

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 16, 2002**

Cornelia G. Clark  
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. 01-1803  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-678**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN EX REL. JOSHUA BEAULIEU,**

**PETITIONER-APPELLANT,**

**V.**

**DAVID H. SCHWARZ, DIVISION OF HEARINGS &  
APPEALS,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Eau Claire County:  
WILLIAM F. GABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joshua Beaulieu appeals an order dismissing his petition for a writ of certiorari challenging his probation revocation. Beaulieu argues that his probation revocation was based on unreliable hearsay statements. We conclude that the statements are admissible as exceptions to hearsay under

WIS. STAT. § 908.03. Therefore, the statements are reliable and we affirm the order.<sup>1</sup>

## BACKGROUND

¶2 Beaulieu was originally convicted of burglary and misdemeanor theft, both as a habitual criminal, contrary to WIS. STAT. §§ 943.10(1)(a) and 943.20(1)(a). Sentence was withheld and he was placed on probation for four years.

¶3 On August 17, 2000, an administrative hearing was held to determine whether Beaulieu's probation should be revoked. Beaulieu was alleged to have stolen \$7 from Stephanie Hibbard while at a billiard hall. Hibbard, who was working behind the counter during the incident, testified at the hearing. She stated that \$7 was lying on the counter. She also stated that Beaulieu and Lisa Gruper were standing at the counter. She turned away, and when she turned back, the money and Beaulieu were gone. She testified that Gruper said she saw Beaulieu take the money.

¶4 Officer Paul Becker also testified at the revocation hearing. He took Gruper's written statement. Gruper stated the same thing she told Hibbard, that she saw Beaulieu take the change. Becker stated that he found her to be a believable witness.

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<sup>1</sup> In addition, Beaulieu urges us to adopt a test for the admission of otherwise unreliable and inadmissible hearsay at revocation hearings. Because we conclude that the hearsay is reliable, we do not address this argument. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶5 In addition, agent Karen Lindholm testified that Gruper had told her two days before the revocation hearing that she saw Beaulieu take the money from the counter. Gruper told Lindholm that she would testify at the revocation hearing. However, she did not appear at the hearing. Lindholm stated she expected Gruper to be at the hearing and therefore had not subpoenaed her. Lindholm believed Gruper did not have a personal interest in the outcome of the revocation hearing and had no criminal record.

¶6 The administrative law judge (ALJ) admitted Gruper's statement through Hibbard's and Lindholm's testimony and her written statement. The ALJ implicitly found Gruper to be credible and found that the evidence was "clear, convincing and credible" to support a finding that Beaulieu had stolen the money. The ALJ ordered Beaulieu's probation revoked. The Department of Hearings and Appeals affirmed the ruling.

¶7 Beaulieu petitioned for a writ of certiorari in the circuit court. He argued that Gruper's statements were unreliable and that a violation of probation cannot be proved entirely by unreliable hearsay. The circuit court concluded that Gruper's statements were admissible as exceptions to hearsay under WIS. STAT. § 908.03 and therefore were reliable. The court denied Beaulieu's petition.

#### STANDARD OF REVIEW

¶8 On appeal of a circuit court order affirming a probation revocation decision, our scope of review is limited to the following issues: (1) whether the department kept within its jurisdiction; (2) whether the department acted according to law; (3) whether the department actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that the department might reasonably make the decision in

question. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994).

## DISCUSSION

¶9 In Wisconsin, rules of evidence do not apply at revocation hearings. *See* WIS. STAT. § 911.01(4)(c). However, a violation of probation may not be proved entirely by unreliable hearsay. *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 583, 326 N.W.2d 768 (1982). Beaulieu contends that his probation was revoked based entirely on unreliable hearsay. Therefore, we must determine whether the hearsay was reliable. This presents a question of law, which we review independently. *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

¶10 The ALJ found that Gruper's statements were admissible and concluded that the department met its burden of proof. The ALJ explained:

[T]he defense argued that the department did not carry its burden of proof because its key witness, Lisa Gruper, did not appear. I disagree. Hibbard's testimony was credible. Gruper identified Beaulieu as the person who took the money from the counter. Beaulieu did not seriously challenge Hibbard's testimony on this point. Gruper's spontaneous, out-of-court, identification of Beaulieu would even be admissible under the rules of evidence, specifically Wis. Stats. § 908.01 (4) (a) 3. and Wis. Stats. § 908.03 (1). She had no time to reflect upon the consequences of her statement and the identification came within minutes or even seconds of the event at issue. There are only two innocent hypotheses: Gruper must either be lying or mistaken in her identification of Beaulieu. There is no evidence to indicate that Gruper had a motive to falsely accuse Beaulieu of a crime. Like Hibbard, Gruper had never seen Beaulieu before June 26, 2000. Gruper's statement is detailed enough to indicate that she had an adequate opportunity [to] observe and identify Beaulieu. She saw him grab the money, fold it, and place it in his pocket. The counter area was not crowded. According to Hibbard, Gruper and Beaulieu were the only people at the

counter, so it is extremely unlikely that somebody else took the money and Gruper mistakenly identified Beaulieu as the perpetrator. It is argued that a thief would not be so casual about leaving the scene of his crime, but an accomplished thief, and Beaulieu's record suggests that he may qualify for that description, knows better than to draw attention to himself with a hasty exit. Beaulieu had a motive to steal. At the time of the theft he was unemployed and had only the 35 [cents] his father had given him. The money on the counter certainly caught his attention. There was, in short, clear, convincing and credible evidence ....

¶11 We agree with the ALJ that Gruper's statements were admissible. It is undisputed that Gruper's statements to Hibbard and Lindholm and the written statement are hearsay. The statements were made by a person not testifying at the hearing and offered to prove the truth of the matter asserted. *See* WIS. STAT. § 908.01(3). However, we conclude that Gruper's statement to Hibbard is a present sense impression under WIS. STAT. § 908.03(1).

¶12 Further, Gruper's statements to Lindholm and the written statement are virtually identical to her statement to Hibbard and therefore are not "unreliable hearsay." Thus, we conclude that these statements are admissible under the catch-all exception. *See* WIS. STAT. § 908.03(24).

#### A. Present Sense Impression

¶13 Beaulieu contends that Gruper's statement to Hibbard is not a present sense hearsay exception because: (1) the statement was made several minutes after the money disappeared; (2) Gruper had time to fabricate a calculated misstatement; (3) no other person can corroborate the claim that Beaulieu took the money; and (4) Gruper was not available for cross-examination despite saying she would appear.

¶14 The present sense impression hearsay exception allows admission if the declarant is “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” WIS. STAT. § 908.03(1). The guarantee of reliability is immediacy. *State v. Stevens*, 171 Wis. 2d 106, 119, 490 N.W.2d 753 (Ct. App. 1992).

¶15 Here, contrary to Beaulieu’s first two contentions, the ALJ determined that Gruper’s identification of Beaulieu “came within minutes or even seconds of the event.” Thus, Gruper did not have time to reflect on the matter or to fabricate her statement. The immediacy of Gruper’s statement to Hibbard establishes the statement as a present sense impression. Because the guarantee of reliability is immediacy, Beaulieu’s last two contentions are irrelevant.

#### B. Catch-All Exception

¶16 Further, we conclude that Gruper’s statement to Hibbard and Linholm and her written statement are admissible under the catch-all exception under WIS. STAT. § 908.03(24). The catch-all exception includes hearsay statements that are reliable for numerous other reasons and are therefore properly admitted into evidence. *State v. Sorenson*, 143 Wis. 2d 226, 244, 421 N.W.2d 77 (1988).

¶17 At trial, Becker testified that he did not have any reason to think that Gruper might have had a personal reason to harm Beaulieu by fabricating a story. Lindholm also testified that she had asked Gruper if she had any vendetta against Beaulieu and found nothing that would indicate Gruper had any personal interest in the outcome of the revocation hearing. Lindholm also stated that she could find no criminal history for Gruper.

¶18 Gruper gave the written statement shortly after she saw Beaulieu take the money. Her statement was virtually identical to what she told Hibbard. Also, two days before the revocation hearing, she reiterated the same information to Lindholm.

¶19 The ALJ indicated that Gruper did not know Beaulieu, that she did not have a criminal record, and that there was no information leading him to conclude she had made up the story to get Beaulieu or protect someone else. All of these circumstances lend guarantees of trustworthiness comparable to other hearsay exceptions. Thus, the statements were properly admitted into evidence.

*By the Court.*—Order affirmed.

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

