

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2008

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. 2007AP483

Cir. Ct. No. 2006CV2383

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. JOSEPH MORGESE,

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:
FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph Morgese appeals from the order of the circuit court that affirmed the decision of the Administrative Law Judge (ALJ) affirming the revocation of his probation. He argues that the circuit court erred when it determined that the ALJ's decision was supported by substantial evidence.

Because we conclude that the evidence supported the decision to revoke his probation, we affirm.

¶2 Morgese was convicted in March 2005 of three counts of failure to support a child. The court imposed and stayed the sentence, and placed him on probation for ten years. In August 2005, the Department of Corrections sought to revoke Morgese's probation because he had consumed alcohol and assaulted his girlfriend. A hearing was held. Morgese alleged at the hearing that he had accidentally kicked his girlfriend in the face, breaking a bone. The victim did not testify. Police officers, however, testified about the incident, including the extent of the victim's injuries.

¶3 The ALJ found that Morgese had violated his probation by consuming alcohol and committing an assault. The ALJ found that Morgese's statement about what happened during the assault was inconsistent with the physical injuries sustained by the victim. The ALJ also found that Morgese's statements demonstrated a propensity to deceive the Department. The ALJ considered alternatives to revocation, but determined that revocation was necessary to impress on Morgese the seriousness of his conduct, to protect the community from future crime, and because of Morgese's lack of candor to his probation agent and at the revocation hearing.

¶4 Morgese then appealed this decision to the Division of Hearings and Appeals. He argued there that the evidence before the ALJ was not sufficient to refute his testimony that he had kicked the victim in the face accidentally. The Division determined that the record fully supported the ALJ's finding. The Division noted that the ALJ had found Morgese's testimony to be unreliable and contradicted by the other accounts. Further, the ALJ noted Morgese's dishonesty

in his interactions with his probation agent. The Division affirmed the decision of the ALJ.

¶5 Morgese then brought a writ of certiorari in the circuit court to review the Department's determination. He again argued to the circuit court that the evidence was insufficient to support the ALJ's finding that he purposefully kicked the victim, and asked the court to return the matter to the Department to determine if revocation of probation was appropriate for the consumption of alcohol violation alone. The court once again found that the evidence was sufficient to support the finding that Morgese assaulted his girlfriend. The court noted that Morgese made alternate but inconsistent arguments: (1) that he accidentally kicked his girlfriend; and (2) that he kicked her in self-defense because she was hitting him. The court rejected both arguments. First, the court found that there was substantial evidence to support the ALJ's determination that Morgese did not kick her accidentally. Secondly, the court concluded that even if Morgese had acted to protect himself, he used excessive force under the circumstances and thereby lost the right to assert self-defense. The court concluded that the Division's decision to revoke Morgese's probation was supported by substantial evidence.

¶6 Morgese now appeals to this court. The decision to revoke probation lies within the discretion of the Department of Corrections. *State ex rel. Lyons v. DHSS*, 105 Wis.2d 146, 151, 312 N.W.2d 868 (Ct. App. 1981). Appellate review of the Department's decision to revoke probation is limited to four inquiries:

- (1) whether the [Department] kept within its jurisdiction;
- (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence

was such that it might reasonably make the order or determination in question.

Van Ermen v. DHSS, 84 Wis.2d 57, 63, 267 N.W.2d 17 (1978) (citation omitted). The reviewing court may not substitute its judgment of the evidence for that of the Department. *Id.* at 64. The Department must prove the violation by a preponderance of the evidence. *State ex rel. Washington v. Schwarz*, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414. “When the sufficiency of the evidence is challenged, we are limited to the question of whether there is substantial evidence to support the department’s decision.” *Id.* (citation omitted). Assigning weight to the evidence, however, “is the province of the department.” *Id.* (citation omitted).

¶7 Morgese renews his argument that there was insufficient evidence to support the battery violation, and that we should remand the matter to the Department to determine whether the alcohol consumption violation warrants revocation. He asserts that there is nothing in the record to contradict his statement that his girlfriend attacked him “in a drunken rage” and that any contact between them was in his own self-defense. We disagree. The ALJ found that Morgese’s version of the events was not credible based on the injuries the victim sustained, including a broken bone in her face, as well as the statements of other witnesses that Morgese and the victim had fought earlier in the evening, and the fact that Morgese had not previously reported to his probation agent his claim that his girlfriend regularly beat him. The ALJ further found that Morgese had a propensity to deceive the Department and had lied to his agent about consuming alcohol. We conclude that this evidence was sufficient to support the finding that Morgese violated the conditions of his probation by assaulting his girlfriend. We

also conclude that the ALJ considered alternatives to revocation and properly rejected them. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

