COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1043
2006AP2405

Cir. Ct. No. 2004CV10407

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL. JEROME V. METCALFE,

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: CLARE L. FIORENZA, Judge. *Affirmed and cause remanded with directions.*

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

¶1 PER CURIAM. Jerome Metcalfe appeals from the order affirming the revocation of his extended supervision, based on his admission to using cocaine and because he made sexually suggestive comments to a staff member in a

treatment program. He argues on appeal that the Department of Corrections improperly imposed a condition of extended supervision that conflicted with the terms imposed by the trial court. Because we conclude that the Department acted properly when it revoked his extended supervision, we affirm.

¶2 Metcalfe was convicted of forgery/uttering as a party to a crime in Milwaukee County in 2002. The court sentenced him to two years and six months of initial confinement, and two years and six months of extended supervision. That same year, he was convicted in Waukesha County of one count of uttering, and sentenced to six years of probation with an imposed and stayed two years of initial confinement and two years of extended supervision to be served consecutively to the Milwaukee case. In the Milwaukee case, the judgment of conviction stated that as a condition of extended supervision he was to have "complete sobriety from both drugs and alcohol," with random urine screens, and that he would serve five days in a House of Corrections for any positive urine screen.

¶3 Metcalfe completed his initial confinement and was released to extended supervision on June 29, 2004. Metcalfe signed the Rules of Community Supervision that provided, among other things, that Metcalfe was to avoid all conduct that violated state, federal, municipal, or county laws (Rule 1); that he was not to possess or purchase "any property commonly used in the manufacture, sale, distribution, packaging or use of controlled substance" (Rule 21); and that he would not engage in any "intimidating or threatening behaviors, including

postures, gestures or comments" (Rule 27).[1] On July 2, 2004, he reported that he had violated Rules 1 and 21 by using cocaine.

¶4 As a result of this incident, Metcalfe was referred to a treatment center as an alternative to revocation. Metcalfe again signed the Rules of Community Supervision that added the additional Rule 29 that he "fully cooperate and successfully complete" his formal alternative to revocation. When Metcalfe arrived at the treatment center, he made sexually suggestive comments to a female staff member. His participation in the treatment program was immediately terminated and he was returned to custody. His violation summary stated that he had: (1) used a substance that he knew to be cocaine in violation of Rules 1 and 21, signed on June 29, 2004; (2) failed to complete his alternative to revocation in violation of Rules 1 and 29, signed on July 7, 2004; and (3) made inappropriate sexual statements to a female treatment center staff member in violation of Rules 1 and 27, signed on July 7, 2004.

¶5 A revocation hearing was held before an Administrative Law Judge. The ALJ determined that Metcalfe had violated his probation as his agent had alleged, and ordered that Metcalfe be incarcerated for one year and one month. The Division of Hearings and Appeals affirmed the decision. Metcalfe then

[1] The Rules of Community Supervision that Metcalfe signed on June 29, 2004, are not part of the record. The Rules he signed on July 7, 2004, are. When the record on appeal is not complete, our review is confined to the record before us. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶6 n.4, 256 Wis. 2d 848, 650 N.W.2d 75 (citing ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979)). In the absence of a complete record, we will assume "that every fact essential to sustain the trial court's decision is supported by the record." ***Id.*** Consequently, we will assume that Rules 1 and 21 of the document Metcalfe signed on June 29 are the same as Rules 1 and 21 in the document he signed on July 7.

brought a petition for a writ of certiorari to the circuit court to review the Department's decision. The circuit court also affirmed the decision.

¶6 Metcalfe argues to this court that the conditions of extended supervision established by the trial court precluded the Department of Corrections from revoking his extended supervision. The sentencing court may impose conditions of extended supervision. WIS. STAT. § 973.01(5) (2005-06).[2] The Department of Corrections may set conditions of extended supervision in addition to those set by the court, if the conditions do not conflict with the court's conditions. WIS. STAT. § 302.113(7). Metcalfe argues that under the condition set by the court, the exclusive remedy for the use of cocaine was five days confinement. He further argues that because the condition set by the court conflicted with the condition set by the Department, he should not have been sent to the treatment center. Because he should not have been sent to the treatment center, his probation should not be revoked for the comments he made to the staff member while he was there. In other words, he would not have made the comments if he had not been sent there improperly. We disagree.

¶7 First, a court may not impose confinement as a condition of extended supervision. ***State v. Larson***, 2003 WI App 235, ¶10, 268 Wis. 2d 162, 672 N.W.2d 322. Consequently, the condition set by the court requiring Metcalfe to be confined for using drugs was invalid. Metcalfe admits that he engaged in the activity that led to his revocation. The only reason Metcalfe offers for challenging his revocation is that the court-imposed condition required that he be confined

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

(which he argues in turn means that he should not have been offered an alternative to revocation). He does not otherwise challenge the Department-imposed conditions. Consequently, the evidence supported the Department's decision that he violated the conditions of his extended supervision. The Department, therefore, acted properly when it revoked his extended supervision.[3]

¶8 Even assuming that the condition set by the court was valid, we would affirm. We conclude that when Metcalfe agreed to the alternative to revocation, he waived any right he may have had to be confined instead. Because he accepted the alternative of going to the treatment center, he cannot now argue that he should not have been sent there. For the reasons stated, we affirm the decision of the circuit court.

By the Court.—Order affirmed and cause remanded with directions.

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

[3] Upon remittitur, the Clerk of the Circuit Court shall amend the judgment of conviction to remove the condition of extended supervision that states that Metcalfe will be confined for a positive urine screen. *See* ***State v. Larson***, 2003 WI App 235, ¶10, 268 Wis. 2d 162, 672 N.W.2d 322.