COURT OF APPEALS DECISION DATED AND FILED

June 9, 2009

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. 2008AP2022

Cir. Ct. No. 2007CV4450

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

STATE OF WISCONSIN EX REL. TYRONE DAVIS SMITH,

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: CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Tyrone Davis Smith, *pro se*, challenges a circuit court order upholding the revocation of his parole. We affirm.

BACKGROUND

¶2 Smith was convicted in 1995 of attempted first-degree intentional homicide while armed, and the circuit court imposed a fifteen-year sentence. Smith was released to parole in August 2004, with a projected discharge date of May 23, 2009. The state of Mississippi accepted transfer of Smith's supervision pursuant to the Interstate Compact for Adult Offender Supervision. Smith absconded from Mississippi supervision, however, and his Wisconsin parole agent, Nicole Patterson, issued an apprehension request.

¶3 Smith was arrested in Wisconsin in July 2006. Patterson did not seek revocation of Smith's parole at that time, and Smith was released from custody. A few days after his release, Smith signed amended "Rules of Supervision," noting on the form that he did so "under undue influence and duress."

¶4 In November 2006, Smith was arrested by Milwaukee police and charged with sexually assaulting S.T., his eleven-year-old cousin. S.T. testified at Smith's preliminary examination and described the sexual assault. The court commissioner found probable cause to bind Smith over for trial. Patterson then served Smith with notice that the Department of Corrections, Division of Community Corrections, recommended revocation of his parole. Following a hearing, an administrative law judge in the division of hearings and appeals concluded that Smith sexually assaulted S.T. Accordingly, the administrative law judge entered an order on January 27, 2007, revoking Smith's parole.

¶5 Smith appealed the parole revocation to the administrator of the division of hearings and appeals. The administrator affirmed, and Smith next

sought *certiorari* review in the circuit court. The circuit court affirmed in turn, and this appeal followed.

DISCUSSION

¶6 On review by *certiorari* of an administrative decision revoking parole, we review the decision of the agency, not the decision of the circuit court. *See* ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 717, 566 N.W.2d 173, 176 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). Our review is limited to four issues: "(1) whether the agency stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable, representing its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." ***State ex rel. Thorson v. Schwarz***, 2004 WI 96, ¶12, 274 Wis. 2d 1, 7, 681 N.W.2d 914, 917.

¶7 When the Department of Corrections is satisfied that a parolee has violated rules or conditions warranting parole revocation, the department must afford the parolee an administrative hearing. WIS. STAT. § 304.06(3). Unless the parolee waives the hearing, a hearing examiner from the division of hearing and appeals conducts a revocation hearing and enters an order either revoking or not revoking parole. ***Ibid.*** Smith argues, however, that the Department of Corrections could not pursue revocation in his case. In Smith's view, the department lost personal jurisdiction over him as a result of alleged irregularities in the department's administration of its rules during his community supervision. We disagree.

¶8 "[T]he DOC ... retain[s] jurisdiction over a parolee until the parolee's date of discharge from the entire sentence." ***DOC v. Schwarz***, 2005 WI

34, ¶31, 279 Wis. 2d 223, 242, 693 N.W.2d 703, 712, *see also* WIS. STAT. § 302.11(6) (parolee remains subject to all conditions and rules of parole until expiration of the sentence or until discharge by the department). The supreme court determined "that the legislature intended to provide the [Department of Corrections] with jurisdiction to enforce offender accountability throughout the term of parole, until the expiration of the entire underlying sentence." ***DOC***, 2005 WI 34, ¶21, 279 Wis. 2d at 236, 693 N.W.2d at 709. Smith's sentence remained in effect and he had not been discharged at the time of the revocation proceedings. Therefore, the department had jurisdiction over Smith.

¶9 Smith further asserts that he could not be disciplined or revoked for violating the rules of supervision because he never agreed to follow the rules and signed the "Rules of Supervision" form under duress. Smith is incorrect. Every parolee is required to "[a]void all conduct which is in violation of state statute." WIS. ADMIN. CODE § DOC 328.04(3)(a) (Dec. 2006). In this case, the Department of Corrections pursued parole revocation because Smith sexually assaulted a child. The department's authority to revoke Smith's parole for committing crimes did not depend on Smith's written agreement to follow the law. *See* ***State ex rel. Rodriguez v. DHSS***, 133 Wis. 2d 47, 52, 393 N.W.2d 105, 107 (Ct. App. 1986). In ***Rodriguez***, this court rejected the argument that a probationer's community supervision could not be revoked for committing a criminal act absent a signed probation agreement. We explained:

> [a] petitioner cannot seriously contend that a probationer can violate the criminal laws of this state without affecting his or her probationary status, even without signing a probation agreement. The purpose of probation is to rehabilitate the person and help the person lead a law-abiding life. By further violating the criminal statutes, the probationer violates the whole concept of probation.

Id., 133 Wis. 2d at 52–53, 393 N.W.2d at 107. Our comments in ***Rodriguez*** are equally applicable here.

¶10 We can quickly dispose of Smith's claims that his parole was revoked unlawfully and that the revocation was arbitrary, oppressive, and unreasonable. Smith bases these claims on his assumption that the revocation proceedings were tainted by a jurisdictional defect. Because Smith's assumption is erroneous, his claims based on that assumption are without merit.

¶11 Finally, Smith contends that the evidence was insufficient to establish that he violated the terms of his parole. We disagree.

¶12 The division of hearings and appeals, not this court, weighs the evidence presented at a parole revocation hearing. *See* ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17, 20 (1978). "A *certiorari* court may not substitute its view of the evidence for that of the [division]." ***Ibid.*** Rather, this court's inquiry "is limited to whether there is substantial evidence to support the [division]'s decision." ***Ibid.*** The division's factual findings are conclusive if any reasonable view of the evidence supports them. *See* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 386, 585 N.W.2d 640, 646 (Ct. App. 1998).

¶13 The evidence presented in this case satisfies the applicable standard. S.T. testified at the revocation hearing that she was eleven years old and in the sixth grade. She described waking up in her living room with Smith on top of her. S.T. testified that Smith was "rubbing against [her], like humping." S.T. stated that she was wearing "sleeping clothes" with a top and a bottom and that Smith was wearing clothes that she could not describe.

¶14 The evidence presented at the revocation hearing also included an excerpt of the testimony that S.T. gave during Smith's preliminary examination. In that testimony, S.T. explained that she awoke on November 23, 2006, and Smith was moving on top of her. He was wearing blue jeans and a red shirt, and his "private part," which felt "like a banana," was touching her buttocks.

¶15 S.T.'s father, Hal S., testified at the revocation hearing and confirmed the accuracy of an earlier statement that he gave regarding S.T.'s allegation against Smith. According to Hal S., his daughter woke him during the night of November 23, 2006, by screaming that Smith had tried to rape her. Hal S. discovered Smith kneeling by the couch where S.T. had been sleeping. Hal S. called the police after observing that Smith had no shirt on and his zipper was open.

¶16 Detective Phillip Simmert, the investigating officer who interviewed S.T. after the incident, also testified at the revocation hearing. He described S.T. as "very shook up, almost catatonic .... Her body would alternate between shaking and being very rigid."

¶17 Patterson testified that Smith gave a statement denying any sexual contact with S.T. Smith elected not to testify.

¶18 In his appellate brief, Smith relies primarily on what he considers a "major inconsistency" in the evidence, namely, the different descriptions offered by S.T. and Hal S. regarding how Smith was dressed during the assault. The administrative law judge acknowledged some discrepancies in the testimony, but deemed those discrepancies "minor." The administrative law judge concluded that S.T. was "truthful and reliable" and that nothing discredited S.T.'s description of

waking to find Smith pressing his penis against her clothed buttocks and "humping" her.

¶19 We defer to the division's credibility findings. ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶26, 239 Wis. 2d 443, 455-456, 620 N.W.2d 414, 421. The finder of fact "not only resolve[s] questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony." ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869, 872 (1989).

¶20 Substantial evidence deemed credible by the fact-finder supports the conclusion that Smith sexually assaulted S.T. Smith's challenge to the sufficiency of the evidence lacks merit. For the foregoing reasons, this court must uphold the order revoking Smith's parole.

By the Court.—Order affirmed.

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