives, but that it must exercise its discretion by considering whether alternatives are available. *Id.* at 67-68.

¶7 A probationer obtains judicial review of the revocation decision by bringing a petition for a writ of certiorari to the circuit court. Appellate review of the Department’s decision to revoke probation is limited to four inquiries:

- (1) whether the Department acted within the bounds of its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will, not its judgment; and (4) whether the evidence was sufficient that the Department might reasonably make the determination that it did.

State ex rel. Warren v. Schwarz, 219 Wis. 2d 615, 628-29, 579 Wis. 2d 698 (1998).

¶8 We conclude that the record fully supports the Administrative Law Judge’s decision. Duewell did not contest that he had threatened to kill both his mother and his wife, and that he had inhaled chemicals. Further, the Department offered him as an alternative to revocation treatment in a secure facility. Duewell refused to accept this alternative and proposed his own. While the law requires a finding of only one of the conditions for confinement, the Administrative Law Judge in this case found that Duewell should be confined for all three reasons. First, the judge found that Duewell’s use of inhalants while taking medication for mental illness increased the likelihood that he would reoffend because his substance abuse is likely to lower his inhibitions. Second, the judge found that Duewell was in need of treatment for substance abuse, sex offender, and mental health issues, and that he posed too great of a risk to be treated in the community. And third, the court found that the threats Duewell made were serious, that he had only been on probation for six months when he violated the rules of probation, that his underlying crime was heinous, and that he had been previously warned about his use of inhalants. Based on all of these facts, the judge found that it would “unduly depreciate the seriousness of the violations” if Duewell’s probation was not revoked.

¶9 We conclude that the decision to revoke Duewell’s probation was a proper exercise of discretion that was fully supported by the evidence presented. Consequently, we, too, affirm the decision of the Administrative Law Judge.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT.
RULE 809.23(1)(b)5. (2005-06).

