COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 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. 01-2696 **Cir. Ct. No. 00-CV-2093**

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

STATE OF WISCONSIN EX REL. DWAYNE SEALS,

PETITIONER-APPELLANT,

V.

DAVID H. SCHWARZ,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Dwayne Seals appeals from the order affirming the decision to revoke his probation. He argues on appeal that the Division of Hearings and Appeals (DHA) acted contrary to law and without substantial evidence when it revoked his probation. We disagree and affirm.

¶2 In December 1998, Seals was convicted of driving without the owner's consent. The court imposed and stayed a three-year sentence and placed him on three years' probation. In July 2000, his probation was revoked for three reasons: (1) possession of drug paraphernalia; (2) failing to report; and (3) providing false information to his probation agent. Seals appealed this decision, arguing that he never received notice of what actions constituted a violation of probation because his agent never provided him with written rules of probation. The DHA affirmed the ALJ's decision, and Seals brought a certiorari action in the circuit court. The circuit court also affirmed and Seals once again appeals.

¶3 In a review of a decision to revoke probation, we defer to the decision of the DHA, applying the same standard as the circuit court. ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶10, 250 Wis. 2d 214, 640 N.W.2d 527, *review denied*, 2002 WI 48, 252 Wis. 2d 150, 644 N.W.2d 686 (Wis. Mar. 19, 2002) (No. 01-0008). Our review is limited to the following questions: (1) whether the DHA kept within its jurisdiction; (2) whether the DHA acted according to law; (3) whether the DHA's actions were arbitrary, oppressive or unreasonable and represented its will rather than its judgment; and (4) whether the evidence was such that the DHA might reasonably make the decision in question. ***Id.***

¶4 Seals first argues that his probation revocation was improper because his probation agent never gave him written rules governing his conduct. "Just as there is an essential requirement that a criminal statute give fair warning of the conduct subject to punishment, so too must a probationer be given some 'fair warning' of the conditions upon which his continued right to probation depends." ***In re G.G.D. v. State***, 97 Wis. 2d 1, 9-10, 292 N.W.2d 853 (1980) (citations omitted). Certain conditions of probation, such as knowledge that an act violates

the criminal law, however, "are so basic that knowledge of them will be imputed to the probationer." ***Id.*** at 10. When probation is revoked on a condition not formally given, the record may be closely examined "to determine whether adequate notice was given to constitute fair warning." ***Id.*** at 10-11.

¶5 We have reviewed the record and agree with the conclusions of the ALJ that Seals had prior notice of the conditions of probation. The first act which was found to be a violation of probation was possession of drug paraphernalia. As discussed above, knowledge that an act violated the criminal law will be imputed to a probationer. We have no difficulty concluding that Seals knew that the possession of drug paraphernalia was a violation of his probation.

¶6 The other two grounds for revoking Seals' probation were failing to report for electronic monitoring and providing his agent with a false employment address. As the ALJ found, however, Seals had previously been on probation, had previously signed other rules of supervision, and had previously had his probation revoked. The ALJ found that Seals "could reasonably be expected to be aware of the conditions of his supervision which the Department has alleged were violated." Given this record of experience with the probation process, we agree with the ALJ's finding that Seals was aware of the conditions of probation.

¶7 Seals further argues that by relying on the previous probation rules, the agent, in effect, imposed on him lapsed conditions of probation from his prior cases. He argues that the imposition of lapsed conditions of probation is forbidden, citing ***R.L.C. v. State***, 114 Wis. 2d 223, 224, 338 N.W.2d 506 (Ct. App. 1983). There is, however, a subtle but important distinction in this case. Here, the prior conditions of probation were not used as current conditions of probation, but rather were used to show that Seals had notice of the current conditions. We

conclude that this use of the prior rules to establish Seals' knowledge of the current rules was proper.

¶8 Seals next argues that there was insufficient evidence presented at the hearing to support revocation of his probation. As to the first basis for revoking Seals' probation, the possession of drug paraphernalia incident, he argues that the two officers who testified about the incident offered contradictory testimony. One officer testified that Seals' car was later towed, while another officer testified that the car had not been towed. While these are admittedly contradictory accounts, they have no bearing on whether Seals possessed drug paraphernalia. The ALJ ultimately determined that the testimony of the officers concerning that issue was more credible than Seals' testimony. We see no reason to disturb that finding.

¶9 Seals also argues that the Department of Corrections did not present sufficient evidence that he received notice that he was supposed to report for electronic monitoring. Again, we disagree. Seals' agent testified that another agent told Seals he had to report. The agent also testified that Seals subsequently called him to tell him that he had not reported because his mother did not want electronic monitoring in the house. Seals denied that he had been told to report for electronic monitoring. The ALJ determined that the agent's testimony was more credible and we see no reason to disturb that finding.

¶10 As to the third basis for probation revocation, Seals argues that there was insufficient evidence to show that he gave his agent an incorrect address for his place of employment. His agent testified that Seals had told him that he gave the incorrect address because he was angry about something else the agent had done. Seals again denied this and offered his own reasons for why he had given

an incorrect address. The ALJ found Seals' testimony to be incredible. Once again, we see no basis for disturbing that finding.

¶11 Consequently, we conclude that there was sufficient evidence to find that Seals violated three conditions of probation. Therefore, we affirm.

By the Court.—Order affirmed.

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